

## Abstract of Opinion No. 90-7

### BEFORE THE NEVADA COMMISSION ON ETHICS

The subject matter of this opinion is whether a constitutional officer of the executive branch, as a member of a state board, would have a conflict of interest as defined by NRS 281.481 when considering matters regarding a major department of the executive branch if the constitutional officer is related to the head of the department.

The Nevada Commission on Ethics takes jurisdiction in this matter pursuant to NRS 281.511.

This matter came before the Commission, meeting in executive session, in Carson City on January 31, 1990, at which time the Commission heard testimony from the constitutional officer and legal counsel to the department head.

The Commission thereafter met for deliberations in executive session on that same day. Based upon the foregoing, the commission makes these Findings of Fact and issues the opinion that follows.

#### FINDINGS OF FACT

1. The individual who is the subject matter of this opinion is a duly elected constitutional officer of the State. As such, this individual is required to sit on an executive branch board pursuant to the Nevada Constitution and Nevada Revised Statutes.
2. This board has the power to examine all claims against the state, except salaries or compensation of officers fixed by law.
3. The constitutional officer is married to the director of a department of the executive branch. Occasionally this department brings matters before the board.

#### OPINION

##### I. Generally

Based on the Findings of Fact, the Commission concludes that the constitutional officer is a public officer as defined by NRS 281.4365(1), and is a member of the executive branch of government as defined in NRS 281.435.

The subject of this opinion is whether the constitutional officer has a duty to disclose, as well as abstain from, voting on matters affecting the department when they come before the executive agency board.

The Legislative Declaration and Findings which express the public policy of the Nevada Ethics in Government Law appear at NRS 281.421:

281.421 Legislative declaration and findings.

1. It is hereby declared to be the public policy of this state that:

- (a) A public office is a public trust and shall be held for the sole benefit of the people.
- (b) A public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.

2. The legislature finds that:

- (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interest.

(b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

Consistent with that policy and the specific provisions of the Code of Ethical Standards (NRS 281.481- 281.511, inclusive), the opinions of the Commission may include guidance to the public official pursuant to NRS 281.521(1):

1. The commission's opinions may include guidance to a public officer or employee on questions of whether:

(a) A conflict exists between his personal interest and his official duty.

(b) His official duties involve the use of discretionary judgment whose exercise in the particular matter would have a significant effect upon the disposition of the matter.

(c) The conflict would materially affect the independence of the judgment of a reasonable person in his situation.

(d) He possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision.

(e) It would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter.

## **II. DISCLOSURE**

The standards to which public officers and employees must conform their conduct to are found at NRS 281.481.

### **NRS 281.481 General Requirements**

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3. No public officer or employee may approve, disapprove, vote, abstain from voting, or otherwise act upon any matter in which he has a significant pecuniary interest without disclosing the full nature and extent of his interest. Such disclosure must be made before the time when he is to perform his duty or concurrently with that performance. If the officer or employee is a member of a body which makes decisions, he shall make disclosure to the chairman and other members of the body. If the officer or employee is not a member of such a body and holds appointive office, he shall make disclosure to the supervisory head of his organization or if he holds an elective office, to the general public in the area from which he is elected.

Disclosure is required if the public official or employee has a significant pecuniary interest in the matter pending before him or her. Such a significant pecuniary interest must be personal to the public official or employee. In general, the commission does not find any personal pecuniary interest of the constitutional officer in claims made against the department which are reviewed and approved or disapproved by the executive branch board. While the director of the department has a professional interest in claims and other matters affecting the department, that interest generally is neither personal or pecuniary affecting his personal benefit or detriment. Should the director, however, have a personal pecuniary interest in a matter which comes before the executive branch board, such as a claim for travel expenses, the issue may arise whether such a matter, and the community property interest therein, of the constitutional officer, rises to the level of a significant pecuniary interest. While this may not be likely, such a significant pecuniary interest would require disclosure pursuant to NRS 281.481.

## **III. Abstention**

Additional standards govern the conduct of members of the legislative branch when performing a legislative function.

NRS 281.501 states in pertinent part:

1. In addition to the general requirements of the code of ethical standards, a member of the legislative branch should not vote upon but may otherwise participate in the consideration of the matter with respect to which the independence of judgement of a reasonable person in his situation would be materially affected by:
  - (a) His acceptance of a gift or loan;
  - (b) His pecuniary interest; or
  - (c) His commitment in a private capacity to the interest of others.

The definition of a legislative function is found at NRS 281.4345 which states in total:

"Legislative function" means introducing or voting upon any ordinance or resolution or voting upon:

1. The appropriation of public money;
2. The issuance of a license or permit;
3. Any proposed subdivision of land or special exception or variance from zoning regulations.

As a member of an executive branch board, the constitutional officer sits in a legislative capacity only when approving or adopting regulations of the board. The board does not appropriate public monies, rather it approves expenditures of funds that have been appropriated by the legislature for specific public purposes. Thus, the standards applying to a legislative duty or function requiring abstention do not apply to the constitutional officer when the officer sits on the executive branch board, even when approving expenditures for the department of which the spouse is the director. That type of review and approval does not fall within the definition of a legislative function triggering the application of the additional standards.

Since there is no requirement for abstention, the application of the provision of chapter 281 of the NRS regarding a reduction in the quorum and its effect on voting do not apply specifically to this situation.

Quite apart and unrelated to this opinion, if the constitutional officer elects to abstain from an issue because of the involvement of her relative over the public perception of a conflict then the executive branch board should recognize the requirements of NRS 281.501(3), which states:

If a member of the legislative branch declares to the legislative body or committee in which the vote is to be taken that he will abstain from voting because of the requirement of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter as fixed by any statute, ordinance or rule of a board or county commission or governing body of a city, is reduced as though the member abstaining were not a member of the body or commission.

While this section does not cover reduction of a quorum due to abstention for reasons other than those enumerated in the statute, it may offer guidance to the board as to the appropriate course to take, if no other provisions in the Nevada Revised Statute applies. See Article IV, section 21 of the Nevada Constitution.

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R.C. WILSON, II, Chairman