

Opinion No. 96-32

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion concerning the conduct of RICHARD STONE, Member, Board of Trustees, Round Hill General Improvement District

This opinion is in response to a third-party request for opinion filed with the Nevada Commission on Ethics (Commission) by Bob Loding regarding the voting and conduct of Richard Stone as a trustee for the Round Hill General Improvement District (RHGID). A hearing on this matter was held by the Commission on April 24, 1997 in Carson City, Nevada, at which evidence was received and Wayne Haigh, Helen Wallace, Mr. Loding, and Mr. Stone testified. The RHGID was represented by Patrick Fagan, and Mr. Stone was represented by Thomas Susich. On August 15, 1997, the Commission allowed Mr. Stone to present argument as to why he felt his violations were not willful. The Commission publicly deliberated the matter and rendered its decision. The Commission now issues the Findings of Fact and Opinion which follow.

FINDINGS OF FACT

1. In 1989, Mr. Stone began working full-time and continuously for OptiComp, a computer business located in Zephyr Cove, Nevada. OptiComp's building is located within the RHGID. Throughout all of the events pertinent to this opinion and as of the dates of the hearings, Mr. Stone was an employee of OptiComp, earning approximately \$50,000 per year.
2. The principal and owner of OptiComp is Peter Guilfoyle. Mr. Guilfoyle and Mr. Stone are work colleagues and personal friends.
3. On December 3, 1993, Mr. and Mrs. Guilfoyle sued the RHGID, claiming that the RHGID's construction, maintenance, and repair of Elks Point Road had damaged an office building owned by the Guilfoyles in which OptiComp was located. The Guilfoyles claimed that the construction of Elks Point Road caused run-off water flow across and into the Guilfoyles' property.
4. At the time Mr. Stone ran to become an RHGID trustee in the fall of 1994, the Guilfoyle lawsuit against the RHGID was still pending, though various settlement proposals were circulating. Mr. Guilfoyle and Mr. Stone had discussed Mr. Stone's candidacy and had also discussed Mr. Guilfoyle's concerns regarding his lawsuit. In fact, in February or March 1995, just after Mr. Stone was elected and sworn in to office, Mr. Guilfoyle and Mr. Stone met, and Mr. Guilfoyle presented Mr. Stone with studies and other information so that Mr. Stone could present the information to and support Mr. Guilfoyle's position before the RHGID. At hearing, Mr. Stone described his role to be "the spokesperson" to the RHGID for Mr. Guilfoyle.
5. The first time the Guilfoyles' lawsuit came before the RHGID after Mr. Stone became a trustee was on August 15, 1995. At this time, Jeff Rahbeck, then counsel for the RHGID, presented and discussed with the trustees, including Mr. Stone, the present terms of the settlement agreement between the Guilfoyles and the RHGID. No vote was taken at this meeting.
6. On December 13, 1995, the Guilfoyle lawsuit came up again. At this meeting, Mr. Stone related how he personally had seen water seeping into the Guilfoyles' building from Elks Point Road when he went to work daily at OptiComp. Mr. Stone also recommended that the RHGID construct a temporary asphalt berm to divert future run-off from flowing towards the Guilfoyles' building. Mr. Stone's suggestion received a cool reception from other trustees and Mr. Rahbeck because, from their view, the Guilfoyles had reneged on an earlier settlement agreement and the

negotiations were "back to square one." Mr. Rahbeck advised that the RHGID do nothing regarding the Guilfoyles' property based upon the advice of the attorney who represented the RHGID's insurance carrier.

7. On January 17, 1996, Mr. Rahbeck discussed the renewed negotiations between the RHGID and the Guilfoyles' new attorney. At this meeting, Mr. Stone revealed that he had done his own independent research of the RHGID's history regarding the Guilfoyles' property. Mr. Rahbeck advised Mr. Stone that Mr. Stone had a conflict of interest regarding the Guilfoyle issue because Mr. Stone was an employee of OptiComp and Mr. Guilfoyle. Mr. Rahbeck advised Mr. Stone to step away from the trustees' table and to go into the audience to participate as a member of the public to say anything further on the issue. Mr. Stone did not accept Mr. Rahbeck's advice. The only action taken at this meeting was a direction by the trustees to Mr. Loding to forward a letter to the Guilfoyles' attorney iterating the RHGID's position.

8. On March 19, 1996, the status of the settlement negotiations between the Guilfoyles and RHGID was discussed. Mr. Stone participated in the discussion, including making proposals regarding pending options. Mr. Stone also seconded a motion to execute an agreement, and Mr. Stone voted on the motion. Mr. Stone did not disclose his relationship with Mr. Guilfoyle or that he worked for OptiComp in the building that would be benefited by the agreement.

9. On April 9, 1996, Mr. Loding explained that he and Mr. Rahbeck had discussed Mr. Stone's participation and vote on the Guilfoyle issue at the previous meeting on March 19, 1996. Mr. Loding stated that Mr. Rahbeck's advice was that Mr. Stone should rescind his vote because of a conflict of interest and that the minutes of the meeting should be amended to show that Mr. Stone abstained from any discussion or participation in the Guilfoyle issue. Mr. Stone did not accept Mr. Rahbeck's advice.

10. On April 19, 1996, Mr. Rahbeck wrote a memorandum to Mr. Stone explaining why Mr. Rahbeck believed that Mr. Stone should abstain from voting on any matter involving the Guilfoyle lawsuit, citing NRS 281.501 (2). Mr. Rahbeck explained that Mr. Stone could participate in the discussion of those matters, but that he must do so in his individual capacity rather than in his official capacity as a trustee. Mr. Rahbeck also said that if Mr. Stone disagreed with his position, then Mr. Stone should be directed to obtain an opinion from the Nevada Commission on Ethics. Mr. Stone was made aware of this memorandum shortly after Mr. Loding received it.

11. On May 16, 1996, the Guilfoyle issue was again discussed by the RHGID. At this meeting, Mr. Stone participated in the discussion of the issue, including explaining that past boards had agreed to correct the Guilfoyles' problem and defending the Guilfoyles' use of unsightly hay bales as a berm. Several trustees expressed their concerns with Mr. Stone's participation as a trustee in the discussion, citing to Mr. Rahbeck's April 19, 1996 memorandum. Mr. Stone explained that he disagreed with Mr. Rahbeck's opinion and advice. Mr. Stone also stated that he would not seek an opinion from the Nevada Commission on Ethics because he did not feel there was a conflict of interest. The trustees asked Mr. Rahbeck whether they could vote to have Mr. Stone removed as a trustee for the remainder of the Guilfoyle issue, and Mr. Rahbeck advised that they could not do so. After this discussion, Mr. Stone continued to participate in the discussion of the matter. Ultimately, Mr. Stone voted regarding the matter, even after several trustees and Mr. Rahbeck advised Mr. Stone not to do so. After the vote, the trustees engaged in a discussion among themselves and Mr. Rahbeck regarding the law of conflicts of interest. The trustees ultimately directed Mr. Loding to contact the Nevada Commission on Ethics and to report back to the trustees at their next meeting.

12. On June 13, 1996, Mr. Loding sent a letter to the Nevada Commission on Ethics requesting an opinion regarding Mr. Stone's conduct as a trustee regarding the Guilfoyle lawsuit.

13. On August 15, 1996, the specifics of the settlement agreement between the Guilfoyles and the RHGID were discussed in great detail. Mr. Stone substantively participated throughout this discussion. Mr. Loding explained that

the Nevada Commission on Ethics would be reviewing his request for an opinion shortly thereafter and that he would report on the preliminary ruling by the Commission at the RHGID's meeting in September 1996.

14. The Nevada Commission on Ethics took jurisdiction over this matter at its meeting on August 15 and 16, 1996.

15. After the Commission took jurisdiction over this matter, negotiations occurred between Mr. Stone's private counsel and the RHGID's counsel regarding Mr. Stone's conduct as a trustee in future matters relating to the Guilfoyle matter. These negotiations, though protracted, did not produce an agreement.

16. On April 22, 1997, the Commission held its hearing regarding this matter. The Commission determined that Mr. Stone had willfully violated provisions of the Ethics in Government Law. Mr. Stone was not present during this deliberation.

17. Because Mr. Stone was not present when the Commission deliberated his matter in April, Mr. Stone requested and was allowed to make an argument to the Commission regarding whether his violations were willful. On August 15, 1997, Mr. Stone made his argument to the Commission. After considering Mr. Stone's argument, the Commission confirmed its earlier ruling that determined that Mr. Stone's violation was willful.

ANALYSIS AND OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(2) because Mr. Stone is a public officer as defined in NRS 281.4365. The questions presented in this matter are: (1) whether Mr. Stone's relationship with OptiComp and the Guilfoyles required him to disclose those interests under NRS 281.501(3) and to abstain from voting regarding the Guilfoyles' matter under NRS 281.501(2); and (2) if a violation occurred, whether that violation was willful?

NRS 281.501(3) states that a public officer shall not vote or abstain from voting on any matter "which would reasonably be affected by his commitment in a private capacity to the interest of others" or "in which he has a pecuniary interest" without first disclosing "the full nature and extent" of those interests. The hearing of this matter clearly established that Mr. Stone had both a working relationship and a personal relationship with OptiComp and the Guilfoyles of almost five years before Mr. Stone became an RHGID trustee. Furthermore, the building at issue in the Guilfoyle's lawsuit against the RHGID was the very building that Mr. Stone had gone to work in daily through the same five-year period.

Most troubling for our analysis, though, was that shortly after Mr. Stone became elected as a trustee, he and Mr. Guilfoyle met so that Mr. Guilfoyle could provide Mr. Stone with a detailed presentation of Mr. Guilfoyle's side of the lawsuit. Mr. Stone essentially agreed to become Mr. Guilfoyle's "spokesperson" to the RHGID trustees. All of this occurred during a critical time of the RHGID's negotiations with the Guilfoyles to resolve the lawsuit during which time the RHGID trustees were receiving information and making decisions regarding the various settlement options.

We must conclude that Mr. Stone was obligated by NRS 281.501(3) to disclose "the full nature and extent" of his relationship with OptiComp and the Guilfoyles every time a matter regarding the Guilfoyles' lawsuit and related issues came before the RHGID trustees. Such disclosure was mandated even if Mr. Stone's fellow trustees were already aware of Mr. Stone's interests. Additionally, such disclosure was mandated every time the matter came before the RHGID trustees even if such a disclosure had been made at previous meetings.

While one function of disclosure is to notify the fellow members of a board of a public officer's interests that may affect his participation, the more compelling reason for disclosure is so that the public served by the board and the public officer is made aware of interests which may affect the public officer's participation in a public matter. The public has a right to know fully any interests one of its elected official may have that may affect either that official's

vote or that may require him to disqualify himself for voting. While the record reflects that Mr. Stone's fellow trustees were well aware of Mr. Stone's relationships with OptiComp and the Guilfoyles, the record does **not** show that Mr. Stone ever disclosed "the full nature and extent" of those relationships. At none of the meetings at which the Guilfoyle matters were discussed did Mr. Stone disclose his relationships with OptiComp and the Guilfoyles, so Mr. Stone violated NRS 281.501(3).

We must next decide whether Mr. Stone's relationships with OptiComp, as his employer, and the Guilfoyles, as both his employers and his friends, were such that "the independence of judgment of a reasonable person in his situation would be materially affected" by those relationships, thus requiring Mr. Stone to abstain from voting or advocating on behalf of the Guilfoyles as a trustee under NRS 281.501(2). We conclude that Mr. Stone's relationship with the Guilfoyles and OptiComp were sufficient that Mr. Stone should have abstained from voting or advocating upon any matter related to the Guilfoyles and OptiComp. We are led to this conclusion for several substantial reasons.

First, the record undeniably established that Mr. Stone and the Guilfoyles were personal friends and business colleagues for years before Mr. Stone became an RHGID trustee. The evidence further showed that Mr. Guilfoyle traded upon this relationship by indoctrinating Mr. Stone shortly after his election as to the details of Mr. Guilfoyle's position against the RHGID of which Mr. Stone was now a member. The evidence further showed that Mr. Stone advocated for positions advantageous for the Guilfoyles several times, even over the warnings of his counsel and fellow trustees.

Second, the record undeniably established that OptiComp was Mr. Stone's primary source of income. We think it fair to conclude that an employee may be influenced by a request from his employer for something that is uniquely within the employee's purview to grant. Furthermore, for five years Mr. Stone had worked in the very building and had experienced first-hand the conditions about which the Guilfoyles eventually sued the RHGID.

We must conclude that a reasonable person in Mr. Stone's situation could not help but have his independence of judgment affected by his concerns about his employer, OptiComp, about his future employment, and about the welfare of his boss and friends, the Guilfoyles. NRS 281.501(2) wisely establishes an objective standard by which to judge whether a public official should be required to abstain from voting or advocating in a matter. The question is always whether a reasonable person in that situation would be unduly swayed by his outside interests, not whether that particular official personally felt that he could "be objective." The Ethics in Government Law was established to "enhance the people's faith in the integrity and impartiality of public officers " NRS 281.421(2)(b). In promulgating NRS 281.501(2), the Legislature set a clear standard that a public officer's vote should only be influenced by the public's best interest as he can discern it, not by any personal interests to which he might be beholden.

To hold otherwise, as Mr. Stone argued, would be to invite disrespect and distrust of governmental institutions. Public officers are not pirates or potentates. Government largesse, in whatever form, is not to be plundered by a public officer for his personal gain, nor is it to be granted to a select few who gain a public officer's princely favor. The rule of law established in NRS 281.501(2) is intended to prohibit such misuse of public office, thereby assuring the public that its servants' votes and advocacy are guided by trustworthy conscience and reason, not by fickle fealty or affiliation.

To put it as plainly as possible, NRS 281.501(3) requires that a public officer disclose any interests that might influence his decision in a given matter, and NRS 281.501(2) requires that a public officer abstain from participating in any matter in which a reasonable man, similarly situated, would have his independence of judgment affected. Mr. Stone did not disclose his relationship with OptiComp and the Guilfoyles, so he violated NRS 281.501(3) Mr. Stone voted once and advocated several times in matters relating to the Guilfoyles that were before him as an RHGID trustee, so he violated NRS 281.501(2).

Finally, we must decide whether Mr. Stone's violations of NRS 281.501(2) and (3) were willful, thus meriting a

penalty under NRS 281.551(1). We conclude that his violations were willful. The record established that Mr. Stone was advised verbally and in writing by the RHGID's counsel that he should abstain from participating in matters related to the Guilfoyles before the RHGID trustees... The record established that Mr. Stone was warned by his fellow trustees that he should abstain from participating in the Guilfoyle matters. In fact, his fellow trustees even sought to make a motion to compel Mr. Stone's abstention, an expression of frustration that was wisely quelled by the RHGID's counsel. The record also showed that Mr. Stone refused to ask this Commission for its opinion even though he had several times been directed to this Commission as the arbiter of ethical disputes. In fact, the RHGID had to bring this matter to the Commission because of Mr. Stone's intransigence. Worse still, Mr. Stone even billed the RHGID for his defiant defense of this Commission's review of this matter.

Based on this record, we must conclude that Mr. Stone's violations of NRS 281.501(2) and (3) were intentional and willful. Therefore, we impose on Mr. Stone a penalty of \$1,500 pursuant to NRS 281.551(1). This penalty must be paid by cash or certified check or money order made payable to "State of Nevada," to be received in the Commission's office no later than 5:00 p.m. P.S. T., June 30, 1998. Should the penalty not be timely received, then the Commission's staff shall be authorized to proceed as necessary to effectuate collection of the penalty.

CONCLUSION

Based upon the record, the Commission concludes that Mr. Stone violated NRS 281.501(2) and (3) by failing to disclose his relationships with OptiComp and the Guilfoyles and by advocating and voting upon matters relating to the Guilfoyles that came before him as an RHGID trustee. The Commission also concludes that Mr. Stone's violations were willful, thus deserving of a penalty of \$1,500.00 pursuant to NRS 281.551(1).

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific facts and circumstances. The provisions of the Nevada Revised Statutes 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: May 29, 1998.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY BOETSCH, Chairwoman