

Opinion No. 94-75

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Opinion Request Regarding JAN EVANS and CHRIS GIUNCHIGLIANI

This Opinion is in response to an opinion request of December 21, 1994, by Assembly member-elect Lynn Hettrick concerning Assembly members-elect Jan Evans and Chris Giunchigliani. Mr. Hettrick requested that the Nevada Commission on Ethics (hereafter "Commission") determine whether either Ms. Evans or Ms. Giunchigliani each would violate NRS 281.501 by voting on her election contest filed with the Secretary of State and by voting to seat herself as a new Assembly member of the 68th Nevada Assembly when it convenes on January 16, 1995.

A hearing on the merits of the request was held on January 9, 1995, in Reno, Nevada. Mr. Hettrick was present and represented by Mr. James Todd Russell, Esq. Ms. Evans was present and represented by attorneys Mr. Robert M. Sader, Esq. and Mr. Wm. Patterson Cashill, Esq. Ms. Giunchigliani was present and also represented by Mr. Sader and Mr. Cashill; she is also represented by Mr. Richard W. Myers, Esq. who was not present at the hearing. The parties provided the Commission with written briefs prior to the hearing.

The hearing was confidential pursuant to the provisions of NRS 281.511(4) and therefore was not open to the public. Subsequent to the hearing, Evans and Giunchigliani waived confidentiality and this Opinion is therefore public.

JURISDICTION

The Commission has jurisdiction over the opinion request filed in this matter pursuant to the provisions of NRS 281.511(2) which provide the following:

2. The commission may render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances:

...

(b) Upon request from any person, if the requester submits all related evidence deemed necessary by the commission for it to make a preliminary determination of whether it desires to take jurisdiction over the matter;...

on the condition that any public officer or employee about whom an opinion is requested or authorized must be notified immediately by certified mail that an opinion has been requested or authorized and that he has a right to appear before the commission and present evidence and argument. The commission shall not issue an opinion nor determine that just and sufficient cause exists to render an opinion without extending him an opportunity to appear before the commission and present evidence and argument.

Evans and Giunchigliani by stipulation waived the just and sufficient cause hearing provided for by NRS 281.511(2) and stipulated to a hearing on the merits of the opinion request. Evans and Giunchigliani did not, however, stipulate to the Commission's jurisdiction over the subject matter of the opinion request. Evans and Giunchigliani contend that the Commission does not have statutory jurisdiction over the matter and its attempt to exercise jurisdiction would violate the separation of powers provided by the Nevada Constitution. The separation of powers provision is in Article 3 of the Nevada Constitution and provides the following:

The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any

functions, appertaining to any of the others, except in cases herein expressly directed or permitted. Nev. Const. Art. 3, § 1.

Article 4, § 6 of the Nevada Constitution states:

Each House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member. (Emphasis added)

Evans and Giunchigliani maintain that if the Commission exercises jurisdiction over the opinion request, the Commission would interfere with the exclusive constitutional authority of the Nevada Assembly under Article 4, § 6 to determine the qualifications, elections and returns of its own members who are, in this case, Evans and Giunchigliani. The exercise of such jurisdiction would, it is argued, constitute an unconstitutional intrusion into a House of the legislative branch of government.

This Commission's jurisdiction is strictly limited by Chapter 281 of the Nevada Revised Statutes. The Commission does not have jurisdiction over, and does not here consider or render an opinion on the **qualifications, elections and returns**, or the **election challenges** to Evans and Giunchigliani. NRS 293.427(3) specifically provides that election contests will be tried in the Assembly and heard and decided as prescribed by the Rules of the Assembly. Moreover, the Commission does not have jurisdiction over the rules and Procedures by which the 68th Nevada Assembly will seat its members, hear and decide contested elections, permit or not permit an Assembly member-elect to vote on his or her contested election, or elect a speaker. Any such internal activity is constitutionally within the exclusive authority of that House of the Legislature. The Commission does not have jurisdiction to determine the legal effect of the placement of the names of Evans and Giunchigliani on the roll of members-elect by the Secretary of State, the January 3, 1995 Proclamation by the Governor that Evans and Giunchigliani were duly elected, or the determination of the Governor not to issue certificates of the election of Evans or Giunchigliani. All such issues are to be determined by the appropriate House of the Legislature, not the Commission.

For purposes of this Opinion, the Commission hypothetically assumes that the Assembly, in determining its own Rules, will allow Giunchigliani and Evans each to vote on the question of her own election contest and seating. Based upon that assumption, this Opinion obviously is moot and of no effect if the Assembly, in its exclusive jurisdiction, determines that Giunchigliani and/or Evans cannot vote on her election contest and seating in the Assembly. Accordingly, the Commission here exercises its limited jurisdiction to hear and issue an Opinion exclusively on the **ethical** question of whether Evans and/or Giunchigliani would violate NRS 281.501 of the Ethics in Government Law in the event that under the Rules of the Assembly each is permitted to vote on her own election contest and her own seating in the 68th Assembly.

The applicable voting provisions of the Ethics in Government Law are at NRS 281.501(1), (2) & (3). Those sections provide the following:

1. Except as otherwise provided in subsection 2 or 3, a member of the legislative branch may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group, is not greater than that accruing to any other member of the general business, profession, occupation or group.
2. In addition to the requirements of the code of ethical standards, a member of the legislative branch shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of a matter with respect to which the independence of judgment 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 interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest where the resulting benefit or detriment accruing to him is not greater than that accruing to any other member of the general business, profession, occupation or group.

3. A public officer or employee shall not approve, disapprove, vote, abstain from voting, or otherwise act upon any matter:

- (a) Regarding which he has accepted a gift or loan;
- (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
- (c) In which he has a pecuniary interest,

without disclosing the full nature and extent of the gift, loan, commitment or interest. Such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the 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. (Emphasis added).

NRS Chapter 281 itself provides no limitation or exception to the application of NRS 281.501 to those facts and circumstances presented in the opinion request. Evans and Giunchigliani argue that NRS 281.501 is inapplicable to legislators voting on any matter other than "legislation." They maintain that the legislative history of NRS 281.501, and all of the Ethics in Government provisions of Chapter 281, as substantially revised by the Legislature in 1991, evidences an intention by the Legislature not to make the voting of members-elect on their own elections and seating in the Legislature subject to NRS 281.501. Were the language of NRS 281.501 ambiguous, the Commission could look to the legislative history to determine legislative intent. NRS 281.501 is clear on its face, however, that it applies to legislators voting on any **matter requiring a decision** by the public body. "Decision" is defined in Chapter 281 as:

The making of a "decision" is the exercise of governmental power to adopt laws, regulations or standards, render quasi-judicial decisions, establish executive policy or determine questions involving substantial discretion. The term does not include the functions of the judiciary. NRS 281.433 (emphasis added)

The clear language of NRS 281.501 and NRS 281.433 does not allow the Commission to look elsewhere to determine legislative intent that NRS 281.501 may not be applied to the issue of whether a legislator-elect may vote on his or her own election contest if permitted by the rules of the Assembly.^[1] There is no ambiguity in, and therefore no allowance for the Commission to go beyond the words of the statute to determine the Legislature's intent.^[2] If the Legislature had so intended, it could have so limited the provisions of NRS 281.501.^[3] Instead, the Legislature made the provisions of NRS 281.501 applicable to legislators **making decisions on any matters** on which they vote in their public capacities. Accordingly, the provisions of NRS 281.501 apply to the **ethical question** of whether Evans or Giunchigliani each may vote on her own election contest and seating in the 68th Assembly.^[4]

FINDINGS

1. The parties stipulated to the following facts at the administrative hearing:

Forty-two seats in the Assembly appeared on the general election ballot on November 8, 1994.

At the General Election on November 8, 1994, Evans received 3450 votes in State Assembly District 30. Her opponents received the following votes: Francis E. Goslings -283 votes; Gary Keeler -2372 votes; and Brendan Trainor -193 votes. On November 18, 1994, Mr. Trainor filed a contest against Evans in the Office of the Secretary of State.

At the General Election on November 8, 1994, Giunchigliani received 3026 votes in State Assembly District 9. Her opponent Kathy Yon Tobel received 2903 votes. On November 22, 1994, Ms. Yon Tobel filed a contest against Giunchigliani in the Office of the Secretary of State.

On November 23, 1994, a majority of the Supreme Court Justices met with the Secretary of State and opened and canvassed the votes.

On November 23, 1994, the Secretary of State notified the Governor of the contests filed against Evans and Giunchigliani.

A certificate of election must be executed by the Governor and delivered to the person seated by the House. The Governor prepared certificates of elections for 40 Assembly member-elect. These certificates of election are in the possession of the Clerk of the Assembly. The Governor did not prepare certificates of election for Evans or Giunchigliani, because contests had been filed against them.

NRS 293.425(2) reads in pertinent part:

When a statement of contest is filed with the secretary of state he shall immediately notify the governor, who shall withhold issuing a certificate of election. If the governor has issued a certificate of election prior to receipt of notice from the secretary of state the certificate is void.

2. On December 12, 1994, then Secretary of State, Cheryl A. Lau, advised Giunchigliani and Evans in separate letters to each that their names would be included on the roll of members-elect as required by NRS 218.100(1).

3. On December 21, 1994, by letter, Secretary of State Lau, advised Lorne Malkiewich, Director of the Legislative Counsel Bureau, that she intended to prepare a roll of members-elect of the Nevada Assembly which would contain the names of all 42 members-elect, including Evans and Giunchigliani, pursuant to the provisions of NRS 218.100.

[5] That statute provides in pertinent part:

1. Prior to the meeting of the assembly of each session of the legislature, the secretary of state shall make out a roll of the members-elect, as shall appear by the returns on file in his office. Only such members whose names shall appear upon the roll shall be allowed to participate in the organization of the assembly.

2. On the 1st day of each session of the legislature at 12 m., the secretary of state shall call the assembly to order, and shall preside over the assembly until a presiding officer shall be elected.

4. On January 3, 1995, the Governor issued a Proclamation pursuant to the provisions of NRS 293.395 which included the names of Evans and Giunchigliani, who received the most votes in Assembly Districts 30 and 9 respectively, and which proclaimed in part the following:

IN accordance with the laws of the State of Nevada, I, BOB MILLER, Governor of the State of Nevada, do hereby proclaim that the following named person, at said election, received the highest number of votes cast for each specified office, and that therefore they are duly elected to said offices, with a right to hold and enjoy the power and privileges thereof, and the questions submitted to the vote of the people did receive the number of votes in the affirmative and in the negative as hereinafter set forth: ...

NRS 293.395 provides in subsection (3) the following:

The governor shall issue certificates of election to and commission the persons having the highest number of votes and shall also issue proclamations declaring the election of those persons.

5. The salary of Assembly members in 1995 is \$7,800.00 for the first 60 days of the legislative session. NRS 218.210. A per diem allowance of \$66.00 is also paid to each member, which was \$10,890.00 for the duration of the 1993 Legislative Session. NRS 218.220(2). Based on these amounts and assuming the session will last as long as the 1993 Legislative Session, Evans and Giunchigliani would each receive \$7,800.00 in salary^[6] and \$10,890.00 in expenditure allowances for necessary living costs they incur for serving in the 1995 Legislative Session.

6. Giunchigliani is employed as a classroom teacher by the Clark County School District and will not receive her salary of \$23,391.50 for the second semester of the 1994-95 academic school year if she serves in the 1995 Legislative Session. She will also not receive \$5,993.00 in benefits for the second semester. Giunchigliani will also pay for temporary living expenses necessary for her to reside in Carson City, Nevada during the 1995 Legislative Session.

7. Evans is employed in the Development Office of the University of Nevada School of Medicine in Reno, Nevada where she resides and will not receive her salary of \$24,501.00 during the 1995 legislative session. She also will not receive additional monthly medical insurance payments on her behalf by her employer and employer paid retirement contributions. She will also incur additional expenses necessary for her to attend and participate in the 1995 Legislative Session in Carson City, Nevada.

OPINION

The only issue before the Commission is whether a legislator may vote on her own contested election to the Assembly in the preliminary organization of the 68th Nevada Assembly when the 1995 Legislative Session convenes. In addressing this question, the Commission must first determine whether under NRS 281.501, with respect to the election contest and seating as a member of the Assembly, the member-elect has a pecuniary interest or has commitment in her private capacity to the interests of others. NRS 281.501(2)&(3). If any such interest or commitment exists, the member-elect must disclose such interest or commitment under the provisions of NRS 281.501(3). In addition, Evans and Giunchigliani would also be required to abstain from voting on such matters if the nature of such pecuniary interest or commitment would materially affect the independence of judgment of the reasonable person in that situation. NRS 281.501(2).

A. Nature Of Interest

Neither Evans nor Giunchigliani with respect to their contested elections, as stipulated by Hettrick at the hearing, has a commitment in her private capacity to the interests of any others. If there is any commitment on the part of Evans or Giunchigliani, it is in her public capacity, as a member-elect, and likely is a commitment to the constituents, election supporters, and others involved in her election to public office.

The only question is whether Evans or Giunchigliani has a pecuniary interest in her contested election which requires the application of the provisions of NRS 281.501. A pecuniary interest is measured in money. *Black's Law Dictionary* defines "pecuniary interest" as "[A] direct interest related to money in an action or case as would, for example, require a judge to disqualify himself from sitting on a case if he owned stock in a corporate party." *Black's Law Dictionary*, p.1018, (1979). The amount of the pecuniary interest is not relevant for purposes of application of the disclosure provisions of NRS 281.501(3). That section of the statute requires disclosure of any pecuniary interest before approving, disapproving, voting or abstaining on any matter in which such pecuniary interest exists. Abstention from voting on any matter in which a pecuniary interest exists, however, is only required when such pecuniary interest would materially affect the independence of judgment of a reasonable person in that situation. NRS 281.501(2)

Because Evans and Giunchigliani each would receive a salary and per diem allowances while serving as state legislators, each has a pecuniary interest in the payments each would receive as seated members of the 68th Nevada Assembly. Each, therefore, has a pecuniary interest in voting on their contested elections.

B. Disclosure

The disclosure provisions of NRS 281.501(3) require public disclosure by a public officer of any matter in which the officer has a pecuniary interest. Disclosure must be made before the public officer approves, disapproves, votes, abstains from voting, or otherwise acts on the matter. Disclosure must be made at the time the matter is considered. If the officer is a member of a body which makes decisions, disclosure is to be made in public to the chairman and other members of the body. NRS 281.501(3).

Since Evans and Giunchigliani have a pecuniary interest in their seats, that interest must be publicly disclosed at the time the matter of their election contests are considered.

C. Abstention

Subsection 2 of NRS 281.501 prohibits members of the legislative branch from voting on matters in which they have a pecuniary interest if such interest would materially affect the independence of judgment of a reasonable person in his or her situation. The statute presumes that "the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest where the resulting benefit or detriment accruing to him is not greater than that accruing to any other member of the general business, profession, occupation or group." NRS 281.501(2).

In applying the abstention provisions of NRS 281.501(2) to the question of whether Evans or Giunchigliani may vote on her own election contest and seating the Commission concludes that the prospective pecuniary interests of Evans or Giunchigliani would not materially affect the independence of judgment of a reasonable person in her situation. The evidence reflects that both Evans and Giunchigliani will suffer financial detriment in substantial reductions in income, health and retirement benefits if they are seated as legislators as opposed to remaining in their private employment during the 1995 Legislative Session.

Additionally, there is no evidence to overcome the statutory presumption that their pecuniary interests in being seated as state legislators is any greater than that of each of the other members-elect to be seated in the 68th Nevada Assembly. The fact that the elections of Giunchigliani and Evans have been contested does not alter or otherwise distinguish the nature of their pecuniary interests from those of other members-elect to be seated in the Assembly. All Assembly members-elect have a commonly shared interest, which is at least partially of a pecuniary nature, in being sworn in and seated in the 68th Nevada Assembly. Because the elections of two members-elect are contested does not distinguish the nature of their pecuniary interests in their seats from those of other members-elect. As such, the resulting benefit or detriment accruing to Evans or Giunchigliani if seated as Nevada Assembly members is not greater than that accruing to any other member of the Assembly.

Evans and Giunchigliani are not, therefore, required under the provisions of NRS 281.501(2) to abstain from voting on the question of their own election contests and seating as members of the 68th Nevada Assembly.

CONCLUSION

Evans and Giunchigliani will not violate the Ethics in Government Law at NRS 281.501(2) and (3) by voting on the question or questions, as the case may be, of their own election contests. The method, manner and procedure whether they may vote under the Rules of the Assembly is exclusively within the jurisdiction, authority and control of the Assembly.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific facts and circumstances. The provisions of 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: January 12, 1995.

NEVADA COMMISSION ON ETHICS

By: /s/ Thomas R. C. Wilson, Chairman

[1] *Sellers v. State*, 108 Nev. 1017, 1019, 843 P.2d 362 (1992); *State v. Loveless*, 62 Nev. 17,23, 136 P.2d 236 (1943).

[2] *Maxwell v. State Industrial Insurance System*, 109 Nev. ____, 849 P.2d 267 (1993); *Palmer v. Dell Webb's High Sierra*, 108 Nev. 673,838 P.2d 434 (1992); *State Gaming Comm'n v. GNLV Corp.*, 108 Nev. 456,458, 834 P.2d 411 (1992); *Nevada Power Co. v. Public Serv. Comm'n*, 102 Nev. 1,4, 711 P.2d 867,869 (1986).

[3] For example, in 1987, the Legislature amended NRS 281.521 to make clear by statute that the Commission had no jurisdiction to interpret the campaign practice provisions of Chapter 294A of the NRS. See, *State Dept. of Motor Vehicles & Public Safety v. Brown*, 104 Nev. 524,526,762 P.2d 882 (1988).

[4] The Commission invites the 1995 Nevada Legislature to review the application of NRS 281.501 to whether members-elect may vote on their own election contests and seating where allowed in the Rules of the House.

[5] As of the date of this Opinion, the roll has not been delivered to the Clerk of the Assembly and the Commission has received no information as to whether the roll has been prepared or signed by the Secretary of State.

[6] NRS 218.2387 provides that legislators must participate in the State of Nevada Retirement Program for which 15% of each legislators salary is withheld.