

Opinion No. 93-55

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Opinion Request Regarding INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT

This opinion is in response to the separate but consolidated opinion requests filed with the Nevada Commission on Ethics (Commission) by Mr. Brad Miller and Mr. George Toto regarding the policy and practice of the Incline Village District (IVGID) of issuing "Gold Cards" and "Silver Cards" to former and present IVGID employees and members of the Board of Trustees (IVGID Board). These cards entitle the bearers to either free lifetime or limited use of recreational facilities owned, operated, and managed by IVGID. The Commission has jurisdiction in this matter pursuant to NRS 281.511(2)(b).

After IVGID waived a just and sufficient cause hearing, the matter proceeded to a full hearing on the merits on June 30, 1994, in Incline Village, Nevada. Confidentiality of the matter was waived by IVGID pursuant to the provisions of NRS 281.511(4), and the hearing was accordingly open to the public. The Commission heard testimony from opinion requester, Mr. Toto; IVGID counsel, Ms. Terry Miller; IVGID Interim General Manager, Patrick Finnigan; IVGID Board chairman, Bernie Ferrari; former and present Board members; and interested residents of Incline Village. Opinion requester Brad Miller did not attend the hearing, but his deposition concerning the matter was introduced into evidence.

At the conclusion of the hearing the Commission closed the administrative record of the matter. The Commission now issues the following Findings and Conclusion.^[1]

FINDINGS OF FACT

1. IVGID is organized as a general improvement district under the provisions of NRS ch. 318. 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 in Incline Village, Washoe County, Nevada.
2. The IVGID Board of Trustees consists of five elected members who serve staggered four-year terms.
3. The IVGID Board has the power and authority to levy and collect general (ad valorem) taxes on and against all taxable property within the district. NRS 318.225.
4. At the time of the hearing on the matter, IVGID had 91 full-time employees, all of whom had free use of the IVGID recreational facilities on a restricted basis.
5. In 1977, the IVGID Board created "Gold Card" privileges to reward the then-current outgoing trustees for their service to IVGID. Gold Card privileges entitle the holder to free life-long use of any recreational facility owned by IVGID. This practice remained an informal one, and Gold Cards were occasionally awarded at the IVGID Board's discretion. In October 1981, Gold Cards were issued retroactively to all past trustees and one past general manager, all of whom had served at some time since 1961.
6. Until January 1985 (at which time the Board adopted a formal policy to reward retiring trustees with Gold Cards), Gold Cards were awarded at the Board's discretion, based only upon practice or informal action. Decisions to award Gold Cards were made generally by resolution of the IVGID Board in duly noticed public meetings.

7. All Incline Village residents are assessed a recreation fee in connection with the purchase of property in Incline Village. The majority of parcels are assessed a fee of approximately \$225.00 per year. Extra rates established by the IVGID Board from time to time are charged except for holders of a Gold Card.
8. There are approximately 7,000 voters in Incline Village including those who own and those who do not own residential property. The Incline Village electorate has not voted on the propriety of the issuance of Gold and Silver Cards to former trustees, managers, or long-term employees.
9. On January 31, 1985, a formal policy regarding the issuance of Gold Cards was instituted after the IVGID Board unanimously adopted Policy and Procedure Resolution No. 107 (Resolution 1483). Resolution 1483 provided that upon retiring from service on the IVGID Board, each former trustee would receive a Gold Card in recognition of his or her service. The Board resolved that it wished to establish this practice as an IVGID policy.
10. On February 14, 1985, the IVGID Board rescinded its policy pending further hearing and completion of a staff survey of present Gold Card holders to determine the financial impact to the District resulting from usage of recreation facilities by Gold cardholders. The report prepared as a result concluded that total gross revenue loss per year from the then-existing 27 Gold Cards was approximately \$1,100 to \$1,400, amounting to about \$40.00 to \$50.00 per Card per year.
11. On March 14, 1985, the IVGID Board voted to award Gold Cards to all past trustees who had not previously received Gold Cards and decided to leave this practice an informal one and subject to the discretion of future boards. Consequently, there was no written policy that the IVGID Board must follow to award Gold Cards to outgoing trustees.
12. In 1988, the Board voted to amend the District's Personnel Policy Manual to provide certain recreational privileges to long-time employees who leave the District in good standing (Resolution 1118). Resolution 1118 provides:
- Upon termination in good standing, full-time permanent, seasonal management, and multi-seasonal employees having at least ten years of service with IVGID shall receive the privileges identified in the Table, "Recreation Privileges," as follows:
- Silver Card.** If the employee has at least ten, but less than twenty years of service with IVGID at the time of termination, then the employee shall receive a Silver Card, entitling the employee to the Silver Card privileges identified in the Table.
- Gold Card.** If the employee has at least twenty years of service with IVGID at the time of termination, then the employee shall receive a Gold Card, entitling the employee to the Gold Card privileges identified in the Table.
- Silver and Gold Card benefits may be changed at any time, without advance notice. The General Manager may distribute Silver Cards and Gold Cards while employees are still employed, although the benefits do not apply until retirement, subject to the restriction that the employee shall forfeit the card upon termination, if the employee is not in good standing at termination. *(Added 11/10/88, Amended 5/10/90, 9/24/92)*
13. Pursuant to the authority of Resolution 1118 as set forth immediately above, the Board has granted Gold Cards to three employees who had served IVGID and Silver Cards to 25 employees, one retired employee, and nine persons who resigned employment.

14. Under Resolution 1118, the Gold and Silver Cards permit the holders to use IVGID's recreational facilities without paying (Gold) or by paying a reduced access fee (Silver). The cards do not remove the duty by the holder to pay the annual recreational assessment on real property owned by him or her.

15. The cards are personal to the holder, and the privileges are nontransferable and cease with at the death of a holder. A single exception was allowed during the early years of the practice, at which time a former trustee had been critically ill and subsequently died. At his request, his card was awarded to his widow.

16. Prior to receiving a card, an IVGID employee would receive free use of IVGID facilities while his or her family would receive discounted use of those facilities, the rates of which would vary from facility to facility .In both instances, the access would be restricted. The privilege of cardholders was also restricted. Cardholders could use IVGID's facilities only if there were space available and no paying guests would be displaced. A cardholder or employee would only be able to book use of IVGID facilities twenty-four hours in advance or risk being bumped. However, although a Gold Card holder would not be required to pay for use of IVGID facilities, in high season usage, a cardholder or employee could and would be bumped from using the facilities.

17. On December 1, 1993, General Manager Rob Hunt resigned his position as an employee in good standing, after approximately nine years.

18. On December 3, 1993, Interim General Manager Patrick Finnigan presented a memorandum to the IVGID Board in connection with the proposed award of a Gold Card to Mr. Hunt. The memorandum provided background information about IVGID's past practices regarding the award of Gold Cards to employees, former employees, and former trustees.

19. During a subsequent public meeting to discuss the propriety of continuing the practice of awarding Gold Cards, Mr. Noel Manoukian, IVGID counsel, discussed the IVGID Board's deeply embedded and long-standing tradition, concluding that if the practice were adopted in a formal, written, deliberated policy where specific criteria for eligibility were described, it would probably be proper under Nevada law.

20. Following Mr. Manoukian's opinion, IVGID Board members moved that Mr. Hunt be provided with a Gold Card in appreciation of his nine years of "splendid service" to IVGID .An amendment to the motion conditioned the award upon a finding by Mr. Manoukian that the practice was not illegal. The amendment, as accepted, was carried by a vote of three to one.

21. Mr. Hunt declined acceptance of the Gold Card pending the Commission's determination of the matter.

22. Since March 14, 1985, the Board has issued Gold Cards to all thirty-six former trustees, three former general managers, including Mr. Hunt, and three former IVGID employees in good standing based on their twenty year service to IVGID .Of these forty-two recipients, ten are deceased, and seven others have left the area and no longer benefit from their cards.

OPINION

Each of the five members of the IVGID Board are public officers within the meaning of NRS 281.4365 and members of the legislative branch of government as defined in NRS 281.4355. Their official duties include formulation of a budget for IVGID and authorization of expenditure of IVGID monies.

The issue presented is whether IVGID ' s alleged practice and policy of issuing recreational passes and privileges to retired trustees and former employees and to other public or private business entities or individuals under terms and conditions more favorable than those allowed residents violates the Nevada Ethics in Government Law.

I. Code of Ethical Standards

The relevant provisions of the Code of Ethical Standards are NRS 281.481(1), (2), and (7) which provide as follows:

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 household, any business entity in which he has a significant pecuniary interest, or any other person.

* * *

7. 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 evidence demonstrated that both Gold and Silver Cards were awarded in recognition of an employee's or retiring trustee's past service. Though IVGID's policy guaranteed that a departing trustee would be issued a Gold Card, the awards were made in accordance with its policy and in open meetings with the knowledge of the community. Because the granting of the cards would never be made by an active Board member to himself or herself, we conclude that the practice would not tend to influence a reasonable person in the position of an IVGID Board member to depart from the faithful and impartial discharge of his or her public duties under NRS 281.481(1).

NRS 281.481(2) prohibits a public officer from using his governmental position to secure *unwarranted* advantages for any person. The Commission's examination of this point must focus on whether a municipal body, such as IVGID, can grant gifts of its largess to selected citizens. Some state constitutions expressly prohibit the legislature from granting to municipal corporations or counties the power to lend their credit or grant money or things of value to any individual, association, or corporation, and prohibit municipal corporations or counties from making any appropriation or donation, or in any way lending their credit, to any individual, corporation, or association. 56 Am. Jur. 2d *Municipal Corporations*, 588, n.10 (1984 & Supp. 1994); Roger A. Cunningham, *Billboard Control Under The Highway Beautification Act of 1965*, 71 Mich. L. Rev. 1356, n.276 (June 1973). The purpose of constitutional provisions prohibiting such gratuities is to prevent transfer of public funds without receiving consideration in return. *City of Aurora v. Public Utilities Comm'n of State of Colo.*, 785 P.2d 1280 (Colo. 1990); *City of Tacoma v. Taxpayers of City of Tacoma*, 743 P.2d 793 (Wash. 1987).

In Nevada, *Gibson v. Mason*, 5 Nev. 283 (1869) stands for the proposition that under the Nevada Constitution a municipal corporation may be permitted by implication to grant donations of public funds. While article 8, section 10 of the Nevada Constitution expressly prohibits the State from becoming a stockholder in any company or association (except corporation formed for educational or charitable purposes) and expressly prohibits the state from donating money to them, neither counties nor towns are constitutionally forbidden from doing so. The Supreme Court reconciled the two provisions to conclude that counties and towns were intended to be exempt from the prohibition by virtue of legislative implication. Based upon *Gibson*, municipal corporations would be exempted from the constitutional prohibition against donations as well, and thus IVGID'S giving of Gold and Silver Cards could not be invalidated on those grounds.

Another Nevada case, *City of Las Vegas v. Ackerman*, 85 Nev. 493, 457 P.2d 525 (1969), further supports the IVGID Board's power and right to grant Gold and Silver Cards to former members of the board. In *Ackerman*, city electors passed an initiative ordinance that increased the salary of firefighters and made the increase retroactive to a

certain date. The trial judge deemed the ordinance "unenforceable " because he considered the retroactive increase to constitute a gratuity prohibited by article 8, section 9 of the Nevada Constitution.

The Nevada Supreme Court reversed that part of the declaratory judgment, noting that in each of the cases from other jurisdictions cited by opponents of the measure, there existed a specific constitutional prohibition against either a retroactive application of a statute or a prohibition against a gratuity by the state or a government subdivision to an individual. The Nevada Supreme Court found no specific statutory enactment or constitutional provision.

A pension paid a governmental employee for long and efficient service is not an emolument which, by Art. I, sec. 7, of our Constitution, cannot be paid. To the contrary it is a deferred portion of the compensation earned for services rendered. In *Haldeman v. Hillegass*, 335 Pa. 375, 6 A.2d 801 (1939) the court, when considering retirement pay said: "This is in effect an acknowledgment by the legislature of prior service, and a recognition by it that long and faithful public employment should be compensated, emphasizing the purpose and scope of the provisions for retirement pay or delayed compensation."

Ackerman, at 501, quoting from *Great American Insurance Company v. Johnson*, 257 N.C. 367, 126 S.E.2d 92 (1962). The Nevada Supreme Court in *Ackerman* concluded:

While there is no prohibition against a municipality granting a gratuity, we find more specifically that the retroactive increase in salary for fire fighters as allowed in the initiative ordinance is in no way prohibited by any constitutional or statutory provision and it makes very little difference what the payment is to be, however, **we prefer to view it as a deferred portion of the compensation earned for services rendered**. (Emphasis supplied.)

Ackerman, at 501.

It is important to note that in *Gibson* the Supreme Court emphasized public policy concerns similar to those states in which the constitution or statute expressly prohibited gifts by governmental agencies, namely that expenditure of public funds should always promote a public purpose. We agree with this public policy concern. As the Supreme Court stated in *Gibson*:

We do not wish to be understood as holding that the Legislature may enforce burdens upon or collect money from the citizens for any object that it may choose; for if it be imposed for a purpose which is not public in its nature--that is, if it be not strictly a tax which is defined to be " a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State--then clearly it would be an unwarrantable exercise of power. But if it be levied for the purpose of furthering any public enterprise, or aiding any public undertaking whereby the community or public as such will be benefited, it would clearly be otherwise. (Emphasis in original.)

Gibson, at 306- 7. Thus, where the public interest will be in no way promoted by such a transfer, even where a compensation is paid, such as in the case of eminent domain, the right of the sovereign power to take a person' s property does not exist in the absence of public benefit. *Gibson*, at 308.

While the award of Gold and Silver Card privileges surely constitutes a conferring of a public benefit upon private parties, we conclude that the IVGID Board's award of Gold and Silver Cards according to Resolution 1118 does not violate NRS 281.481(2) for several reasons. First, the giving of Gold and Silver Cards according to Resolution 1118 is an emolument of employment with or service to IVGID. Once Resolution 1118 was passed, all employees of IVGID would have a reasonable expectation that Gold or Silver Card privileges would await them once they had

fulfilled the requisites for entitlement to the privileges. Viewed in this way, the Gold and Silver Cards are nothing more than deferred compensation, similar to the pension that was discussed and approved in *Great American Insurance Co. v. Johnson, infra.*, and the retroactive pay increase discussed and approved in *Ackerman, infra.*

Second, the emolument or privilege represented by the Gold and Silver Cards is not "unwarranted" under NRS 281.481(2) because it is **earned** through service to the public. To qualify for a Silver Card, an IVGID employee must have dedicated ten years or more of his or her career in good service to the public served by IVGID. To qualify for a Gold Card, an IVGID employee must have dedicated twenty years or more of his or her career to the public served by IVGID. In all such cases, the public served by IVGID has received valuable service, in return for which it extends the Gold and Silver Card privileges as deferred compensation and in gratitude for such public service. We find that this earned benefit in this matter is not unwarranted.

Third, as long as Resolution 1118 is the means by which future Gold and Silver Cards are awarded, there is little possibility for abuse of the Gold and Silver Card privilege. We caution that the past practice of granting the Gold and Silver Cards without any formal policy seemed ripe for caprice and abuse (though we do not mean to indicate that any such caprice or abuse actually occurred). Additionally, we believe that the policy of granting Gold Card privileges to departing trustees should be formalized in writing, perhaps as part of Resolution 1118. We believe that a grant of Gold Card privileges to a departing trustee would be warranted because a trustee must have successfully run for office and served his or her constituency in a public forum and under constant public scrutiny for one or more terms, thus serving the public commendably and civic-mindedly. We believe that if Resolution 1118 (with a written policy included regarding departing trustees) continues to be the guide for the granting of Gold and Silver Card privileges, that the privileges can rightly be treated as warranted emoluments or privileges that are within the sanction of NRS 281.481(2).

Finally, regarding NRS 281.481(7), it appears to us that the self-interest of the present members of the IVGID board in awarding the Gold and Silver Cards to others is far too attenuated to impose liability under this section. As long as the tenets of Resolution 1118 are adhered to, the granting of Gold and Silver Card privileges will be orderly, predictable, and not subject to the whim or caprice of the IVGID Board.

CONCLUSION

We conclude that the policy of the IVGID Board of granting Gold and Silver Card privileges to employees and trustees of IVGID does not violate NRS 281.481(1), (2), or (7) for the reasons stated above. We recommend that a formal resolution (perhaps as an amendment to Resolution 1118) be made to reduce to writing the unwritten policy of granting Gold Card privileges to a departing trustee. We would also reiterate that in the future, if the Gold and Silver Card policies are amended, that the public policy concern discussed in *Gibson* and *Ackerman* discussed above be the guiding principle in any such amendments so that the public served by IVGID will continue to receive a true and fair benefit in the provision of Gold and Silver Card privileges.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific facts and circumstances. The provisions of NRS 281.481 and NRS 281.501 quoted and discussed above must be applied on a case-by-case basis, with results that will vary depending on the specific facts and circumstances involved.

DATED: December 28, 1995.

NEVADA COMMISSION ON ETHICS

By: /s/ William R. Morse, Vice Chairman

[1] Chairman Thomas R. C. Wilson abstained from participating in this matter, and thus, Vice Chairman William R. Morse presided over this matter.