

Opinion No. 95-58

BEFORE THE NEVADA COMMISSION ON ETHICS

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

MIKE NEVIN, Member, Storey County Board of Commissioners

This Opinion is in response to a request filed with the Nevada Commission on Ethics by Ms. Janet Hess, the District Attorney of Storey County, Nevada, regarding the employment of Mr. Jeff Nevin for the position of Firefighter/Emergency Medical Technician (EMT) II at the Virginia City, Storey County Fire Department (VCFD) by the Storey County Board of Commissioners. Jeff Nevin's father, Mike Nevin, currently serves as Virginia City Fire Chief. Ms. Hess asked whether Jeff Nevin's employment was prohibited by the State of Nevada's anti-nepotism statute, NRS 281.210, or the Code of Ethical Standards.

The just and sufficient cause hearing was merged into the hearing on the merits of the request, and the merged hearing was held on March 8, 1996, in Carson City, Nevada. Ms. Hess, Mike Nevin, Ms. Margaret Lowther, Storey County Auditor, Ms. Marylou Walling, Personnel Director and Administrative Assistant to the Board, Mr. Gary Hames, Fire Captain of the VCFD, and Mr. Marshall Hansen, volunteer fireman of the VCFD, testified, and the Commission also received documentary evidence regarding the subject matter of this determination. The hearing was open to the public and the Commission's resulting opinion available for public review pursuant to NRS 281.511(4).

FINDINGS OF FACT

1. The Virginia City Fire Department (VCFD) is staffed by employees and volunteers and responds to fires and medical emergencies in Virginia City, the Virginia City Highlands in Storey County, and Silver City in Lyon County. Virginia City has no medical doctor or medical facility within thirty minutes of the community.
2. The Storey County Board of Commissioners (Board) is the governing authority for Storey County. The Storey County Administrative Manual contains the Board's policies and procedures for the hiring and employment of full-time, part-time, and temporary positions. Because the manual does not provide guidelines for what actions the Board must take when hiring intermittent employees, the Board has traditionally exercised hiring authority over such employees only in non-emergency situations. In emergencies, department heads have been allowed the discretion to employ persons to perform relief work on an as-needed basis.
3. In January 1980, Mike Nevin was appointed by the Board to serve as the Storey County Fire Chief. He is paid a monthly salary though he works only part-time. As Fire Chief, he is directly responsible to the Board and shall act as an advisory member to the Board on any matter related to the administration, fire prevention, and control when such matters may directly or indirectly affect the health, safety, and welfare of the residents of Virginia City and Gold Hill. The Fire Chief also supervises those individuals hired by the Board as paid fire captains in Virginia City and Gold Hill. While the Board retains supervisory authority over Chief Nevin, Chief Nevin has direct supervisory authority over Captain Hames, who in turn directly supervises the position of Firefighter/EMT II.
4. In June through November 1993, Chief Nevin's son Jeff was employed by the Public Works Department as a part-time laborer. Jeff Nevin has also been employed as a seasonal firefighter for the Nevada Division of Forestry in the Carson City area. Jeff Nevin is certified by the State of Nevada as a Firefighter I, EMT Level II and is current with Hazardous Material Awareness and Operations levels training as required by federal OSHA regulations. He has completed specialized classes in the Incident Command System, Biological/Contagious Disease Hazards, and other special fire and medical classes. He has served as a volunteer fire captain with the Volunteer Fire Department since 1993. Jeff Nevin has one of the highest volunteer response records in the VCFD for both ambulance and fire responses.
5. In 1994, the VCFD responded to a total of 163 emergency medical calls. Because the VCFD did not have personnel to man an ambulance, many of these emergency calls were transported by Care Flight at a significant cost to the user. Since 1995, VCFD reported 104 incidents that had time delays, required treatment or

transportation of persons by on-duty staff, or required the calling back to duty of off-duty staff.

6. The past practice of the VCFD was to maintain a two-man engine company for a minimum of five days per week whenever possible. Because the number of VCFD volunteers was declining, especially EMTs, the VCFD began using Jeff Nevin as an intermittent firefighter/EMT in May 1994. Chief Nevin hired his son with no public notice or advertisement and without the approval of the Board. By October 1994, Jeff Nevin was averaging 26 hours per week, and his time cards for the payroll periods between February 20, 1995 and March 5, 1995, reflected weekly hours of 34 and 40 hours.

7. On January 17, 1995, the Board unanimously voted to grant a five-percent cost-of-living increase to Storey County employees, retroactive from January 1, 1995. Chief Nevin testified that he believed that such increase applied to **all employees** regardless of employment status at that time, including his son, even though his son was still an intermittent employee at this time.

8. On February 21, 1995, the Board moved to approve the minutes of the February 7, 1995, meeting and clarified that the pay raise granted applied only to *permanent* full-time and part-time employees, retroactive from January 1, 1995, thereby rendering Jeff Nevin ineligible for the salary increase. During the interim between February 21, 1995, and March 5, 1995, however, Chief Nevin had ordered that his son's VCFD time cards include the five-percent cost-of-living increase.

9. In early March 1995, when Jeff Nevin discovered that his paycheck did not reflect the aforementioned salary increase, he informed Captain Hames. Rather than discussing the matter directly with the County's payroll clerk, Ms. Gerrie Honea, Captain Hames notified Chief Nevin of the perceived error. Chief Nevin then visited the Storey County Recorder/Auditor's Office to challenge Ms. Honea's failure to include the cost-of-living increase on his son's paycheck. Chief Nevin stated to Ms. Honea that he did not believe it was fair that intermittent employees were denied the cost-of-living increase. Ms. Honea responded that it was not the policy of the County to provide cost-of-living increases to intermittent employees. Chief Nevin retorted that his son's raise had "nothing to do with any policy." Chief Nevin became quite heated and insistent in this conversation, though he subsequently apologized to Ms. Honea for his tone of voice in the encounter.

10. On March 8, 1995, after learning of Chief Nevin's heated confrontation with Ms. Honea, Ms. Margaret Lowther (Ms. Honea's supervisor) wrote a letter to Chief Nevin to formally inform him as to why his son was not entitled to the cost-of-living increase. Ms. Lowther's letter was accompanied by copies of the appropriate provisions of the Storey County Administrative Manual and explained that the County Recorder/Auditor's Office only takes direction for payment of salaries from the Board when accompanied by the proper paperwork. She stated that pursuant to the Board's policies and procedures, the Auditor's Office did not and never had made salary changes based on a department head's request outside the scope of meetings conducted by the Board and in the absence of signed paperwork, and she assured Chief Nevin that Ms. Honea had performed her public duties in compliance with these procedures.

11. Following Chief Nevin's receipt of Ms. Lowther's letter, Jeff Nevin ceased to work in any capacity for the VCFD (until he was subsequently hired by the Board as a permanent, full-time employee in November 1995).

12. On March 14, 1995, Ms. Lowther informed the Board of Chief Nevin's attempt to include a 5% salary increase on his son's time card without providing any paperwork to the County Recorder/Auditor's Office or obtaining prior approval from the Board. She further expressed her concern regarding the County's liability or responsibility under the State Industrial Insurance System (SIIS) and the Public Employees Retirement System (PERS) based on Jeff's employment record with the VCFD because his employment had exceeded 25 hours per week. Ms. Lowther said that if it was the Board's desire to hire Jeff Nevin as a permanent part-time or full-time employee in the VCFD, it should do so as soon as possible in a regularly scheduled meeting. Further, because Chief Nevin was Jeff Nevin's father, Ms. Lowther said that the Board would need to hire Jeff Nevin directly, without the involvement of his father.

13. On March 21, 1995, Ms. Janet Hess wrote a memorandum to Ms. Lowther in which she concluded that "[a] father in a position to rank applicants for a job in his department, in a position to decide whether to keep the son after the probationary period, and in a position recommending what the pay increase should be for his son as department head, offends the nepotism act [NRS 281.210]."

14. On March 21, 1995, the Board discussed the County's hiring practices. The Board determined that the Storey County Administrative Manual must be followed by all department heads regarding hiring procedures and salaries.
15. On April 4, 1995, after Ms. Marylou Walling presented the Board with a recommendation from Captain Hames to hire Jeff Nevin as a *relief* firefighter/EMT, the Board moved to hire Jeff Nevin as a temporary employee and to place the matter on the agenda for its next meeting.
16. On May 26, 1995, and June 2, 1995, an advertisement for a permanent full-time Firefighter/EMT was run by the County in the Comstock Chronicle, a newspaper of general circulation in Storey County Storey. Additionally, a copy of the advertisement was faxed to the Nevada Division of Forestry, Central Lyon County Fire District, Yerington Fire Department, East Fork Fire District, and Carson City Fire Department. The advertisement stated that preference for employment would be given to County residents.
17. On June 9, 1995, Jeff Nevin applied for the position of firefighter/EMT II. He was one of nine applicants for the position.
18. Chief Nevin was not involved with the testing process, and did not discuss the process or the applicants with Captain Hames. He had, however, discussed the needs of the VCFD with Captain Hames. Captain Hames compiled a written examination compiled based upon the International Fire Service Training Association (validated by Oklahoma State University and in accordance with National Fire Protection Agency recommendations). The top five candidates based upon the scores of the written examination would be given the opportunity to advance to an oral examination.
19. On June 27, 1995, Ms. Walling administered the written examination and Captain Hames was available to answer any questions an applicant might pose. Ms. Walling and Captain Hames scored the examination immediately after its completion. Jeff Nevin was among the top five candidates, and thus he proceeded to the oral examination.
20. On June 29, 1995, 30-minute oral examinations were conducted by four public safety officers: Bob Wartgow, Paramedic Captain and fire fighter of the East Fork Fire and Paramedic District; John Magruder, a paramedic employed by the Nevada State Emergency Medical Services; Bill Decker, Fire Chief of the Central Lyon County Fire Department; and Marshall Hansen. The process was supervised by Ms. Walling who also totaled the scores from the written and oral examinations. Based upon the totaled scores, the five remaining candidates would be rated and the top two candidates would be submitted for recommendation to the Board along with the three top-rated applicants from a previous hiring list. A pre-hiring interview board consisting of Captain Hames, Ms. Walling, and Mr. Hansen contacted the three candidates from the previous hiring list to determine if any were interested in the currently available position.
21. On November 10, 1995, the pre-hiring board made a final recommendation that either Jeff Nevin or Mr. Ronald Adkins be hired for the position. The pre-hiring board stated that the testing demonstrated that Jeff Nevin exceeded the requirements for the job.
22. On November 13, 1995, Jeff Nevin authorized the release of his application to the Storey County District Attorney and the Attorney General for review.
23. On November 21, 1995, the Board, against Ms. Hess' advice, voted to hire Jeff Nevin for the full-time position of Firefighter/EMT II. At that time, the Board had been informed that another qualified candidate was available who could have been hired.

ANALYSIS AND OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(2). Based upon the Findings of Fact, the Commission concludes that Chief Nevin and each of the members of the Board were public officers as defined by NRS 281.4365(1).

The questions presented in this Opinion are: (1) whether Chief Nevin or the Board were prohibited from employing Jeff Nevin by NRS 281.481(1) or (2) or NRS 281.210(1) (the anti-nepotism statute); and (2) whether Chief Nevin

violated the Code of Ethical Standards by attempting to obtain a salary increase for his son while the junior Nevin was temporarily employed by the VCFD.

1. Analysis of the Employment of Jeff Nevin

NRS 281.481(1) requires a public officer to abstain from seeking or accepting employment, engagement, emolument, or economic opportunity which would ***tend to improperly influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties***. NRS 281.481(2) prevents a public officer from using his position to secure or grant ***unwarranted privileges or advantages for himself or any member of his household***. NRS 281.210, Nevada's anti-nepotism statute, forbids a county officer from employing in any capacity on behalf of his county, any relative of such person who is within the third degree or consanguinity or affinity.

The purpose of the anti-nepotism statute is "to prevent bestowal of patronage by public officers in employing their relatives regardless of how qualified the employee may be." Op. Nev. Att'y Gen. No. 147 (Oct. 1, 1973); Op. Nev. Att'y Gen. No. 203, (Sept. 10, 1952). A person hired contrary to NRS 281.210 must not be paid wages for services subsequently rendered (NRS 281.210(4)), and the person who performs the unlawful hire is guilty of a gross misdemeanor (NRS 281.210(5)).

The Attorney General has examined the anti-nepotism statute several times (See Op. Nev. Att'y Gen. No. 367 (Mar. 24, 1958); Op. Nev. Att'y Gen. No. 430 (Dec. 3, 1958)), concluding that the statute is only violated when the statutorily defined relationship, by blood or by marriage, exists between a person with *actual* hiring authority and the person hired. However, if a recommendation for employment is tantamount to actual employment because the individual who has written the recommendation has effective hiring and firing power, even though the ultimate power rests elsewhere, NRS 281.210 is still implicated and violated. Op. Nev. Att'y Gen. No. 147 (Oct. 1, 1973). In Op. Nev. Att'y Gen. No. 656 (April 9, 1970), the Attorney General analyzed the anti-nepotism statute as follows:

The evil contemplated by the legislature was the packing of state employment with relatives of those having the appointing power, thus denying an equal opportunity to those not in the same category. It can readily be seen that one is less disposed to fire a relative regardless of ability, than to dispense with the services of one not so related. If each department head of a large state institution were permitted to hire relatives, under the subterfuge that such person was not related to the person having the ultimate power to hire and fire, the employment roster would have the appearance of a group of family reunions ... It is the opinion of this office that a department head in a state organization who hires a relative within the third degree of consanguinity or affinity, even though the ultimate power of hiring and firing such employee rests with the head of the institution or organization, violates the Nepotism Act.

In the present case, there were two separate employments of Jeff Nevin by the VCFD: (1) May 1994 through March 1995, when Jeff Nevin was hired by Chief Nevin, his father, as a temporary firefighter/EMT; and (2) November 1995 to the present, when Jeff Nevin was hired by the Board in the permanent, full-time position of Firefighter/EMT II. For the following reasons, it appears to the Commission that Jeff Nevin's first employment violated NRS 281.210, but his second employment did not violate NRS 281.210.

Regarding Jeff Nevin's first employment by the VCFD as a temporary firefighter/EMT, the record was clear that Jeff Nevin was hired by his father, Chief Nevin, to work within Chief Nevin's department. NRS 281.210 prohibits such an employment by a father of a son. The statute makes no distinction between part-time and full-time employment nor does it provide for any exception based on emergency circumstances. As a consequence, Chief Nevin violated NRS 281.481(1) because a father's employment of his son under these circumstances would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties. In fact, as will be discussed later, the relationship between Chief Nevin and Jeff Nevin did cause Chief Nevin to depart from the faithful and impartial discharge of his duties. Further, because Chief Nevin's employment of his son was prohibited by the anti-nepotism statute, the granting of the employment would be "unwarranted" as a matter of law. Thus, we conclude that Chief Nevin used his position in government to secure or grant an unwarranted privilege for his son Jeff in violation of NRS 281.481(2).

NRS 281.210(4) provides that "[a] person employed contrary to the provisions of this section must not be compensated for the employment." NRS 281.210(5) provides that any person who has violated the anti-nepotism statute "is guilty of a gross misdemeanor." This Commission has no authority to enforce these provisions.

Therefore, this Commission commends Chief Nevin's violation of NRS 281.210 to the Storey County District Attorney for her determination of whether and how to proceed under NRS 281.210(4) and (5).

Regarding Jeff Nevin's second employment by the VCFD as a permanent, full-time firefighter/EMT II, the record did not support a conclusion that this hiring was in violation of the anti-nepotism statute or the Code of Ethical Standards. NRS 281.210 does **not** prohibit a family member of a public official from being employed by the same political subdivision which the official serves. Instead, NRS 281.210 prohibits a public official from acting to hire or secure the employment of a relative. The determinative issue is whether Chief Nevin took any acts regarding Jeff Nevin's permanent hiring that might be **tantamount to employment** because he had effective hiring and firing power, even though the ultimate power rests in the Board. If such were the case, the hiring of Jeff Nevin as a firefighter/EMT II would have been a violation of NRS 281.210(1). See, Op. Nev. Att'y Gen. No. 147 (Oct. 1, 1973).

Pursuant to Section 2.4 of the Storey County Administrative Manual, the Board determines who is hired for full-time, part-time, or temporary positions and what their compensation will be. The record showed that unlike the temporary hiring of Jeff Nevin, with which Chief Nevin was involved directly and personally, the permanent hiring procedure for this particular firefighter/EMT II position was specifically designed to buffer the process from Chief Nevin's influence or involvement. The written test, oral board members, and pre-hiring process were completely assembled by Captain Hames, Ms. Walling, and Mr. Hansen. There was no evidence that Chief Nevin had been involved in any manner with the Board's final hiring decision. Therefore, that the person whom the Board determined to employ happened to be the son of its Fire Chief, was not prohibited by the anti-nepotism statute and accordingly, the Board's employment of Jeff Nevin did not constitute improper use of its members' public positions to grant Chief Nevin or his son unwarranted privileges, preferences, exemptions or advantages within the meaning of NRS 281.481(2).

2. Analysis of Chief Nevin's Attempts to Secure a Raise for Jeff Nevin During Jeff Nevin's Temporary Employment.

The record showed that in early March 1995, Chief Nevin learned that his son had not received the 5% increase received by other employees. Storey County policy provided that temporary employees were not entitled to such increases. Rather than contacting Captain Hames (Jeff Nevin's supervisor) about his concerns, Chief Nevin instead abusively confronted Ms. Honea, the payroll clerk for Storey County. The Commission's impression of this confrontation was that Chief Nevin intended to obtain his son's raise through intimidation and hostility and regardless of any legal impediment. This was especially evident when Chief Nevin told Ms. Honea that his son's raise had "nothing to do with any policy."

Chief Nevin's tirade against Ms. Honea was intolerable and evidenced with glaring clarity a violation of NRS 281.481(1). The Commission concludes that Chief Nevin willfully and intentionally used his position as fire chief in a blatant attempt to get a 5% increase for his son to which the son had no legal entitlement. To make matters worse, at this time the Chief's hiring of his son violated Nevada's anti-nepotism statute, so any increase in Jeff Nevin's wages at this time was also unlawful. Additionally, we are troubled that when Captain Hames learned that Jeff Nevin did not receive the 5% increase he went straight to Chief Nevin and did not himself raise the issue with Ms. Honea. This incident illustrates vividly the evils that were intended to be prohibited by NRS 281.210 and 281.481(2), namely the use of position by one member of a household to attempt to obtain unwarranted advantages for another member of the household. Chief Nevin's subsequent apology to Ms. Honea and admission to the Commission that what he did was "totally wrong" does not excuse his conduct, nor does it make the conduct any less willful.

In view of the facts of this matter, we caution against any future activity described in this opinion.

CONCLUSION

The Commission concludes Chief Nevin violated NRS 281.210 and NRS 281.481(2) by hiring his son Jeff as a temporary employee of the VCFD. The Commission further concludes that the 1995 hiring of Jeff Nevin by the Board for the full-time position of Firefighter/EMT II did not violate NRS 281.210 or 281.481(1) and (2). Finally, Chief Nevin violated NRS 281.481(2) when he attempted to use the authority or influence of his office to secure an unwarranted raise in salary for his son's unauthorized employment.

COMMENT

The Commission commends the wisdom and courage of Ms. Lowther in reporting her concerns to Ms. Hess and not yielding to the pressures upon her payroll clerk by Chief Nevin and that of Ms. Hess in bringing this matter.

It is specifically noted that the foregoing Opinion applies only to these specific facts and circumstances. The provisions of NRS 281.210 and NRS 281.481(1) and (2) discussed above must be applied on a case-by-case basis, with results which may vary depending on the particular facts and circumstances involved.

DATED: September 13, 1996.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman