

Opinion No. 93-34

BEFORE THE NEVADA COMMISSION ETHICS IN THE MATTER OF THE OPINION REQUEST REGARDING INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT

This Opinion is in response to a first-party request by the Incline Village General Improvement District (IVGID or "District") Board of Trustees' (Board) regarding the Board's proposed resolution to solicit contributions from local businesses to fund an employee incentive and reward program and to obtain advice in setting guidelines for its operation consistent with the Code of Ethical Standards at NRS 281.481 *et seq.* The Nevada Commission on Ethics (Commission) has jurisdiction in this matter pursuant to NRS 281.511(1) and (2)(b).

The Commission met in Reno, Nevada, on September 29, 1993, to conduct a hearing on the opinion request. Attorney Teresa Miller represented IVGID at the hearing and waived confidentiality on its behalf. The hearing was therefore open to the public. The Commission heard testimony from Ms. Sandy Bendorf, IVGID Employee/Community Relations Manager, and Eric Severance, senior staff member and Manager of the Diamond Peak Ski Resort. Immediately thereafter, the Commission deliberated in closed session. Based upon the foregoing, the Commission makes the Findings of Fact and renders the Opinion that follows.

FINDINGS OF FACT

1. IVGID is organized as a general improvement district in conformity with the provisions of Chapter 318 of the Nevada Revised Statutes. IVGID is responsible for the management of community roads, local water and sewer collection, parks, baseball diamonds, tennis courts, golf courses, and a ski resort and recreational center within the District in Incline Village, Washoe County, Nevada.
2. There are approximately 70 year-round, full-time IVGID employees, with as many as 700 to 800 individuals on IVGID's payroll during peak recreational seasons.
3. The IVGID Board of Trustees consists of five elected members who serve staggered four-year terms.
4. On October 24, 1991, the IVGID Board adopted a "Mission Statement" which recognized "people as IVGID's most valuable resource, " and declared that each employee's work performance was vital. The Board called upon IVGID managers "to reward individual performance and celebrate team achievements."
5. In the Spring of 1993, the Board reviewed various employee recognition programs of both public and private employers in seeking to accomplish the goals set forth in its mission statement. The Board sought to implement a program which would acknowledge good employee work performance and provide an incentive for continued good service.
6. In June of 1993, the Board drafted a resolution and a personnel policy amendment to implement the employee incentive/reward program. The draft resolution and amendment provided the following:

WHEREAS, on October 24, 1991 the Board adopted a mission statement for IVGID, based upon the central tenets of service, value and people;

WHEREAS, the mission statement identifies people as IVGID's most valuable resource, declaring that each employee's performance is vital, and calling upon IVGID managers to reward individual performance and celebrate team achievements; and

WHEREAS, the Board finds that recognition of IVGID employees encourages good performance, improving work quality, productivity and efficiency and lowering long term costs to taxpayers; and

WHEREAS, on May 26 and June 10, 1993, the Board reviewed employee recognition programs

within IVGID and found that they are similar to those of other public and private employers and generally compatible with the Board's intent of rewarding good performance; and

WHEREAS the Board has encouraged partnerships between IVGID and local businesses to improve the local economy; and

WHEREAS, some local business have expressed a desire to participate in rewarding good performance by IVGID employees; and

WHEREAS, the Board believes that including local businesses in an IVGID employee recognition program can make the program stronger by widening community support for good performance by IVGID employees, by increasing the public visibility of the recognition, and by lowering costs to IVGID taxpayers to undertake employee recognition activities; and

WHEREAS, IVGID personnel policies prohibit the receipt or acceptance by an employee of money or other consideration from anyone other than IVGID for performance of an act which the employee would be expected to render in the course of IVGID employment; and

WHEREAS, NRS 281.481 (1) prohibits public employees from seeking or accepting gifts which would tend (to) improperly influence a reasonable person from the faithful and impartial discharge of his/her duties; and

WHEREAS, the Board wishes to establish procedures to ensure that IVGID's acceptance of contributions from local businesses for use in employee recognition programs serves to reinforce good employee performance and does not serve to encourage improper employee behavior; and

WHEREAS, the Board concludes that the procedures specified herein will eliminate any appearance of a conflict of interest by requiring that solicitation of contributions for employee recognition be conducted in an open and public fashion, by connecting the award of contributions to good job performance, by preventing the contributor from choosing which employee receives the award, by prohibiting the granting of any consideration or special treatment to contributors of employee recognition awards, and by requiring good documentation of awards which document is a matter of public record.

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of the Incline Village General Improvement District that it hereby adopts the following amendment to IVGID Personnel Policies, as a new section thereof:

11.6 SOLICITATION. No employee shall solicit awards, prizes, gifts, certificates, merchandise, services, money or other consideration from any person, business, agency, organization, party or group, for distribution to employees in any form or for use in conjunction with an employee event, except as provided herein:

- A. The solicitation must be approved in advance in writing by the department head, as part of a program to recognize superior employee performance.
- B. The solicitation for contributions must be disseminated on an unrestricted basis to a cross-section of people, businesses, and/or organizations, through publication in a local newspaper of general circulation.
- C. Persons or parties making contributions in response to the solicitation must not receive any form of consideration or special treatment, directly or indirectly, as a result of their contributions, beyond a written thank-you from the soliciting department.
- D. All contributions shall be made to IVGID or an IVGID department and not to a named or readily identifiable individual or group of individuals within the District.

E. All contributions shall be received by the General Manager and/or department head and each such receipt shall be recorded in writing.

F. The General Manager or department head shall determine how to recognize employees as individuals or in groups and shall record the date and rationale for award and delivery of each contribution to an employee or employees. In the event some contributed items are not awarded, they shall be inventoried and safely stored until another recognition opportunity arises, or they shall be returned to the contributor.

7. IVGID's purpose in seeking to amend its personnel policy was to: (1) "provide optimal employee quality recognition with the least resultant cost to the District"; (2) "develop a true partnership with local businesses to improve the economy throughout the community", and (3) "conform its conduct to the ethical standards of this state."^[1]

8. IVGID anticipated that deserving employees whose performance would merit such recognition would be awarded prizes to be determined by management. Prizes would range from small trinkets with a nominal value (such as baseball caps) to larger prizes such as \$200.00 airline tickets obtained from a local travel agency.

9. IVGID did not intend to offer cash or bonuses to its employees, and did not consider the award program as a salary augmentation because the funds and prizes would be administered separately from salaries.

10. With the exception of IVGID managers, all IVGID employees were eligible to participate in the program.

11. Individuals or businesses to be solicited to donate prizes or contributions with which to purchase gifts would include a general cross-section of the business community and would not be restricted to persons or businesses within IVGID's boundaries. Solicitation of donations would be publicly advertised in newspapers or through use of publicly available lists, such as business license listings, or those lists published by the Chamber of Commerce. Contributions would also be made in the form of solicitation letters sent to businesses that had previously sought to donate promotional items to IVGID.

12. Donors to the program would have no control over which individual employee received any particular contribution. No employee in his or her individual capacity would receive a donation from a contributor. All gifts were to be generically pooled for distribution to specific employees as determined by the Board upon the recommendation of the general manager and the department heads. IVGID would not compensate contributors for donations and all donations would be accounted for from the time of their receipt. Individual logs would be maintained by identified IVGID staff and would include the name of the individual or group recipient.

13. The budget for the program was approximately one percent of the total payroll budget, district wide.

OPINION

Each of the five members of the IVGID Board is a public officer within the meaning of NRS 281.4365. Their official duties include formulation of a budget for IVGID and authorization of expenditure of IVGID monies.

The issue presented by the District is whether IVGID may solicit donations from persons or businesses to reward and motivate excellent employee performance by furnishing deserving employees with gifts or prizes.

The relevant provisions of the Code of Ethical Standards^[2] are NRS 281.481(l), (2), and (4) which provide the following:

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

A. Contribution Solicitations

The preliminary question in this Opinion is whether direct or indirect solicitation of persons or businesses by the IVGID General Manager or department heads for contributions to employee events, or for special employee recognition awards, violates the provisions of NRS 281.481(1). This provision of the Code of Ethical Standards prohibits public officers or employees from seeking or accepting gifts, services, favors, employment, engagements, emoluments, or economic opportunities which would *tend* to improperly influence a reasonable person to depart from the faithful discharge of his public duties. IVGID's proposed employee gift policy contemplates that the General Manager and department heads would be involved in the solicitation of prizes and gifts for its employees. All other IVGID employees would be precluded from soliciting contributions.

For purposes of this opinion, a direct solicitation would be a personalized request made orally or in writing to an individual or business. A generic solicitation, i.e. not personalized to a specific individual or business but delivered by a personalized mailing or by an oral communication to an individual or group of individuals, would also be a direct solicitation. An indirect solicitation would be a solicitation communicated to the general public, as opposed to a targeted group such as local businesses, through another messenger such as a newspaper or other medium.

Whether the solicitation is direct or indirect, the question for the Commission is whether a reasonable person in the position of the general manager or a department head would "tend" to be improperly influenced to depart from the faithful discharge of his public duties by knowing the identity of donors responding to his solicitation for gifts. The tendency for one to be improperly influenced by such knowledge is heightened in this case by the following factors: (1) IVGID's employee reward program will partially, if not significantly, be dependent on private donations for its support and continued viability; (2) Incline Village is a small community in which IVGID has exclusive control over necessary services needed by each business and resident of the village and in which individuals and businesses are more likely to know and be known by IVGID staff and trustees; and (3) there is a questionable nexus between soliciting contributions from persons who rely on IVGID services in personal or business capacities and rewarding certain employees who provide such necessary services to those donors and to the community at large.

While the general concept of rewarding employee performance is meritorious, relying on the private sector to even partially sustain the employee incentive/reward program where the private sector is dependent on the provision of quality governmental services from such employees, creates a situation in which solicitations, whether direct or indirect, may be perceived more as coercive or an obligation. This problem is magnified in a smaller community such as Incline Village, Nevada whose population is approximately 7,199 and whose location on the eastern rim of Lake Tahoe in the Sierra Nevada Mountains may be slightly more isolated, and its business community more interdependent, than other larger or less isolated communities in this state.

Even though only the IVGID General Manager and department heads would know the identity of donors to the employee reward program, that knowledge would "tend to influence" a similarly situated reasonable person responsible for overseeing the allocation of IVGID services to the community because a reasonable person in the general manager's or department heads' situations would naturally be appreciative of businesses or private residents who respond to a solicitation to donate to IVGID's ongoing employee incentive/reward program. That appreciation and potential feeling of indebtedness to the donor has the capability of being the basis for a reasonable person to depart from the faithful and impartial discharge of his public duties.

There appears from the evidence in the record to be at least an implied, if not direct, link between the solicitation aspect of the employee incentive/reward program and the formation of partnerships between IVGID and local businesses. The connection appears to be that the solicitation program is in furtherance of IVGID's policy to form partnerships with local businesses for mutually beneficial purposes. Such partnerships were apparently contemplated as being informal and mutually supportive in nature. Although public/private partnerships provide viable solutions to issues facing many communities, they must be crafted in a manner that does not disregard the

unique character of each partner. Even though IVGID is responsible for administering what are commonly private or non-governmental businesses, such as a ski resort, recreation center and general golf courses, it must be mindful that the District is nonetheless a governmental entity to which certain public attributes and responsibilities attach. A public body participating in a "partnership" with a private business or businesses remains accountable to the interests of the entire community and not just the interests of its private partners. The Commission is not convinced, especially in view of IVGID's competitive participation in typically private business ventures and its articulation of the importance of business referrals for itself as well as other members of the business community, that IVGID management staff, or a reasonable person in their situations, would not tend to be influenced by gratitude or obligation to donors responding to their solicitations. Such individuals would be more likely to treat or assist businesses who had contributed to the employee award program more favorably than those businesses or residents who had not so contributed. Whether the favorable treatment would be in the form of a business referral or expedited or preferential delivery of IVGID services is irrelevant and that such would **actually** occur is not the issue.

The critical point is that the propensity for such preferential treatment is more likely to occur, or could create a perception of occurrence, under the applicable reasonable person standard, if the solicitation component of the employee incentive/reward program is adopted by the IVGID Board.

The Commission concludes therefore, that IVGID's direct or indirect solicitation, through its General Manager or department heads, of private residents and local businesses to contribute to an employee reward program creates a situation in which a reasonable person in the positions of the General Manager or department heads would "tend" to be improperly influenced by knowledge of who in the community has and has not contributed to the program, such that he could depart from the faithful and impartial discharge of his public duties in ensuring the fair and impartial allocation of IVGID services to all members of the Incline Village community.

B. Unwarranted Privileges

NRS 281.481(2) prohibits use of one's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself or any other person or entity. This Commission previously determined in confidential opinion request No. 91-13, that a director of a public regulatory body violated the provisions of NRS 281.481(2) by soliciting, on agency letterhead, contributions to an employee Christmas party from business entities regulated by that agency.

While IVGID is not a regulatory body, its position in relation to Incline Village residents and businesses is not entirely dissimilar to a regulatory body in that it has exclusive authority over the allocation of necessary sewer, water and road services needed by all community residents and businesses. IVGID also administers community recreational services, most likely desired by at least some, if not all, residents. Contributions that might be donated to IVGID in response to a direct or indirect solicitation, may be involuntary and therefore "unwarranted" in the sense that the solicited individuals or businesses may not be acting as willing participants in the program, but responding only to real, or *perceived*, governmental coercion. Thus, despite IVGID's position that it wants to ensure that businesses would not feel pressured to contribute and that IVGID would neither give those involved any special consideration or preferential services nor render any "retaliation" against a business which did not choose to participate, it would nevertheless in these circumstances be unduly coercive for a business to be faced with a government solicitation for a donation. As with the impropriety of solicitations by regulatory bodies of entities regulated, the perception of coercion or lack of choice for fear of being "out of the loop" of the mutually supportive public/private partnerships encouraged in Incline Village, may be sufficient to create the perception of governmental authority being used to obtain benefits or perquisites for its employees. For these reasons, IVGID's good intentions notwithstanding, there is a reasonable probability that NRS 281.481(2) would be violated should execution of IVGID's solicitation policy ensue.

C. Salary Augmentation

The premise of NRS 281.481(4) is that only the government shall compensate employees for government work and nongovernmental private sources cannot reward, compensate, control or influence a public officer's or employee's public service work performance.

In Opinion No. 92-17 entitled In the Matter of the Opinion Requests of Professor Looney and President Crowley, the Commission determined that donations from a private foundation made directly to University of Nevada public employees violated the provisions of NRS 281.481(4). The Commission held however, that private donations made

directly to the Board of Regents, as opposed to a donation made directly to public employees by the private source, became public money and could be used by the Regents to reward and provide benefits to officers or employees regardless of the original source of funds, whether public or private. The Commission in that case explained that "(T)his is based upon the practice that only the government normally should compensate employees for government work, so that third parties do not reward, compensate, control or influence a government or public employee's decision or service. Accordingly, it is usual for the law to forbid a supplement to a public employee's salary from private or outside sources." Opinion 92-17, page 8.

Similarly in this opinion request, as long as private donations are free from control of the private donor as to the use to which the funds are put, the provisions of NRS 281.481(4) are not violated. To stay within the bounds of NRS 281.481(4), a donated gift from a private source would have to be given to the IVGID Board and not to an employee directly. A donor could not determine which, if any individual would receive the contribution. The IVGID Board of Trustees, who approve the pay levels for management and employees as well as bonuses and perquisites for those employees, is the only authority that has jurisdiction to develop and follow criteria based upon merit and performance, for determining which employee should be awarded gifts or other special recognition for excellent employee performance.

CONCLUSION

Notwithstanding IVGID's commendable efforts to build safeguards and insulation into its guidelines so as to prevent the employee incentive/reward program from being arbitrary or political, based on the circumstances presented in this opinion request, IVGID's solicitation policy would violate NRS 281.481(1) and (2), but its employee incentive/reward program, without the solicitation component, would not violate the provisions of NRS 281.481(4).

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, with results which will vary depending on the specific facts and circumstances involved.

DATED: July 12, 1995.

NEVADA COMMISSION ON ETHICS

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

[\[1\]](#) July 6, 1993 Opinion Request letter to the Commission from counsel for IVGID.

[\[2\]](#) While not relevant to the circumstances of this opinion request, the Commission notes for informational purposes only that Chapter 281 of the Nevada Revised Statutes also provides the following at NRS 281.350: Every public officer or public employee who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon any agreement or understanding that he shall act in any particular manner in connection with his official duties or the public service; or who, being authorized to purchase or contract for materials, supplies or other articles or to employ servants or labor for the state or any county or municipality, or for the public service, shall ask or receive, directly or indirectly, for himself or another, a commission, percentage, discount, bonus or promise thereof from any person with whom he may deal in relation to such matters, shall be guilty of a gross misdemeanor.