

Opinion No. 93-01

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion of GARY A HORTON

This opinion is in response to a request of Gary A. Horton, a Water Planning Economist employed within the Department of Conservation and Natural Resources, Division of Water Planning (DWP). The Nevada Commission on Ethics (Commission) takes jurisdiction in this matter pursuant to NRS 281.511.

This matter came before the Commission, meeting in open session, in Reno, Nevada, on February 26, 1993, at which time the Commission heard testimony from Gary A. Horton and Peter Morros, Director of the Department of Conservation and Natural Resources.

Statutory confidentiality of all proceedings was waived by Mr. Horton and the hearing was therefore open to the public. Thereafter, the Commission deliberated in open session, and orally rendered its decision on the record, which is now expressed more fully in this written opinion.

FINDINGS OF FACT

1. Mr. Horton worked for the Department of Conservation and Natural Resources, within the DWP as the State Water Planning Economist since leaving the Gaming Control Board in late February, 1991, where he served as manager of the Gaming Research Department.
2. Mr. Horton's responsibilities included the compilation, analysis, and dissemination of data relating to the State's demographic and economic characteristics and trends such that accurate and timely forecasts may be made of the state demands on water resources.
3. Mr. Horton brought with him to the DWP the gaming-related databases he compiled at the Nevada Gaming Control Board. This data, which is generally printed and released in various publications of the Nevada Gaming Control Board, is in the public domain and not proprietary in nature.
4. The databases Mr. Horton compiles are in electronic file format on a computer and are updated by small electronic files containing a time series of revised data beginning with January 1988.
5. Mr. Horton was employed by Rett Jesse, State Water Planner for the DWP, to compile one of the most comprehensive sets of electronic databases of the socioeconomic impacts of water policy in the State. Because of his computer capabilities and his accomplishments at the Gaming Control Board, Mr. Horton was hired to assemble a number of socioeconomic databases on Nevada and its counties in a single, electronic format.
6. The purpose of this compilation of data was to satisfy (i) the time series requirements of correlation analysis and econometric forecasting model development and, (ii) to provide the highly detailed data necessary in the development of inter-industry input-output models on a county-by-county basis that was jointly developed with the Department of Agricultural Economics, School of Agriculture, University of Nevada, Reno.
7. As a result of this data compilation, a publication was produced and released on August 7, 1991, substantiating the data requirements and outlining the databases that had been assembled of the Nevada water basin analysis, hydrologic data, and socioeconomic indicators.

8. The Department of Administration issued a directive that all future requests for data were to go through Harlan Elges, Chief of Administration. In response, Mr. Horton prepared an interagency memorandum which was signed by Mr. Jesse and sent to William Bible, Chairman of the State Gaming Control Board, on July 15, 1991. This memorandum outlined the DWP projects and the need for model development, particularly gaming-related data, due to the critical importance of that industry to the State's economy. The memorandum detailed the need to receive data in "time series" (historical) format by electronic means, such that existing databases could be easily updated with the most accurate information available.

9. Chairman Bible's reply of August 27, 1991, informed Mr. Jesse that as long as the data requested was not proprietary, there should be no problem in providing the information to the DWP.

10. At approximately the same time of Mr. Bible's reply to the request for data, Mr. Morros was advised by Judy Matteucci, Director of the Department of Administration, that the DWP was not to undertake the collection of any economic data on its own behalf and that all data requests and requirements were to go through the Department of Administration. A memorandum confirming that directive was provided to Mr. Jesse.

11. On September 26, 1991, Mr. Horton made a proposal to Robert N. Barone, Chairman and Chief Executive Officer of Comstock Bank located in Carson City, Nevada, that Comstock Bank fund copying and postage costs associated with the development and publication of a quarterly business and economic report that analyzed current economic trends and then made projections based upon those trends. Comstock Bank would receive credit for funding the publication on the front and back covers. At that time, Mr. Horton did not ask to receive any form of compensation for this report; he simply wanted to be reimbursed for the expense of producing the report.

12. On September 27, 1991, Mr. Barone advised Mr. Horton that Comstock Bank wished to internalize the report and publish it as the *Comstock Bank Report on Nevada Business and Economics*. At this time, Mr. Barone proposed paying Mr. Horton a fee for each quarterly report.

13. Deferring any final decision on the matter, immediately after his conversation with Mr. Barone, Mr. Horton contacted Deputy Attorney General P. Mark Ghan, the Department of Conservation and Natural Resources legal counsel in the State Attorney General's Office, to discuss the propriety of Mr. Barone's offer.

14. On October 1, 1991, Mr. Horton met with Mr. Barone to discuss the particulars of their business arrangement. Mr. Barone agreed to fund the project, purchase a computer and printer, install them in Mr. Horton's home, and arrange for all copying and mailing functions to be performed by Comstock Bank personnel. Although Mr. Horton would be paid for each publication, the report would be published under the heading and logo of Comstock Bank, which would also retain editorial rights to the report.

15. On October 9, 1991, Mr. Barone contacted Mr. Horton to inform him that the Board of Directors of Comstock Bank had approved the arrangements and that Mr. Barone would thereafter pursue his own legal opinion in regard to any conflict of interest Mr. Horton may have. At this time they agreed that the letter of understanding that Mr. Horton had previously presented would serve as the basis of their contractual agreement.

16. On the morning of October 11, 1991, Mr. Barone informed Mr. Horton that Mr. Barone's attorney, Mike Dyer, had found no conflicts in their arrangement and that upon finalization of the agreement the parties would sign a contract providing that it was subject to approval by the Attorney General's office.

17. Later in the day of October 11, 1991, Mr. Horton forwarded a written request to the Attorney General's office for an opinion concerning the matter. The request reiterated that under the terms of the proposed contract with Comstock Bank, he had been commissioned to use existing, non-proprietary data, which was readily available in the public domain and through published reports, which dealt with such items as national business and economic trends,

Nevada labor force and employment, taxable sales, and tax and gaming revenues in the composition of a business report. The purpose of the report was to outline the general trends and impacts of these economic measures for the State of Nevada and its principal markets in Clark" and Washoe Counties through the use of tables, graphs, and written analysis. All work on the report was to be done on Mr. Horton's own time and away from his public office, composed and printed on computer equipment purchased by Comstock Bank for use in Mr. Horton's home.

18. On October 24, 1991, Mr. Horton signed a contractual agreement to act as a consultant in financial, business and economic matters to Comstock Bank in exchange for a retainer of \$1,000. In addition to its receipt of all business and economic forecasts prepared by Mr. Horton on matters relating to national business and economic trends and Nevada economic indicators, Comstock Bank would also receive his input on financial matters relating to financial model development, interest rate sensitivity analysis, bank profit models, forecast mechanisms, and the computerization of such. Mr. Horton would also provide input regarding bank planning, including bank goal setting and strategies, action plans, environmental and competitive assessments, bank strengths and weaknesses, etc.

19. Comstock Bank agreed to pay Mr. Horton an additional \$1,000 upon the signing of the agreement, which would entitle the bank to receive two consecutive quarterly issues of the proposed *Comstock Bank Report on Nevada Business & Economics* to bear its name and logo exclusively, and for which the bank would receive total credit. An additional \$1,000 would be payable to Mr. Horton upon the Comstock Bank's election to publish the third and fourth issues.

20. Mr. Horton was to develop the mailing list and develop and maintain a subscription plan, subject to the Comstock Bank's approval. The subscription fees collected, from both individual and corporate subscribers, would be shared by the parties once the bank had been repaid for all production and mailing costs.

21. All of the software needed for production of the reports and studies was to be supplied to Mr. Horton by the Comstock Bank and would belong to Comstock Bank, but would be maintained at a location specified by Mr. Horton.

22. In a December 16, 1991 letter opinion issued by the Attorney General's Office, Mr. Ghan stated that on the basis of the facts provided no conflict of interest existed among Mr. Horton, Comstock Bank, and DWP as long as the work Mr. Horton performed for Comstock Bank did not constitute the same work he did for DWP, did not involve utilization of information which was otherwise generally unavailable, and did not require governmental time, property, equipment or facility. Based upon his discussion with Mr. Ghan regarding the requirements of Mr. Barone ' s offer and Mr. Ghan' s determination that no conflict of interest resulted from the arrangement as long as the outside employment did not constitute the same work which Mr. Horton did for the DWP, Mr. Horton agreed to meet with Mr. Barone to discuss how to keep the two job functions separate. Mr. Ghan did refer in the opinion that the Commission may issue opinions interpreting the statutory ethical standards that apply to a public officer or employee. (A copy of the Attorney General's Opinion is attached as Exhibit A).

23. On December 31, 1992, Mr. Horton was contacted at his home by his supervisor, Mr. Jesse, who informed him that Ms. Matteucci had advised Mr. Morros that Mr. Horton was assembling data and making forecasts solely for the purpose of selling the same to Comstock Bank.

24. On January 4, 1993, Mr. Horton met with Mr. Morros to discuss Ms. Matteucci's allegations. Mr. Morros recommended that Mr. Horton request an opinion from the Commission.

25. On January 7, 1993, Mr. Horton requested this opinion from the Commission.

OPINION

Gary A. Horton is a public employee as defined by NRS 281.436.

NRS 281.481(1), (2), (4), (5), (7) and (10) are relevant to the Commission's present inquiry.^[1] Each of these statutes will be analyzed and applied *seriatim*.

With respect to NRS 281.481(1), Mr. Horton's contractual employment with Comstock Bank does not relate to his official duties as a state employee. He was not retained by Comstock Bank as a DWP employee, but as an experienced economist with computer capabilities who could analyze and put together periodic reports to make economic forecasts based on existing, non-proprietary, readily available **public** data. Consequently, Mr. Horton's relationship with Comstock Bank would not tend to improperly influence him to depart from the faithful and impartial discharge of his official duties.

With respect to NRS 281.481(2), the Commission notes that although Mr. Horton's state job provided him access to information within the DWP, that information was available to anyone else who might wish to obtain it. None of the data was proprietary, secret, confidential, or otherwise not publicly available. Mr. Horton's work for Comstock Bank did not involve any database of the DWP. The information was public and available to him (as well as others) through the DWP, but the DWP did not generate that information.

With respect to NRS 281.481(4), the nature of Mr. Horton's employment with Comstock Bank is entirely separate from the work Mr. Horton performs for the DWP as the Water Planning Economist. While the report Mr. Horton publishes for Comstock Bank focuses on national business and economic trends, Nevada labor force and employment, Nevada taxable sales, tax revenues, and gaming revenues, his employment duties with the State are limited to water-related issues which include assessment of county-specific economic activity and growth prospects. Because Mr. Horton is not performing the same type of duties for Comstock Bank as he does for the DWP, Mr. Horton is not in violation of NRS 281.481(4).

Regarding NRS 281.481(5) and NRS 281.481(7), all of the information which Mr. Horton uses to produce the Comstock Bank publication is available to the general public and is not proprietary. Similarly, Mr. Horton produces this publication on his personal time and does not use governmental property. Comstock Bank purchased and maintains all the necessary equipment which it had installed in Mr. Horton's private residence. Mr. Horton did not violate NRS 281.481(5) or NRS 281.481(7).

With respect to NRS 281.481(10), Mr. Horton had expertise as an economist and a vast experience in the area of forecasting which Mr. Barone wished to use. Mr. Horton was experienced in producing the desired publication. Mr. Horton's outside employment was not secured because of his public employment and because of the nature of his business and economic forecasting expenses. Mr. Horton did not violate NRS 281.481(10).

CONCLUSION

Mr. Horton has not violated any of the provisions of the Nevada Ethics In Government Law by his employment by Comstock Bank. His outside employment would not tend to improperly influence him in or to cause him to depart from the faithful discharge of his public duties. He did not use his position as a water planning economist to secure his employment by Comstock Bank. The nature of his work for Comstock Bank is separate from the work he performs for the Division of Water Planning. All the information used to produce the Comstock Bank publication is available to the general public. He does not make use of government time or property to produce the publication.

COMMENT

It is specifically noted that the foregoing opinion applies only to these specific circumstances, and may not apply to other circumstances. The provisions of NRS 281.481 quoted and discussed above must be applied on a case-by-case basis on the specific facts and circumstances involved.

DATED: April 8, 1996.

NEVADA COMMISSION ON ETHICS

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

[1] NRS 281.481 provides in pertinent part:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend to improperly influence a reasonable person in his position to depart from the faithful discharge of his duties.

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person.

....

4. A public officer or employee shall not accept any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of his duties as a public officer or employee.

5. If a public officer or employee acquires, through his public duties or relationships, any information which by law or practice is not at the time available to people generally, he shall not use this information to further the pecuniary interests of himself or any other person or business entity.

....

7. A public officer or employee, other than a member of the legislature, shall not use government time, property, equipment or other facility to benefit his personal or financial interest.

10. A public officer or employee shall not seek other employment or contracts through the use of his official position.