

BEFORE THE NEVADA COMMISSION ON ETHICS

This Opinion is in response to requests filed with the Nevada Commission on Ethics (Commission) on July 7, 1993, and July 23, 1993 by two associations.

Both requestors question the conduct of three officials within a department/division of a Nevada state agency ("Division"). The requestors assert that: (1) An Official mailed documents on behalf of a private non-profit organization (Organization A), at state expense, to over 100 special interest groups and individuals, while denying the same privilege to the requestors' organizations; and (2) A private organization (Organization B), was permitted to use the Division's facsimile machines and cover sheets to send a five-page document to legislators and other special interest organizations. It is alleged that both of these activities were approved by the officials of the state agency.

A just and sufficient cause hearing on the matter was held on December 7, 1993, in Reno, Nevada, to determine whether there was good and sufficient evidence to allow the Commission to proceed to hold a hearing on the merits of the requests and to render an opinion in the matter. The Commission heard testimony and received documentary evidence regarding the subject matter of this determination.

Following presentation of the testimony and evidence offered, the Commission met for deliberations in executive session that same day. Based upon the foregoing, the Commission makes the following Findings of Fact and issues the Decision that follows.

FINDINGS OF FACT

1. The Division is authorized by statute to administer the laws of the State of Nevada and is vested with the authority to collect and disseminate throughout the state information calculated to educate and benefit the people of the state pursuant to the Nevada Revised Statutes for the division.
2. Official #1 was appointed by the Director of the Department to serve as the Division's chief administrative officer. Official #2, the Division's Deputy Administrator, was appointed by the Administrator of the Division. Official #3, a commission member, was appointed by the governor. Official #3, in his or her private capacity, is chairperson of Organization A.
3. The Organizations are private groups.
4. Organization B is a private organization with whom the Division works closely. A former Division employee ("Employee") was employed as a legislative lobbyist by Organization B.
5. During the 1993 legislative session, a Committee was considering a bill submitted by Organization B to revise existing statutory provisions. The Department had worked closely with Organization B on the bill. The intent of the bill was to broaden an existing statute.
6. On April 8, 1993, Employee was in the Division's Reno headquarters checking on Organization B's proposed amendment to the bill to determine if the Division agreed with its language. The Employee asked the Division's permission to have the information faxed to the Legislative Council Bureau (LCB) staff person assigned to the Committee. Official #2 authorized the Employee to use the Division's facsimile equipment and a fax coversheet to send a five-page document consisting of Organization B's proposed amendments to the bill to the LCB in Carson

City.

7. The cost of the fax sent to the LCB staff member on April 8, 1993 consisted of one piece of paper (the fax cover sheet), a few minutes of clerical time, and the electricity to operate the fax machine for less than one minute. Because a fax from Reno to Carson City is a local call, no long distance charges were incurred by the Division.

8. The April 8, 1993 fax transmission was the only occasion upon which Organization B used the Division's fax machine.

9. In accordance with its operational policy to keep Nevada groups apprised of current events and legislative actions, the Department prepared reports and newsletters to distribute as informational mailings to such organizations. The Department possessed a directory of Nevada organizations that contained the names and addresses of those individuals and groups from which the Division's standard mailing list was comprised, and to which mailings were directed.

10. The Employee and the requestor Organization A are on the Division's standard mailing list.

11. Organization A prepared newsletters containing information for dissemination to members identified on its own mailing list.

12. The operational policy of the Division was not to accept materials for distribution by private organizations or individuals and not to permit use of its fax machine by such groups or individuals absent collaborative activity with the Division for a public purpose. It was not the Division's policy to automatically mail to those on its standard mailing list information it received from private organizations or individuals. Instead, materials submitted to the Division by private organizations or individuals were available for public review at the Division's Reno headquarters.

13. During the 1993 legislative session, the Division collaborated with Official #3 and a representative of a concerned group, to attempt to apprise all Nevada groups of legislative activities. Due to the press of Division business, it had not compiled an informational mailing to send out to groups to make them aware of current issues. As a courtesy, Organization A provided the Division a copy of the April 1993 edition of its newsletter, which appeared upon the letterhead of Organization A. The Organization A newsletter was comprised of legislative and regulatory data that had been gathered by members of Organization A. Organization A mailed out the newsletter to those members of its organization that appeared on its mailing list.

14. After reviewing the newsletter for accuracy of the information therein and checking the statements to make sure that they were statements of fact and not opinion, Official #1 made the decision to mail copies of the newsletter to the individuals, groups, and organizations on the Division's standard mailing list. Official #1 made this decision without consulting with Commission members.

15. On April 16, 1993, the Division mailed copies of the newsletter to those on its mailing list (including the requestor) using Department stationary and postage. The newsletter was attached to a memorandum from Official #3 in his or her capacity as member of the Commission, but the first page of the memorandum inadvertently was printed on the letterhead of Organization A.

16. The Division's mailing did not save Organization A any money in terms of defraying postage or distribution costs since Organization A had already mailed the newsletter to its own mailing list at its own cost. No financial or personal gain accrued to Organization A or the Chairperson of Organization A as a result of the Division's mailing.

ANALYSIS AND OPINION

The Nevada Commission on Ethics takes jurisdiction in this matter pursuant to NRS 281.511(2). Based upon the Findings of Fact, the Commission concludes that the Officials were public officers as defined by NRS 281.4365(1).

NRS 281.481(2) provides that a public officer may not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, or any business entity in which he has a significant pecuniary interest or any other person. NRS 281.481(7) provides that a "public officer or employee, other than a member of the legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest." The term "benefit" was intended by the Legislature to mean that which is personal, pecuniary, direct, individual, and unrelated to public duty and responsibility.

The question before the Commission was whether the Division's use of its equipment and resources to transmit revisions to a bill by a private organization and to distribute a private newsletter conferred a benefit, privilege, or preference upon the private organization in violation of NRS 281.481(2) and (7). Regarding the use of the fax machine, the hearing revealed that the material that was faxed, while being generated by Organization B, dealt with amendments to a bill upon which the Division had been working with Organization B. The Department had approved or agreed with the amendments, and thus the use of the fax machine was as much for the Division's benefit as it was for Organization B's benefit.

Regarding the mailing by the Department, the hearing revealed that the April 1993 Division mailings included a private group's newsletter as part of its own official communication distributed at state expense. The Division distributed the newsletters as a matter of **policy advocacy**. Official #1 made the decision to send out the mailings because he or she determined it to be within the public interest, because it was consistent with the interests of the Division, and because it conformed to the Division's operational policy. The mailings were of a collaborative nature to better inform concerned citizens of current legislative and regulatory issues. That the Division's public advocacy of such policy issues may have agreed with the personal or private interests of Organization A constituted neither a violation of NRS 281.481(2) or (7) since the Division's commitment remained to its **own** policies.

Any political benefit which Organization A may have derived as a result did not rise to that level of statutory violation that would warrant a sanction. Further, the Commission pointed out that Organization A attained no indirect financial benefit based upon postage cost savings as a result of the Division mailings, for the conservationist group had already distributed to its own members at its own cost. The Division's distribution of the same newsletter was made at the Division's own prerogative, and was sent out to those individuals and organizations on the Division's mailing list.

Finally, in response to the requestors' concerns that the Division's policy was administered in a discriminatory manner, the Commission stressed that it was not within its jurisdiction to determine whether the Division's decision was fair. Distribution of public information by the Division for purposes of educating the people of Nevada regarding its issues was not only authorized by statute, but was part of Official #1's job with the Division. The mistaken usage of Organization A's letterhead in connection with the mailings did not render the Division's distribution of information unauthorized. Further, because Official #3 was a public officer, had he or she gone to the Division in that capacity to arrange for the mailing, the action would have been appropriate.

CONCLUSION

The Commission finds no improprieties, conflict, or evidence to establish that the conduct of the state employees named in this request was prohibited by NRS 281.481(2) or (7). Neither the utilization of state-owned facsimile equipment to direct Organization B's proposals to a legislative committee, nor the Division's distribution and bearing of costs associated to mail materials developed by Organization A to concerned groups within the state constituted conduct that violated the Code of Ethical Standards.

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(2) and NRS 281.481(7) quoted and discussed above must be applied on a case-by-case basis, with results that may vary depending on the specific facts and circumstances involved.

DATED: December 5, 1995.

NEVADA COMMISSION ON ETHICS

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