

Abstract of Opinion No. 95-10

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion concerning the conduct of PUBLIC OFFICER

This opinion is in response to the opinion request filed on February 22, 1995, with the Nevada Commission on Ethics ("Commission") concerning a city councilperson. The issue presented is whether Councilperson's alleged use of his or her public position to threaten to obtain or to obtain a cease-and-desist order against the operation of Requestor's business was prohibited by the Nevada Ethics in Government Law.

A hearing on the merits of the request was held on April 26, 1995, in Carson City, Nevada. Requestor, Councilperson, Councilperson's counsel, and various witnesses, all appeared and testified. The hearing was confidential pursuant to the provisions of NRS 281.511(4) and (9) and was, therefore, not open to the public. After the conclusion of the hearing, the Commission met in closed session on that same day. Based upon the foregoing, the Commission makes the Findings of Fact and issues the opinion that follows.

FINDINGS OF FACT

1. At the time of the hearing in this matter, Councilperson was a public officer as defined in NRS 281.4365(1). At all times pertinent to this opinion, Councilperson was a member of the City Council.
2. In his or her private capacity, Councilperson is the director of a Hotel/Wedding Chapel (Hotel #1) in Nevada.
3. Requestor is the president of a California telephone service business ("CTSB") that provides replacement telephones to hotels on which are eight direct/speed dial buttons, each individually labeled and preprogrammed to call tourist-related service providers (such as restaurants, entertainment, and taxi accommodations) within the immediate community of each particular hotel. The phones enable hotel patrons to directly contact such services at no charge to the hotel. Accompanying each replacement telephone is a directory containing double-page inserts of advertisements, price lists, and other information about each of the individual service providers whose telephone numbers are preprogrammed on the phones.
4. Advertisers who subscribe to the telephone service are charged \$1.00 per month per hotel room in which a replacement phone is installed. CTSB is responsible for the costs associated with maintaining the phones.
5. In the summer of 1994, CTSB began negotiating with another hotel (Hotel #2) in the same city to allow placement of its phones within each of its hotel rooms.
6. After Hotel #2 agreed to permit CTSB to install replacement phones in each of its hotel rooms, Requestor came to the city during the first or second week in December 1994 to solicit local businesses to advertise its services through CTSB's service at Hotel #2.
7. Upon reading a brochure advertising Hotel #1, Requestor visited it to determine whether its owner would be interested in advertising its services through Requestor's business. Because Councilperson was not available for a meeting at that time, Requestor explained the services provided by CTSB to the receptionist at Hotel #1.
8. In a subsequent phone conversation between Requestor and Councilperson, Councilperson requested that he be provided hard-copy information concerning CTSB. On December 14, 1994, Requestor faxed four pages to Hotel #1, including therein a cover sheet, contract, and a pictorial of the replacement telephone and accompanying insert

page.

9. By December 21, 1994, Requestor had commitments from seven businesses to advertise on Hotel #2 replacement telephones for a six-month period.

10. On December 21 or December 22, 1994, Requestor phoned Councilperson to discuss the status of Councilperson's interest in utilizing CTSB's services for Hotel #1. Councilperson verbally agreed to proceed, but desired that another contract and insert samples be sent because the original information had been lost. The agreed terms were a flat fee of \$200 per month for six months. Requestor stated that he would fax the information and informed Councilperson that he would be in the city during the first week of January 1995 to install the phones. After this conversation with Councilperson, Requestor stopped soliciting businesses for an eighth spot on the replacement phones.

11. During Requestor's conversations and negotiations with Councilperson concerning Hotel #1 's use of CTSB's service, Councilperson never asked Requestor if Requestor possessed a license to do business in the city.

12. During the first or second week of January 1995, Requestor phoned Hotel #1 to determine whether its staff had completed preparation of the telephone insert pages. Requestor spoke to a secretary who instructed him to call back as she had no answer for him at that time. When Requestor called back, he spoke to the same secretary who confirmed that she was aware of the agreement between Hotel #1 and CTSB and that the inserts would be ready by approximately January 24, 1995, when Requestor's son ("Foreman") anticipated being in the city to install replacement phones at Hotel #2.

13. On or about January 22, 1995, prior to Foreman's departure from California for City, Requestor called Hotel #1. He was told by a secretary that because the copy of the contract faxed previously had been lost, another one was needed. Requestor was again informed that the inserts and a signed contract would be ready by the time Foreman arrived in city.

14. Councilperson's executive assistant ("Assistant") testified that during a phone conversation with Councilperson, Councilperson told Assistant there was no time to talk, Assistant wrote "no time" on a fax sent by Requestor on December 22 or 23. Assistant wrote "no time" to go forward on the fax. After this, Assistant decided to write a letter of Assistant's own to Foreman.

15. On January 22 or 23, 1995, Requestor and several family members printed out labels, including those which generically identified "Hotel #1" to place upon 200 phones, and preprogrammed into them the telephone numbers belonging to each of the eight CTSB's clients whose advertisements would appear in hotel rooms at Hotel #2, including the telephone number for Hotel #1. CTSB rented a van to enable Foreman to bring to the city the phones and accompanying labels. Foreman was to gather the advertising literature that would be in the insert pages from each of CTSB ' s clients and to place the advertisements in each hotel room book.

16. Requestor arrived in city late on January 23, 1995, with an assistant and commenced placing replacement telephones in each of the 200 hotel rooms at Hotel #2. This process took approximately ten minutes per room. The most time consuming process, and the final step involved, was the placement of the advertisers' inserts into the pages of the hotel room books.

17. Councilperson testified that on January 25, 1995, Requestor offered Hotel #1 a "free trial" of the CTSB services. Councilperson's spouse called the City Council Business License Division to inquire whether CTSB had a business license. Councilperson stated that licensing problems he had encountered in the past led him to take such precautions. Councilperson' s spouse was told that someone would get back to them concerning the request.

18. On January 25, 1995, Requestor phoned Hotel #1 to speak with Councilperson after Foreman called Requestor to inform Requestor that Hotel #1 had not provided Foreman with its advertising literature. Assistant told Requestor that Councilperson would "get back to Requestor" regarding the time the inserts would be available. On January 26, 1995, Assistant repeated the story to Foreman when Foreman called Hotel #1 about the advertising inserts.

19. Assistant testified that the only calls she made concerning the advertising services were to Foreman at Hotel #2. According to Assistant, Foreman wanted to know where the inserts were. Assistant's impression was that Councilperson was interested in the deal. In Assistant's first conversation with Foreman, Foreman did not pitch any free deals. She did not know anything about a free trial service until shortly before Foreman left city.

20. According to Assistant, on January 27, the day before Foreman left city, Assistant told Foreman that Assistant did not think Foreman should have put Hotel #1 in the Hotel #2 phone system, which Foreman had done already. Foreman said this presented no problem because CTSB wanted a wedding chapel entry on the phone anyway, and a maintenance man could reprogram the phones later. Foreman further informed Assistant that Foreman was not surprised that a contract between Hotel #1 and CTSB had not been signed.

21. Councilperson testified that he did not know until January 26, 1995, that Hotel #1 was required to prepare inserts. According to Councilperson, Foreman and Assistant were talking about free terms and attempting to put some materials together.

22. By the end of January 26, 1995, when Foreman still had not learned whether Hotel #1 had completed its advertising inserts, Requestor instructed Foreman to remain in city one more day. With the exception of literature to be obtained from Hotel #1, Foreman had retrieved all necessary information from the seven other advertisers and had completed installation of each hotel room's telephone and preparation of the accompanying inserts.

23. On the morning of January 27, 1995, Foreman called Assistant at Hotel #1, who told Foreman that neither Councilperson nor the relevant documents were available. After Foreman telephoned Requestor to relay this news, Requestor made a few calls to others to verify Foreman's report based on newspaper articles Requestor had read that Councilperson was being sued by others and that Councilperson was "notorious" in this regard. Subsequently, at approximately 10:15 a.m., Requestor called Assistant from a pay-telephone to voice Requestor's concerns related to the delay in obtaining inserts for Hotel #1. Requestor indicated, however, that there was still enough time to "scramble" and put a package together. As CTSB had performed such services for other clients in the past, Requestor explained that the company would be presently more than willing to do so on Hotel #1's behalf if Hotel #1 so desired.

24. Assistant got off the phone and then returned to inform Requestor that Councilperson had "changed his mind." In response to Requestor's statement that Requestor "may have to sue," Assistant stated that Requestor could not because there was no contract. Requestor reported he would indeed sue, and would "just get in line."

25. Within minutes of this conversation, Councilperson called Requestor's secretary in California and requested that Requestor contact him immediately. Upon being paged by his secretary, Requestor phoned Councilperson immediately thereafter. Requestor testified that Councilperson stated to him as follows:

Where did you get the nerve to threaten me, you tucking son-of-a-bitch bastard?
You can't do this to me. I'm going to shut you down and report you to the PUC
and I'll make sure that you can't do this again.

Requestor responded that he would still sue, told Councilperson to "take [his] best shot," and hung up. Although Requestor could not swear to the fact, he believed that Councilperson told him that he was a councilperson and that he "had influence." Requestor definitely remembered the inference of having influence and an explicit referral to the

Public Utilities Commission.

26. A half-hour later, Requestor received an urgent page informing Requestor to call the general manager of Hotel #2 ("General Manager"). General Manager reported to Requestor that he had just been notified by the City Clerk's Office that a cease-and-desist order was going to issue to prevent CTSB from doing business in city. Minutes later, Requestor's secretary called to inform him that she had just gotten a call from the city revenue officer ("Revenue Officer"), informing her that a cease-and-desist order had been issued against Requestor and that Foreman would be arrested.

27. Requestor then phoned the City Clerk's Office to inquire whether it was necessary for a company doing business in both California and Nevada to have a Nevada business license. The answer of the person to whom Requestor spoke was ambivalent: the person did not know, but thought it might be advisable. Thereafter, Requestor called the Revenue Officer concerning the cease-and-desist matter.

28. Revenue Officer admitted to issuing the Notice To Comply after the deputy city attorney ("Deputy") had directed him to investigate the matter and if Revenue Officer found a violation of the Business License Ordinance. Following Requestor's explanation of the events which precipitated issuance of the notice, Revenue Officer informed Requestor that if Foreman registered CTSB in Nevada and paid the necessary fees to obtain a business license (effective January 1, 1995), the problem could be immediately rectified. Requestor telephoned Foreman and instructed him to meet with Revenue Officer in the city clerk's office and they would have the necessary documents ready for signature.

29. In a second call to Revenue Officer, Requestor asked the identity of the person who had contacted Revenue Officer regarding Requestor's lack of a Nevada business license. Revenue Officer reported that he had not been directly contacted by the person inquiring into the licensure matter, but that he had become involved through the Chief Deputy City Attorney ("Chief Deputy") for the city, who, he thought, had probably been contacted by Councilperson.

30. Chief Deputy testified that on January 26, 1995, or early January 27, 1995, he received a telephone call from Councilperson. Not asking about any particular contract or referring to Requestor specifically, Councilperson inquired whether CTSB or "a person" needed a business license to do business within the city and whether a license would be required to program 200 hotel phones at Hotel #2. Chief Deputy assigned the matter to Deputy, the deputy city attorney who was in charge of licensing, via a routing slip upon which Chief Deputy recited that Councilperson was concerned about "a person installing phones." Chief Deputy made it known to Deputy that it was Councilperson who had made the licensing inquiry but did not give Deputy any special instructions. Chief Deputy testified that there was nothing remarkable about the request; there was nothing that Councilperson did to indicate that he was seeking an advantage that was not otherwise available to the public.

31. Deputy testified that the standard procedure after determining that a company is conducting business in city without a business license is to issue that business a Notice to Comply. The notice commands the business to cease and desist from doing business in the city from the date of issuance of the notice until a license to conduct business is obtained. The notice provides that failure to cease and desist operating that business from the date of the notice may result in arrest and citation. Deputy explained that although failure to obtain a license would not result in arrest, arrest might be a consequence of failure to cease and desist from business operation in the absence of a license, at the discretion of license inspectors. Though the notice generally allows ten days for compliance, most recipients of such notices remedy the problem within one or two days.

32. After receiving Chief Deputy's note on January 27, 1995, Deputy conducted an investigation. The matter was not presented to Deputy as an emergency nor did Deputy perceive or perform his investigation with that in mind. He took the note to compliance officers in the Business and License Division, which was located downstairs from his office.

Deputy never had any discussion with Councilperson regarding the matter.

33. After determining that Requestor's business was being conducted in city without benefit of a business license pursuant to Section 4.04.020 of City Ordinance No. 404, Revenue Officer issued a Notice to Comply to CTSB. CTSB was informed to complete and return an enclosed application for a city business license by February 10, 1995.

34. At approximately 4:00 p.m. on January 27, 1995, Foreman completed a Nevada Business Registration form and City Business License Application which resulted in the issuance of a business license by the city, effective January 1, 1995. In addition to the \$55.00 license registration fee, a penalty of \$27.50 was imposed. Foreman left city on the afternoon of January 27, 1994, without having included inserts for Hotel #1 in the hotel room books which accompanied the replacement telephones.

35. After Revenue Officer completed his investigation and told Deputy that the matter would be resolved, Deputy prepared a memorandum dated January 27, 1995, directed to the attention of Councilperson. Deputy believed he drafted the memo on the same day the investigation occurred. Deputy's memorandum said:

I have forwarded to our compliance investigators, your inquiry relative to CTSB. I received that information from Chief Deputy and have asked that formal inquiry be made in this regard. I can tell you that initial research reveals that CTSB is not licensed with the city to do business herein. We will be contacting Hotel #2 and attempting to contact a representative of CTSB to ensure their compliance with Chapter 4 of the city Municipal Code. Thank you for bringing this matter to the attention of the Business License Division. I will be contacting you shortly with respect to what we learn in this regard.

Deputy forwarded the memo to Chief Deputy, who did nothing in response.

36. A few days following January 27, 1995, Deputy received a telephone call from Requestor. The call had been directed to Chief Deputy but had been routed to Deputy. Requestor asked Deputy who had "turned him in," and described the events which had culminated in the issuance of a business license. Requestor explained that telephones in Hotel #2 hotel rooms had already been installed and programmed, but Councilperson did not want them. Requestor told Deputy that Councilperson had stated that "I'll see you're shut down. I'm a councilperson." Requestor asked Deputy what he thought, but Deputy did not give him any specific information. Deputy responded that although he understood Requestor's concerns, Councilperson's public status never exerted any influence. Deputy explained that Councilperson's request was not given any special treatment; it was processed in the same, routine manner as any other complaint would be handled in that office. Deputy testified that he told Requestor that he could not be sure that the initial inquiry concerning CTSB's business license had come from Councilperson directly.

37. After Deputy's telephone conversation with Requestor, Deputy called Chief Deputy to inform him of Requestor's claim that Councilperson had breached his contract with his company and that Councilperson had threatened Requestor. However, Chief Deputy did not recall that Deputy described to him the exact terms of Councilperson's threat.

38. Following his conversation with Deputy, Chief Deputy called Councilperson to obtain Councilperson's explanation of the events that had transpired between himself and Requestor. Councilperson responded that he had no dealings with Requestor and that Requestor had dealt almost exclusively with Councilperson's secretary. Councilperson claimed that Hotel #1 had no contract with CTSB, that Councilperson had rejected Requestor's offer, and that he did not threaten Requestor.

39. Chief Deputy did not investigate the circumstances of the events. He understood that there was some kind of dealing that did not end in a contract. He did not understand from what Councilperson had told him that there was a dispute. He was aware that Requestor had been informed that his business was subject to a cease and desist order and of the possible arrest of Requestor's son. Until his second conversation with Councilperson, Chief Deputy stated he had no knowledge concerning a personal relationship between Requestor and Councilperson or that there was a correlation between the installation of 200 telephones at Hotel #2 and Councilperson's business.

40. After a second conversation with Chief Deputy, Councilperson faxed Chief Deputy a copy of the letter prepared by Assistant dated January 27, 1995, to demonstrate that there was no contract between Hotel #1 and CTSB. Chief Deputy testified that both of his conversations with Councilperson occurred on the same day.

41. Approximately one week later, Requestor called Chief Deputy. Chief Deputy returned Requestor's call on or about February 6, 1995, whereupon Requestor repeated what he had formerly told Deputy regarding Councilperson's threats.

42. Councilperson's testimony differed sharply from Chief Deputy's, Deputy's, and Requestor's testimony. Councilperson testified that he did not have a conversation with Requestor on December 21 or 22, 1994, or January 27, 1995. He stated he had only had two conversations with Requestor: on December 14 or 15, 1994, at which time he asked to have documents sent, and after January 27, 1995. Councilperson admitted that he had a heated conversation with Requestor, but he claimed that it occurred after January 27, 1995. Councilperson testified that he had not initially asked Requestor about a license because he was not sure if Requestor had concluded negotiations with Hotel #2. Furthermore, because Councilperson was busy with his campaign for city council, he did not have the time to discuss any matters with Requestor.

43. Similarly, Councilperson testified that he never phoned Chief Deputy and that Chief Deputy had called him on approximately January 31, 1995. Councilperson also denied receiving or even seeing Deputy's memo to him until the hearing. Councilperson testified that an official decision not to do business with Requestor was made on January 27, 1995, before finding out that CTSB lacked a city business license. At the time the decision was made, Councilperson was not sure whether a license was needed.

44. Assistant testified that on January 27, 1995, she wrote a letter to Foreman to inform him that Hotel #1 declined the free trial service offered by CTSB. Although Assistant had planned to call Foreman and tell him so directly, he had already checked out of Hotel #2. No letterhead appeared on the correspondence, and Requestor's address appeared only on the envelope. In addition to mailing the letter to Foreman, Assistant faxed a copy of it to Requestor. Also, according to her handwriting on the fax cover sheet, she likewise faxed a copy to Chief Deputy, although she did not remember doing so. She had circled the fax record of the transmittal to Chief Deputy's office upon Hotel #1 's telephone activity report with the accompanying notation, "proof letter was faxed."

45. Assistant testified that Councilperson did not know about her letter, as he was not in the office. Councilperson testified that he had not told Assistant to write a letter. Assistant could not remember if Requestor called the same day of the letter to complain, or if it was later.

OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(2). Councilperson was a public officer in his position as Councilperson for the city as such employment is defined in NRS 281.4365(1).

The issue presented in this matter is whether Councilperson used his position as a councilperson to secure unwarranted privileges, preferences, or advantages for himself or a business entity in which he has a significant pecuniary interest. NRS 281.481(2) provides:

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. (Emphasis supplied.)

Requestor complained that Councilperson used his position as councilperson to harass his son and his business by obtaining a cease-and-desist order after difficulties developed regarding the advertising agreement between Hotel #1 and CTSB. We find that Councilperson did use his position as councilperson to secure an unwarranted advantage for himself and Hotel #1.

The events of January 27, 1995, seem undisputed. Chief Deputy testified that he was contacted by Councilperson about whether CTSB (or at least a telephone installer) needed a city business license. Chief Deputy passed the question on to Deputy, who then passed the question on to Revenue Officer for investigation. Chief Deputy and Deputy testified that the initial contact that commenced the investigation came from Councilperson. Revenue Officer concluded that CTSB needed a business license and issued a Notice to Comply to CTSB. Deputy then wrote a memorandum to Councilperson explaining the results of the investigation. Foreman paid the proper fees and penalties, and CTSB received a city business license. All of this happened on January 27, 1995.

On this same date, Assistant wrote a letter to Foreman confirming that Hotel #1 intended not to proceed with CTSB, and apparently he faxed a copy of this letter to Chief Deputy. Though Councilperson denies it, it appears to the Commission that January 27, 1995 was the day that the deal between Councilperson and Hotel #1 and CTSB acrimoniously dissolved.

Requestor may have embellished his recollection of his conversation with Councilperson on January 27, 1995, with some unnecessarily coarse language; nonetheless, it seems plausible that Councilperson made some such threat, since the course of events that followed bears out the threat. We find that the threat was plausible because it was carried out.

Councilperson's claims that he knew nothing of the deal souring on January 27, 1995, and that he did not speak with Chief Deputy until January 31, 1995, are not credible in light of the testimony presented and the course of events. Chief Deputy and Deputy testified that the investigation was commenced at Councilperson's request. The investigation was done and the Notice to Comply was issued on January 27, 1995. Deputy wrote his memorandum to Councilperson on January 27, 1995. Most importantly, Assistant not only wrote a letter to Foreman confirming that Councilperson and Hotel #1 were withdrawing from a relationship with CTSB, but apparently she also faxed a copy of this letter *to Chief Deputy*. Unless Councilperson had already contacted Chief Deputy to initiate the investigation, what purpose would Assistant have had in sending private correspondence relating to Councilperson's private business dealings to Chief Deputy? Councilperson's denials are incredible, implausible, and against the weight of the evidence.

Councilperson cannot cloak himself in the virtue of citizenship by claiming that his motive in seeking an investigation was civic. Through his spouse, Councilperson contacted the business licensing authorities directly two days before his dealings with CTSB collapsed. This inquiry was treated, apparently, as an ordinary citizen inquiry, since it was not immediately addressed. Only when Councilperson's personal business relationship with CTSB soured did he personally look into CTSB's licensure status, and then instead of contacting the business licensing authorities, Councilperson went directly to the Chief Deputy City Attorney to voice his concern. Such immediate access to the City Attorney's office is a special privilege of a councilperson.

Thus, it appeared to the Commission that Councilperson called Chief Deputy to begin the investigation of CTSB in reaction to the falling out with CTSB. Whether the motive was retaliation, a show of power, a negotiating tactic, or a

pre-litigative stratagem, it seems that Councilperson used his connections as a councilperson to commence an investigation intended to embarrass or harm CTSB and its representatives. NRS 281.481(2) certainly would prohibit Councilperson from using his position, special knowledge, and influence to impose the gravity of the city government upon CTSB and CTSB's representatives because his private business dealings had soured. Such an action constitutes the use of his position in government to secure an unwarranted advantage for itself and his private business. Such a use of power constitutes an "unwarranted" advantage since it is unlikely that a citizen whose dealings with CTSB had so deteriorated, assuming he thought to check on CTSB's licensure status, would have had the direct access to Chief Deputy to drive the investigation from the top down rather than from the bottom up, since a citizen would likely have had to contact the business licensing authorities and worked from a secretary up to an investigator, as had councilperson's spouse earlier attempted unsuccessfully.

By noting this, the Commission does not intend to imply that Chief Deputy, Deputy, or Revenue Officer did anything wrong by acting upon Councilperson's complaint; once informed, they were duty-bound to act, particularly where the source of the complaint was a councilperson whom they all serve. Nor does the Commission interpret NRS 281.481(2) to mean that a public officer cannot report potential violations of ordinance, regulation, or statute to the proper authority, since such reporting would and ought to be expected and encouraged. Rather, the Commission's conclusion that Councilperson's acts violate NRS 281.481(2) is based upon these unique circumstances, namely that he only reported CTSB's violation after his private business relationship with CTSB soured, and then he reported the violation not to the business licensing authorities, but directly to the Chief Deputy. In other words, it is not Councilperson's act of reporting CTSB that constitutes an ethical violation, but rather why, when, and how he made the report that transforms an otherwise commendable act into an "unwarranted" abuse of privilege.

CONCLUSION

The Commission concludes that Councilperson violated NRS 281.481(2) by using his access and privileges as a councilperson unwarrantedly by contacting Chief Deputy to commence an investigation against CTSB after his private business dealings with CTSB and its representatives soured.

COMMENT

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

DATED: December 26, 1995.

NEVADA COMMISSION ON ETHICS

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