

Amended Opinion No. 95-51

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION concerning the conduct of

DAVID A WOOD, Councilman, City of Henderson

This Opinion is in response to a request filed on September 18, 1995 by James R. Arrendale concerning the past conduct of Henderson City Councilman David A. Wood. A hearing on this matter was held by the Commission on August 16, 1996 in Las Vegas, Nevada. At the hearing, the following were sworn and testified: Mr. Arrendale, Mr. Wood, Shauna Hughes, and Ronald Coury. Mr. Wood was represented by Peter Bernhard of Schreck, Jones, Bernhard, Woloson & Godffey, and Mr. Coury was represented by Alan Buttell. The hearing was public. Based upon the testimony, evidence, and argument presented, the Commission makes the following findings, conclusions, and opinion.

FINDINGS OF FACT

1. In early 1988, Suburban Enterprises, d/b/a "Thirstbusters" was licensed as a restaurant and tavern facility. The principals in Suburban Enterprises are Ron Coury and Dan Hughes.
2. In May 1988, Thirstbusters, a Henderson restaurant, applied for a limited gaming license and authorization to operate a casino. The Henderson Planning Commission (Planning Commission) voted 7-0 to deny Thirstbusters' application. On February 21, 1989, the Henderson City Council (Council) unanimously voted to deny Thirstbusters' application for operation of a casino but granted a restricted gaming license authorizing operation of 15 slot machines.
3. On May 16, 1990, Larry Scheffler was appointed to the Council to replace Councilman Carleton Lawrence.
4. In November 1991, the Planning Commission unanimously denied Thirstbusters' application for a limited use gaming permit to expand the number of slot machines at the casino beyond 15 machines. On December 17, 1991, the Council unanimously denied Thirstbusters' application to obtain a special use permit for a limited gaming license to expand its operation to include up to 1.99 slot machines and up to nine live table games.
5. In early 1992, Messrs. Coury and Hughes filed a civil lawsuit in the Clark County District Court against the City of Henderson seeking review of the City's denial of their request to increase their gaming.
6. On May 21, 1992, Mr. Coury and the City entered into a settlement agreement (hereinafter Settlement Agreement) whereby Thirstbusters would be allowed a total of 40 gaming machines. Paragraph 3(B) of the Agreement specifically provided: "*Suburban Enterprises d/b/a Thirstbusters agrees not to seek an increase in the number of gaming devices over and above that mentioned in paragraph 3(A) above, at or during any time in which Ronald T. Coury or Daniel Hughes remain as the sole shareholders and maintain ownership and control of said corporation . . .*" (Emphasis supplied.) On June 25, 1992, the Council voted 4-1 to approve the Settlement Agreement. Mr. Scheffler cast the sole vote to deny approval.
7. In late March 1995, Mr. Scheffler filed for reelection to represent Ward IV on the Council. Claire MacDonald also filed to represent Ward TV.
8. On March 30, 1995, Mr. Wood filed for the Ward IV seat.
9. On March 30, 1995, an article appeared in the Las Vegas Review-Journal (hereinafter LVRJ) concerning the pattern of voting on issues by incumbent Larry Scheffler.
10. On April 1-2, 1995, Larry Scheffler sent in his first party request to the Nevada Commission on Ethics, in response to the article.

11. On April 1, 1995, an article appeared concerning Mr. Scheffler's press release regarding his ethics request.
12. On April 3, 1995, apparently, Mr. Ron Coury wrote his opinion request to the Nevada Commission on Ethics. It was not received until April 12, 1995.
13. On April 4, 1995, Mr. Wood met with Mr. Coury and solicited a contribution from Mr. Coury for his campaign. During this meeting, Mr. Coury informed Mr. Wood of Mr. Coury's concerns regarding Thirstbusters and its applications before the Council. After the meeting, Mr. Coury and Mr. Hughes each made in-kind contributions of \$1,025.00 to Mr. Wood's campaign.
14. On April 6, 1995, an article ran in the LVRJ in which it was reported that Mr. Coury had filed a request for an opinion against Mr. Scheffler. The article reported that Mr. Coury filed the request on April 3, 1995, although the Commission did not receive Mr. Coury's request until April 12, 1995. At the hearing before the Commission, Mr. Coury stated that he supported all candidates who opposed Mr. Scheffler and any other candidates for the Council where he felt that the candidates were likely to support his views and concerns, especially his ongoing pursuit of additional gaming machines at Thirstbusters.
15. Starting in mid-April 1995 and throughout the campaign, Mr. Wood's campaign advertising focused on ethical concerns with such slogans as "NO CONFLICTS Not a Developer" and "Ethics are a Council Person's Responsibility."
16. On April 20, 1995, the Commission sent Mr. Coury a certified letter acknowledging its receipt of his request for an opinion concerning the alleged conduct of Mr. Scheffler. The letter informed Mr. Coury in bold-print type: **"Be advised that unless otherwise notified by this office, this proceeding is CONFIDENTIAL under Nevada law and all information related hereto should not be discussed with anyone outside this administrative process."** (Emphasis in original.) This warning was repeated in correspondence mailed to Mr. Coury dated July 19, 1995 and September 14, 1995.
17. Despite the Commission's admonition that the request against Mr. Scheffler was confidential, on April 25, 1995, a full-page advertisement paid for by Suburban Graphics appeared in the Henderson Home News (HHN), accusing Mr. Scheffler of failing to respond to a "factually *documented ethics complaint*" (Emphasis in original.) The advertisement listed nine "facts" that were restatements of Mr. Coury's confidential request filed with the Commission on April 12, 1995. The same full-page advertisement also ran in the April 27, 1995 edition of the HHN.
18. On May 2, 1995, the primary election was held, and Mr. Scheffler and Mr. Wood emerged as the two candidates for the general election.
19. On May 19, 1995, Suburban Enterprises gave Mr. Wood's campaign \$1,500.00.
20. On May 21, 1995, the LVRJ ran a story that summarized the complaints Mr. Coury had filed with the Commission relating to Mr. Scheffler's voting record, his failure to list companies upon or failure to file financial disclosure statements, and his relationship with John Marchiano.
21. On June 6, 1995, the general election was held, and Mr. Wood was elected to represent Ward IV. On June 20, 1995, Mr. Wood was sworn in as councilman.
22. On June 22, 1995, Mr. Coury and Mr. Hughes each gave Mr. Wood \$345.00 in in-kind contributions.
23. According to campaign expenditure filings made by Mr. Coury and Mr. Hughes, they spent a total of \$32,156.80 during the 1995 city council campaign. For the entire campaign, Mr. Wood reported contributions received from Mr. Coury, Mr. Hughes, and Suburban Graphics totaling \$4,240.00, which equaled six (6) percent of his total campaign budget.
24. In early July 1995, Mr. Wood called Shauna Hughes, Henderson City Attorney, to ask her whether he could reopen the Settlement Agreement between the City and Messrs. Coury and Hughes. Ms. Hughes was on her regular annual vacation in southern California at the time. Ms. Hughes informed Mr. Wood that the Settlement Agreement could not be reopened without an act of the court since, to the best of her memory, the Settlement

Agreement had been merged with the final order of the court.

25. Several days later, Ms. Hughes was called by Ted Buttell, Mr. Coury's attorney. Mr. Buttell informed Ms. Hughes that the Settlement Agreement had not, in fact, been merged into the court's final order, and so he indicated strong disagreement with Mr. Hughes' advice to Mr. Wood a few days earlier. Ms. Hughes asked Mr. Buttell if she could respond to his arguments when she returned to the office after her vacation, especially since she had no files with -her on her vacation. At hearing, Mr. Wood admitted that upon receiving his advice from Ms. Hughes, he had called Mr. Coury.

26. Mr. Wood testified that he did not feel any sense of unusual emergency in acting upon this matter right after being sworn in, but felt that this request, like any other, should be handled as expeditiously as possible. Mr. Coury testified that he felt a sense of urgency in getting this matter examined, if possible, because he felt that he was losing a competitive position every day that passed and his competitors were allowed to continue expanding their businesses in his area while he was foreclosed from such expansion.

27. On August 15, 1995, Ms. Hughes wrote a memorandum to the Henderson Mayor and Council members in which she informed them that while Thirstbusters/Coury/Hughes may not present a renewal of their request for additional gaming devices to the Council because of the Settlement Agreement, such a renewal of the request could come from a Council member. Ms. Hughes cautioned "that if some member of the Council elects to move forward with placing an item on the agenda for modification of the Settlement Agreement, consideration should be given to obtaining an agreement to waive District Court review. Without such an agreement, the possibility of relitigating the same issues is present."

28. After Ms. Hughes' memorandum, Mr. Wood submitted a request to place on the agenda for the Council's September 5, 1995 meeting an item described as "Discussion/Action - Amendment to Settlement Agreement between the City of Henderson and Thirstbusters."

29. At the September 5, 1995 Council meeting, Mr. Wood's agenda item regarding Thirstbusters received a full hearing and discussion, including the testimony of Mr. Coury and many others. Contrary to Ms. Hughes' caution, Mr. Wood did not seek to obtain from Messrs. Coury and Hughes an agreement to waive district court review of his agenda item seeking reconsideration of the Settlement Agreement. Mr. Wood's motion to reconsider the Settlement Agreement failed.

30. On September 18, 1995, Mr. Arrendale filed an opinion request with the Commission seeking a ruling that Mr. Wood's actions to place reconsideration of the Settlement Agreement upon the Council agenda were in violation of the Nevada Ethics in Government Law.

31. On April 4, 1996, Mr. Coury and Mr. Hughes filed a Complaint and Petition for Writ of Mandate against the City, the Council members, and the City Clerk. On June 14, 1996, Judge Bonaventure issued an order in this case, ordering that "Thirstbusters' application to increase the number of its gaming machines be placed upon the City Council Agenda in the ordinary course."

32. Pursuant to Judge Bonaventure's order, on July 16, 1996, the Council heard the application for additional gaming machines. The Council unanimously denied Thirstbusters' application, with councilmen Wood and Clark abstaining.

33. At the Commission hearing on this matter, Mr. Wood provided several explanations for his position in wanting to have this matter reconsidered by the Council. He indicated that he thought the process had been unfair to Mr. Coury. He also indicated that while it appeared that the process had been accomplished in the normal course of affairs, he felt that the Council had not considered all of the factors that should be considered in their decision. He also indicated that, while all the factors he felt were germane were in front of the Council, they had not made an adequate record of considering those factors. He also felt that he had a different perspective on the whole issue of gaming expansion in the area of Thirstbusters because his view of the issue and the area was some three and a half years later and, thus, more current. He also indicated that he personally felt there would be problems in getting a different recommendation from staff in view of other problems with the site, but that this process might have been used to correct some traffic problems at the location by conditioning Thirstbusters' request on road improvements.

ANALYSIS AND OPINION

The Commission has jurisdiction in this matter pursuant to NRS 281.511(2). Based upon the Findings of Fact, the Commission concludes that at all pertinent times, Mr. Wood was a public officer as defined in NRS 281.4365(1).

The question presented in this matter is whether Mr. Wood violated NRS 281.481(1) or (2)[1] by seeking to have the Settlement Agreement reopened when the proprietors of Thirstbusters, Mr. Coury and Mr. Hughes, contributed significantly to his successful campaign. This matter was a close case, but on the record presented we must conclude that the evidence was insufficient to justify a finding that Mr. Wood committed an ethical violation.

The record shows that Mr. Wood received \$4,240.00 in campaign contributions directly from Messrs. Coury and Hughes. Mr. Wood also conceded that he benefited from the nasty campaign mounted by Messrs. Coury and Hughes against Mr. Scheffler, in which cause Messrs. Coury and Hughes spent \$32,156.80. In fact, the predominant thrust of Mr. Wood's advertisements tied neatly to Messrs. Coury's and Hughes' attacks against Mr. Scheffler because Messrs. Coury and Hughes accused Mr. Scheffler of unethical conduct and Mr. Wood's advertisements consistently focused on his purported ethics and, by implication, Mr. Scheffler's lack of ethics.

The record also showed something other than an ordinary politician-constituent relationship may have existed between Mr. Coury and Mr. Wood. (In fact, neither Mr. Coury nor Mr. Hughes are actually Mr. Wood's constituents since neither live in Henderson, much less in Mr. Wood's ward, although the business is in his Ward.) Five days into his campaign, Mr. Wood met with Mr. Coury and discussed Mr. Coury's desire to increase the number of gaming machines at Thirstbusters, as well as the whole history of Mr. Coury's and Thirstbusters' relationship with the city of Henderson and his dissatisfaction with the way he had been treated. After that discussion Mr. Coury and Mr. Hughes gave Mr. Wood's campaign \$2,050.00 in in-kind contributions. It appeared that Mr. Wood was in touch with Mr. Coury throughout the campaign, during which Messrs. Coury and Hughes continued to contribute to Mr. Wood's campaign directly and indirectly through expensive and highly visible attacks on Mr. Scheffler.

Within days of his election, Mr. Wood contacted Ms. Hughes *on her vacation* to ask about reopening the Settlement Agreement, and when he was advised that it was not possible, Mr. Wood immediately went to Mr. Coury. Mr. Coury then called his attorney who then called Ms. Hughes, *still on her vacation*, and disputed her advice. When Ms. Hughes returned to work, she wrote a memorandum advising that only a Council member could place the matter of reopening the Settlement Agreement on the agenda, which Mr. Wood promptly did. Though Ms. Hughes prophetically cautioned that a waiver should be sought to protect the City from suit should the Matter be placed upon the agenda, Mr. Wood did not do so. Thus, when the Settlement Agreement matter was heard and voted down, Messrs. Coury and Hughes all too predictably sued the City again. (It should be noted that opinions differ about whether these contacts with Ms. Hughes occurred while she was on vacation, but in viewing all of the evidence, it appears that they did occur during that time.)

Mr. Coury presented evidence and Mr. Wood argued that time and subsequent Council acts had changed the circumstances sufficiently that the Settlement Agreement's restrictions upon Thirstbusters' gaming created an unfair competitive disadvantage for them that was never intended at the time of the approval of the Settlement Agreement. In light of the evidence presented, we find that this argument is at least colorable even though its merits did not, ultimately, prevail before the full Council.

Based on the above facts, we conclude that Mr. Wood's action in placing the matter on the agenda, as described above, operated for the direct benefit of Mr. Coury, Mr. Hughes and Thirstbusters. By its terms, Mr. Coury and Mr. Hughes were specifically prohibited themselves from seeking such action. We also conclude that Mr. Wood's successful campaign was benefited by Messrs. Coury and Hughes, both through their contributions to his campaign and through their high-profile attacks on Mr. Scheffler. It should be noted, though, that the total financial contribution, according to the testimony presented, amounted to six (6) percent of Mr. Wood's total budget. It should also be noted that Mr. Coury donated more money to Ms. MacDonald than to Mr. Wood. Moreover, our analysis under NRS 281.481(1) and (2) requires *proof* of an improper correlation between the benefits conferred by Messrs. Coury and Hughes upon Mr. Wood and the subsequent benefit he conferred on them. As we earlier stated, this matter presented a close question, but we cannot find a violation based upon the evidence presented and two public policy concerns raised at hearing.

The first public policy raised by Mr. Wood concerns the heart of the electoral process; namely, that citizens donate to

candidates with whom they agree and that when a public officer acts on behalf of a constituent who donated to his campaign, the public officer's act cannot be a per se departure "from the faithful and impartial discharge of his public duties" under NRS 281.481(1) or "unwarranted" under NRS 281.481(2) because such a finding would unduly interfere with a free electoral process. We agree that democracy, as practiced in the United States, allows citizens to actively participate in a candidate's candidacy through the donation of money or services and that this practice cannot be discouraged. We are concerned, though, with the acts of the candidate once in office, and NRS 281.481(1) or (2) could be violated by an elected official who received campaign funds from a constituent in return for a promise to do a particular act upon election.

The second public policy raised by Mr. Wood is that a campaign contribution cannot be considered an improper "gift" per se under NRS 281.481(1). We agree. The record reflects that Mr. Wood, Mr. Coury, Mr. Hughes, and Suburban Enterprises all properly disclosed the campaign contributions made to Mr. Wood or against Mr. Scheffler. We are not prepared to issue a blanket statement that properly disclosed campaign contributions will *never* qualify as a "gift . . . which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties." As the test makes clear, the question is not whether money is a "gift," but rather whether the money would improperly influence a reasonable man. It is conceivable that a campaign contribution could be deemed to improperly influence a reasonable man depending upon the amount of the contribution, the identity of the donor, the timing of the gift, and other such factors.

In this case, the evidence was clear that Mr. Wood's candidacy was financed in small part by Messrs. Coury and Hughes, that Mr. Coury and Mr. Wood discussed the campaign contributions and the issue of Thirstbusters' Settlement Agreement in the same conversation, and that Mr. Wood, once elected, did attempt action that would reopen the previously closed matter. Nonetheless, the evidence also showed that there was an arguably colorable public policy concern with the way in which Thirstbusters had been treated in light of the City's gaming approvals subsequent to the Settlement Agreement, and there was no direct evidence of an express *quid pro quo* between Mr. Coury and Mr. Wood. Moreover, the total amount of the campaign contributions from Messrs. Coury and Hughes was a small percentage of Mr. Wood's total campaign budget.

In considering the evidence presented as a whole, while this is a close case, we must give Mr. Wood the benefit of the doubt. There is insufficient evidence presented to support a finding of a violation of the statutes in question.

In so saying, however, we do not find that this opinion request was brought in bad faith or merely for a vexatious purpose. Mr. Wood's actions might easily appear to constitute a *quid pro quo*, particularly in light of the significance of Mr. Coury's and Mr. Hughes' direct and indirect assistance and Mr. Wood's obvious and prompt enthusiasm for their cause directly upon his taking office. Especially in view of the history among the personalities involved, Mr. Wood's conduct understandably raised eyebrows and suspicions, but the record before us does not allow the conclusion that Mr. Wood (or a reasonable man in his place) was actually improperly influenced by the campaign contributions in issue.

Thus, Mr. Wood did not violate NRS 281.481(1) because there was insufficient evidence to conclude the campaign contributions he received constituted a "gift . . . 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 duties." Rather, the evidence showed that Mr. Wood had a colorable reason to seek review of the Settlement Agreement, and so, by seeking to reopen the Settlement Agreement he was arguably within (and thus not "departing from") the "faithful and impartial discharge of his duties." Similarly, Mr. Wood did not violate NRS 281.481(2) because whatever "privileges, preferences, exemptions or advantages" he obtained for Thirstbusters, Mr. Coury and Mr. Hughes were not "unwarranted" in light of the colorable reason for reviewing the Settlement Agreement.

CONCLUSION

We conclude that there was insufficient evidence presented that Mr. Wood violated NRS 281.481(1) or (2) by placing on the Council agenda an item intended to reopen the Thirstbusters Settlement Agreement.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances. The provisions of NRS 281.481 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: June 6, 1997.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman

[\[1\]](#) NRS 281.481(1) and (2) provide:

A code of ethical standards is hereby established to govern the conduct of public officers and employees:

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.