Opinion No. 96-39

BEFORE THE NEVADA COMMISSION ON ETHICS
IN THE MATTER OF THE REQUEST FOR OPINION concerning the conduct of
BOB NOLEN, Clark County Constable

This Opinion is in response to a third-party request for opinion filed with the Nevada Commission on Ethics (Commission) by J. David Burress concerning the conduct of Clark County Constable Bob Nolen. The original hearing date of October 18, 1996 was continued as a result of a request from Mr. Nolen and his counsel. Evidentiary hearings were held on January 23 and 24 and March 21, 1997 at which Mr. Burress and Mr. Nolen presented numerous exhibits. Mr. Burress presented the testimony of the following witnesses: himself, Leonard Griffin, Cathy Cooney, Kelly Sheldon, Louis Tabat, David Cowan, Debbie Rose, Mike Counterman, Rick Yohner, Paul Coroneos, and Faye Duncan-Daniel. Mr. Nolen presented the testimony of the following witnesses: himself, Gary Reese, George Helms, Gene Perry, Cathy Cooney, Peter Garriano, and Doug Tharp. Mr. Nolen was represented by Moran & Associates, and Mr. Burress represented himself. On April 25, 1997, the Commission publicly deliberated the matter and reached a decision. The Commission now issues the Findings of Fact and Opinion which follows.

FINDINGS OF FACT

1. In October 1993, Mr. Bob Nolen was appointed by the Clark County Commission to be the Las Vegas Township Constable. Prior to his appointment as Constable, Mr. Nolen had served on the Las Vegas City Council from June 1983 until October 1993. In his private capacity, Mr. Nolen was a co-owner of Corporate Intelligence International (C.I.I.), a business that served process, among other services. Mr. Nolen claimed to have divested himself of his ownership interest in C.I.I. when he was appointed Constable.

2. Mr. Nolen was appointed to fill a vacancy created when Constable Don Charleboix resigned from the office after he was convicted of several criminal charges relating to his conduct while in office. Mr. Nolen's appointment was only for the length of Mr. Charleboix's unexpired term, namely until January 1, 1995.

3. At the time of Mr. Nolen's appointment, the Constable's office had a policy and procedure manual that remained in effect until the time of the Commission's hearing, with some modifications by subsequent memoranda that will be discussed herein. The manual provided that "the Constable shall devote his full time to the Constable's office." The manual also provided that deputies were considered peace officers while they were on duty and that while on duty they were to have their badges, identification cards, and sidearms.

4. In January 1995, the duties of the Constable's office were transferred into the civil division of the Metropolitan Police Department (Metro). At this time, the deputy constables became Clark County employees and were paid a salary and the same benefits as other county employees.

5. In August 1995, the Constable's office was reinstated by the Clark County Commission, and Mr. Nolen was reappointed to serve as the Constable until the next election, which would be in November 1996. Shortly after being reinstated as Constable, Mr. Nolen changed the pay policies for his deputies. In particular, Mr. Nolen ceased paying the deputies a salary and benefits and, instead, paid the deputies on a per paper basis on a sliding scale ranging from $5.15 per paper (under 465 papers served) to $6.40 per paper (546 and more papers served). Warrants were $15.00 each, and standby time for executions was $12.00 per hour. Additionally, deputies were paid only for the actual mileage they drove in a given day rather than being paid a mileage fee for every paper served. Mr. Nolen explained that he made these changes to motivate his deputies through the incentive of higher pay for more work. The deputies that testified on this issue said that the result of Mr. Nolen's new payment policies was a lowering of office morale.

6. When Mr. Nolen became Constable in October 1993, the county provided him with several employees, including Ms. Kelly Sheldon and Ms. Faye Duncan-Daniels. Ms. Duncan-Daniels was the office manager for the Constable's office. In March 1994, Ms. Cathy Cooney was hired to be an additional secretary. Ms. Cooney was a personal friend of Mr. Nolen's wife, Cindy. Ms. Cooney was hired through the county's usual testing procedures, though she was ultimately hired personally by Mr. Nolen.

7. In December 1995, Mr. Nolen hired Mr. Doug Tharp as a deputy. Mr. Nolen and Mr. Tharp had been friends since 1955. Mr. Tharp agreed to serve small claims summonses, the most difficult types of service, and Mr. Nolen agreed that Mr. Tharp would receive $6.40 per paper (the top pay rate on the sliding scale) for every paper, regardless of how many papers he had served.

8. On January 4, 1996, the deputies held a meeting to discuss their pay and lack of benefits. Mr. Tharp attended this meeting because he was interested in increasing his pay and benefits. On January 8, 1996, all of the deputies (Messrs. Briggs, Burress, Coroneos, Counterman, Cowan, Griffin, Tharp, and Yohner) signed a memorandum to Mr. Nolen in which they requested information from Mr. Nolen to assist them in formulating a wage proposal.

9. In January 1996, the Las Vegas Constables Association (LVCA) was formed to become a collective bargaining unit for deputies employed in the Constable's office. At a meeting of the LVCA on January 28, 1996, Mr. Tharp nominated Mr. Burress to be the president of the LVCA. Mr. Burress was elected the president, Mr. Griffin was elected the vice president, Mr. Yohner was elected treasurer, and Mr. Coroneos was elected the member representative.

10. On March 4, 1996, Mr. Nolen announced that he had created the position of Chief Deputy Constable and that he had hired Mr. Tharp for the position. Mr. Nolen further indicated that all personnel were to report directly to Mr. Tharp and that "he will be responsible for all day to day operations." Mr. Nolen testified that he needed a chief deputy to monitor the deputies' work in the field. Mr. Tharp's duties as Chief Deputy included supervision of the deputies, office paperwork, reviewing log books, and the preparation of all documents for service by 8:00 a.m. each morning so that the work could be assigned out to the deputies for each day's service, work that had previously been done by Mr. Nolen and others in the office. Mr. Nolen testified that he expected Mr. Tharp to be in the office about four hours per day. Mr. Tharp would continue to serve papers himself as he assigned those duties to himself. Mr. Nolen also agreed to pay Mr. Tharp a salary of $500.00 per week plus the top amount per paper for every paper Mr. Tharp served, regardless of how many papers Mr. Tharp had served. By this agreement, Mr. Tharp became the only deputy with a salary. Mr. Tharp's salary was paid out of the Constable office's own budget, and Mr. Tharp was not paid or treated as a county civil service employee. Therefore, Mr. Tharp was not paid out of the county's general fund and did not receive the benefits afforded county civil service employees such as the Constable office's administrative staff received.

11. Mr. Burress felt slighted by Mr. Tharp's promotion. Mr. Burress had been a deputy since 1994 and was the most productive deputy. Mr. Burress did not find out that Mr. Nolen was considering promoting a deputy to a newly-created Chief Deputy position until just days before Mr. Tharp's promotion. At no time did Mr. Nolen notify Mr. Burress or any other deputy that he would be seeking to create and fill a new position of Chief Deputy. Though it was the policy at the time of Mr. Tharp's hiring and at the time of his promotion that all deputies be P.O.S.T. certified, Mr. Tharp was not P.O.S.T. certified. In fact, when Mr. Tharp attempted to become P.O.S.T. certified in March 1996, he was unsuccessful. On March 12, 1996, Mr. Burress, on behalf of the LVCA, wrote to Mr. Nolen to oppose the appointment of Mr. Tharp, arguing that Mr. Tharp's appointment was in retaliation for the formation of the LVCA.

12. On March 11, 1996, the LVCA filed an unfair labor practices complaint against the Constable's Office with the State of Nevada Local Government Employee-Management Relations Board, seeking injunctive relief.

13. On May 3, 1996, an office meeting was held. The written agenda for the meeting indicated that deputies were still allowed to carry sidearms and that they were "peace officers" within their township. Also on May 3, 1996, Mr. Nolen issued a memorandum to all personnel iterating that while deputies are not required to carry sidearms, they may do so.

14. On May 20, 1996, Mr. Nolen issued a memorandum to all personnel in which he stated that "[i]t is the policy of the Las Vegas Constables office that Deputy Constables must be POST certified." Part of P.O.S.T. certification is firearms qualification. Mr. Tharp was still not P.O.S.T. certified at the time of this memorandum.

15. On June 26, 1996, Mr. Nolen terminated Mr. Burress. Also in June, 1996, Ms. Duncan-Daniel filed her candidacy against Mr. Nolen, and shortly thereafter Mr. Nolen arranged to have Ms. Duncan-Daniel transferred to another department within the county over Ms. Duncan-Daniels' objection.

16. On July 16, 1997, the Commission received Mr. Burress' request for an opinion in this matter. The hearing of

the matter was set for October 18, 1996 so that the matter could be heard and ruled upon before the November 1996 elections. Pursuant to a request from Mr. Nolen and John Moran, one of his three attorneys, the matter was continued until January 23 and 24, 1997, after the election.

18. On October 2,1996, the Local Government Employee-Management Relations Board (EMRB) issued an order enjoining Mr. Nolen and the Constable's office from interfering with the deputies' attempt to organize their collective bargaining unit.

19. In November 1996, Mr. Nolen was elected to serve a four year term as Constable.

20. On December 23,1996, Mr. Nolen issued a memorandum to all personnel in which he stated a new policy of the Constable's office that deputies were not to carry firearms while on duty.

21. At all times pertinent herein, the testimony showed that Mr. Nolen worked far less than forty hours per week in his office.

22. At all times pertinent herein, the testimony was in conflict as to what Mr. Nolen was doing while he was not in his office, as to whether her was "on the job" twenty-four hours per day, and as to whether he was available twenty-four hours per day by telephone.

ANALYSIS AND OPINION

The Commission has jurisdiction over this matter because Mr. Nolen is a public officer as defined in NRS 281.4365 in his capacity as Las Vegas Township Constable. From the presentations made by both parties, the Commission identified the following as the issues in need of analysis and resolution:

1 . Did Mr. Nolen violate NRS 281.481(2) by using his position as Constable to structure his work, and his office, so that he worked less than full-time while receiving a full-time salary of $63,000 per year?

2. Did Mr. Nolen violate NRS 281.481(7) by using his office's fax machine and cellular telephone for his personal affairs and by using his secretary to schedule and keep his private and campaign calendar?

3. Did Mr. Nolen violate NRS 281.481(2) by using his position as Constable to preferentially hire and treat Doug Tharp and Cathy Cooney?

4. Did Mr. Nolen violate NRS 281.481(2) and (7) by using his position as Constable and the resources of his office to benefit the campaigns of Ralph Lamb and Gary Reese?

5. Did Mr. Nolen violate NRS 281.481(2) by using his position as Constable to restructure the job duties of his deputies, especially by prohibiting the deputies from carrying firearms, to alter the deputies' legal status so that they were no longer peace officers entitled to the employment protections afforded peace officers?

6. If Mr. Nolen violated any of these provisions, was the violation willful, and if so, should penalties be assessed pursuant to NRS 281.551(1)?

After a preliminary discussion of the legal principles and conclusions that overarch our analysis and opinion, we will take up each of these issues *seriatim.*

1. General Legal Principles and Conclusions

In NRS 281.421 the Legislature provided this Commission with an expression of its intent in creating the Ethics in Government Law, stating:

> 1. It is hereby declared to be the public policy of this state that:
> (a) ***A public office is a public trust and shall be held for the sole benefit of the people.***
> (b) A public officer or employee must commit himself to avoid conflicts between his private

> interests and those of the general public whom he serves.
> 2. The legislature finds that:
> (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.
> *(b)* ***To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.*** (Emphasis supplied.)

We consider NRS 281.421 to be the guiding light of our interpretation of the Ethics in Government Law, meaning that when we interpret and apply the specific statutes within our jurisdiction, we will depend upon NRS 281.421 as the fundamental set of principles to inform our interpretation.

The provisions of the Code of Ethics at issue in this matter are NRS 281.481(2) and (7), which provide:

> A code of ethical standards is hereby established to govern the conduct of public officers and employees:
> ***
> 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.
> 7. A public officer or employee, other than a member of the legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest.

The application of the foregoing principles and legal requirements in the analysis of this case necessarily turned upon the credibility of the witnesses. On many points, the testimonies of several witnesses were irreconcilable, necessitating that we find one witness to be credible and another incredible. Most crucial to our decision herein we conclude, based upon the record before us and the demeanor of the witnesses we observed, that Mr. Nolen and a number of his witnesses, namely Cathy Cooney, Kelly Sheldon, George Helms, and Doug Tharp, were not completely credible. In particular, we make the following general observations:

1. We could not find Mr. Nolen to be credible because his testimony was consistently evasive, constantly changing, internally inconsistent and ever self-serving. His unrelenting refusal to simply answer the questions put to him, combined with his general demeanor during the hearings, inexorably led to the conclusion that he was being dishonest with the Commission.

2. We could not find Cathy Cooney to be credible because of her almost catatonic demeanor, her inability to look the Commissioners in the eye, her frequent glancing at Mr. Nolen and his counsel as though seeking approval or assistance with her answers, and the comparative confidence she had in responding to questions put to her by Mr. Nolen's counsel and the apparent discomfort and lack of confidence she exhibited in responding to questions put to her by Mr. Burress and Commissioners. We have rarely seen a witness so unable to answer questions that apparently had not been previously rehearsed.

3. We could not find Kelly Sheldon to be credible because her answers to questions put to her by Mr. Nolen's counsel appeared rehearsed whereas she struggled with questions put to her by Mr. Burress and Commissioners, especially regarding her explanation as to why she kept a log of Mr. Nolen's time in the office and then suddenly destroyed the log she had so meticulously kept.

4. We could not find George Helms to be credible because his explanations regarding when he felt it was necessary to carry or not carry a sidearm seemed to defy common sense. As with many of Mr. Nolen's witnesses, Mr. Helms' demeanor seemed to indicate that his answers to the questioning by Mr. Nolen's counsel were

unspontaneous and carefully rehearsed.

5. We could not find Doug Tharp to be credible because his demeanor dramatically changed depending upon who was asking the question. When Mr. Nolen's counsel asked Mr. Tharp questions, Mr. Tharp was professional and calm, but when Mr. Burress or a Commissioner asked a question that probed one of his previous answers, Mr. Tharp became brusque and his answers became difficult and evasive.

As the above discussion shows, the Commission's impression of Mr. Nolen and his witnesses is that their testimony was rehearsed and unspontaneous. When Mr. Nolen and his witnesses were confronted with questions that were "off script," they would become hostile, evasive, confused, or self-contradictory, with concomitant changes in demeanor such as searching glances at Mr. Nolen and his counsel, fidgeting, avoidance of eye contact, and facial flushing. The overall impression we received from Mr. Nolen's presentation was that it was overly staged, guarded, and lacking in candor, the very repudiation of Mr. Nolen's insistence throughout that he "had nothing to hide."

We have engaged in this lengthy discussion of credibility because much of our analysis and many of our conclusions are credibility dependent. Because of the way in which this matter was presented, we were often forced into choosing one party's presentation over the other party's presentation, and witness credibility was the unavoidable key to such determinations. Therefore, our general finding that Mr. Nolen and his witnesses were incredible colors our discussion and determinations that follow.

2. Mr. Nolen's Structuring of His Work Load

NRS 281.481(2) prohibits a public officer from using his position in government to grant to himself an "unwarranted privilege." In interpreting NRS 281.481(2), we must keep in mind the guiding principles enunciated in NRS 281.421 that "[a] public office is a public trust and shall be held for the sole benefit of the people" (NRS 281.421 (1)(b)) and that the Ethics in Government Law was intended "to show the appropriate separation between the roles of persons who are both public servants and private citizens" (NRS 281.421(2)(b)). The question before this Commission was whether Mr. Nolen granted himself an "unwarranted privilege" by operating his office such that he could work far less than full-time while receiving a full-time salary of $63,000 per year. We answer this difficult question of first impression by holding that Mr. Nolen did violate NRS 281.481(2) in the way he used his position. Several facts gleaned from the voluminous record in this matter support our holding.

First, the record shows that Mr. Nolen worked no more than 25 hours per week (by Mr. Nolen's reckoning) to perhaps as little as 5-10 hours per week (by Ms. Duncan- Daniels' reckoning). No witness, including all of Mr. Nolen's witnesses, could say that Mr. Nolen ***ever*** worked a full 40-hour week. The significance of this fact is that Mr. Nolen ***never*** intended to work and ***never*** has worked full-time as Constable from day one to the present. Meanwhile, Mr. Nolen gladly collected his full-time pay of $63,000 per year, $5,250 each and every month. By his own testimony and that of his witnesses, it was clear that Mr. Nolen never lived up to the simple statement in his own policies and procedures manual that he would ***"devote his full time to the Constable's office."***[1]

Second, even after 24 hours of hearing (including one 15-hour day) in which Mr. Nolen was given every opportunity to show this Commission just what he did during the few hours he decided to work, we are left with an incomplete understanding of what precisely Mr. Nolen did. Some of his activities were clearly within his duties as Constable, such as consulting with computer specialists to update the office's computer system, meeting with citizens who use the office's services, and meeting and dealing with his staff. On the other hand, some of his activities bore little or no relation to his duties as Constable, such as baby-sitting his grandchildren, visiting the campaign offices of Ralph Lamb and Gary Reese, and conducting his own re-election campaign. There was also evidence produced that he frequently stayed home due to poor health; however, there is no sick day allocation for his position. Finally, he testified that he acted as an unelected, unappointed general ombudsman for the greater Las Vegas area, answering anyone's questions and solving anyone's problems.

Most puzzling and troubling were the sightings of Mr. Nolen drinking at bars during working hours. For example, Mr. Nolen admitted that he did meet deputies or other people at least twice at the Olympic Gardens, a topless bar, during working hours and during which meetings he did consume alcohol. Several deputies testified about their meetings with Mr. Nolen during normal working hours in other bars throughout the Las Vegas area, including the Blue Haven, Foothills Express, PJs, the Four Kegs, Bob Grant's Junction, and the Olympic Gardens. At these meetings, Mr. Nolen would consume alcohol and conduct some Constable business, such as answering calls received on the office's cellular telephone. One deputy testified that he observed Mr. Nolen's speech to be slurred at three of these bar-room meetings.[2]

The bar-room meeting were troubling not because they showed that Mr. Nolen likes an occasional beer and "adult entertainment." Mr. Nolen's choice to conduct business in such places is not, in itself, unlawful or unethical; although it may reflect an incredible insensitivity to the sensibilities and expectations of the public he serves. Mr. Nolen's testimony regarding these bar-room meetings was troubling because it was so wildly inconsistent. As we understood it, Mr. Nolen's testimony was that he was always on duty, 24 hours per day, except when he was drinking in a bar in the middle of a weekday afternoon, at which time he declared himself off-duty, and yet he continued to conduct Constable business, while off-duty, through the use of his ever-present cellular telephone. It appeared that Mr. Nolen's duty status turned on what he was hoisting, a beer or a cellular telephone. The conclusion we were forced to reach as a result of this testimony is that Mr. Nolen lacked credibility and had no real explanation for the duty status of his bar-room meetings because it never occurred to him that he would ever be asked to account for them. Thus, the bar-room meetings became an unbecoming symbol of Mr. Nolen's contempt for the public he served and the obligations owed to the public trust and, finally, for this Commission's hearing questioning his behavior.

Third, it appeared that Mr. Nolen intentionally structured the operations of the office so that his chronic absences would not affect the operation of the office. The record showed that Mr. Nolen promoted Mr. Tharp to a position specifically created by Mr. Nolen for him so that Mr. Nolen could and did assign to Mr. Tharp the supervisorial and managerial tasks that had previously been done by Mr. Nolen or others in the office. The record also showed that Mr. Nolen assigned the supervision of the office's ministerial and office functions to Ms. Duncan-Daniel and, later, Ms. Cooney. Close examination of the record showed that Mr. Nolen had virtually delegated away all of the duties he claimed he performed, the duties he was elected to perform and paid to perform, except the dubious duty of "schmoozing," apparently the only non-delegable function which Mr. Nolen actually performed himself. In light of these delegations of authority and duties, Mr. Nolen's boast throughout the hearing that the Constable's office was running better than ever is ironic, since Mr. Nolen had practically assured that whatever success the office had was despite him, not because of him.

Fourth, Mr. Nolen's persistent insistence at hearing that he was "always available" by telephone argues against him, not for him. It is truly a hollow response to the citizen who wants to meet his or her elected Constable that he can be reached by telephone, especially where the cellular telephone number upon which Mr. Nolen placed so much reliance was unlisted and unavailable to the public. The only people to whom the cellular telephone was readily useful were Mr. Nolen's staff and insiders to whom the number had been entrusted by Mr. Nolen himself. We must conclude that Mr. Nolen's use of the telephone was much less for the convenience of the public than it was for his personal convenience, allowing him to do whatever he did with the majority of his working hours that he was not in his office while maintaining the appearance of involvement.

Based on the record before us, it appeared that Mr. Nolen never intended, from day one, to work as a full-time Constable, and then he machinated his office so that his chronic and intentional absences from the office would not affect the operation of the office. Mr. Nolen's manipulations are the heart of the ethical violation we must find.

The "public trust" in NRS 281.421(1)(b) is a simple employment compact between the citizens and its elected officials: the public is the employer and the elected official is its well paid employee. The public has a right to expect that its public employees, including, and especially, its elected officials, will earn their pay. At every turn and from

day one, Mr. Nolen intentionally did not earn his pay, and, instead, he betrayed the public trust by taking $5,250 per month to work whenever he felt like it.

Mr. Nolen unabashedly insisted at hearing that, "I can decide when I'm on duty and when I'm off duty. I believe I have the power and authority and under the statute to decide what my duty hours are." Mr. Nolen plainly told the Commission that, "I see nothing wrong with that," when he was asked why he was drinking at 2:00 p.m. on a weekday at the Olympic Gardens. In fact, by his closing argument, Mr. Nolen was insisting that if he could do his job "with one phone call a day from his house," he would be doing what he was elected to do.

We disagree. Fundamentally, the public elects its officials to do a job, not to collect a paycheck. We cannot say or condone Mr. Nolen's argument that he earns his $262.50 per day for a single telephone call. We will not allow Mr. Nolen to render this simple, profound social compact so feudal in nature such that the public's vote for him becomes nothing more than the public bestowing on him the title of Constable, with a fiefdom to rule unquestioned, and unquestionable, by anyone, and a handsome stipend drawn from the public's hard labor. Such a cynical view of public service is precisely the evil intended to be combated by the Ethics in Government Law as stated in NRS 281.421.

This Commission is not empowered to judge the competency of a public official. Whether the Constable's Office ran well, whether Mr. Nolen was a good manager of personnel, and whether the Constable's Office was running at a surplus during Mr. Nolen's tenure are not guiding considerations for this Commission. Mr. Nolen's self-congratulatory declaration that the office is running well is illusory. The public did not elect Mr. Nolen to do otherwise. Mr. Nolen was not elected to be comparatively better than the felon that preceded him; he was elected to do a job, period.

We must interpret and apply the statutes given us, and we interpret NRS 281.481(2) to require us to examine what Mr. Nolen did, not the results his office could produce without his presence. A private business owner and manager is accountable to the bottom line, i.e. whether the business operates profitably, and thus, he may fairly be judged by the production of the enterprise. A public manager, on the other hand, is accountable to the general public and may not be judged solely by the production of the enterprise. A private business owner has the prerogative to create a business that will run without him while he collects his pay; a public official may ***not*** structure his office so that it will run without him because it is the public's money, not his, that is paying his salary.

If Mr. Nolen had simply taken $63,000 from the Constable Office's bank account, it would be clear that such conduct would violate NRS 281.481(2) because such embezzlement would constitute the securing of an unwarranted privilege or advantage for himself. Though we are not accusing Mr. Nolen of embezzlement, we are likening his treatment of his office to embezzlement because the end result is the same: Mr. Nolen received large sums of money that he had not earned, and thus, to which he was not justly entitled. Mr. Nolen used his position as the elected head of the Constable's Office to assure that he would only need to work as it suited him. We will not stand by, hands folded neatly in our laps, while Mr. Nolen bilks his constituents of $63,000 per year for such a disgraceful work ethic.

Mr. Nolen made us aware of the opinion he sought and received from the District Attorney in the interim between the January and March hearings (the opinion is dated February 10, 1997) which concludes that there are no statutes, regulations, or ordinances that require that Mr. Nolen keep any particular work hours. Our research has confirmed this conclusion.[3] Nonetheless, the District Attorney's opinion is unhelpful to our analysis because of when it was issued and because it answers the wrong question. Obviously, all of the acts we are scrutinizing happened months and years before the District Attorney's opinion, so Mr. Nolen's claim that the District Attorney's opinion explains or justifies his conduct is nonsensical. It seems that Mr. Nolen became concerned about the propriety of his conduct only ***after*** this Commission began examining it. In other words, if Mr. Nolen offered the District Attorney's opinion to justify years of abuse of his position, the opinion was sought and received years too late.

Additionally, even the District Attorney recognized and acknowledged that the absence of statutory authority might not be a complete answer, because he closed the letter by saying, "For a definitive answer as to any specific questions on ethics, you may wish to refer to the appropriate Commission on Ethics."

Furthermore, if the question before us was whether Mr. Nolen was ***required*** to be at the Constable's office every day between 8:00 a.m. and 5:00 p.m. on weekdays, then our answer would be that there is no law that specifically so demands. The question before us, though, is whether the machinations by Mr. Nolen violated NRS 281.481(2) by allowing Mr. Nolen to receive a full-time paycheck while working occasionally. We find Mr. Nolen's use of his office to be abusive and licentious. Just because there is no law defining one's work hours does not mean that one never needs to come to work. It is certainly true that no law compels Mr. Nolen to work any given hours, but NRS 281.481(2) is violated when an elected official takes full-time pay while consciously and deliberately failing to earn the generous pay he receives.

In rendering our holding in this matter, we are cognizant of two practical concerns. First, we are aware of the argument that the citizens of Las Vegas, Mr. Nolen's employer, should be the only authority to decide whether Mr. Nolen is adequately performing the job for which they elected him. We feel compelled to reach the extraordinary conclusion we have reached because of Mr. Nolen's extraordinary machinations and contempt for the very people he served. Because of the way in which Mr. Nolen conducted his office, the public would have no real way to know about Mr. Nolen's dereliction from duty. Thus, the well-placed reliance on the electorate is an ineffective remedy where the public servant has surreptitiously acted to abuse the public trust without leaving a publicly visible trace of his infamy.

Furthermore, this Commission's very existence and powers were intended to provide oversight of this state's elected officials supplemental to the ultimate oversight of the voters.

Finally, even if the electorate ultimately expresses its disgust with Mr. Nolen at its next available ballot box, Mr. Nolen will have, by then, received $252,000 without having given his employer, the citizens, $252,000 worth of work.

Second, we are aware of the concern that with this opinion, we will become the arbiter of whether a public official has truly earned the money he or she has been paid. By this opinion, we are not inviting such questions. Rather, we view Mr. Nolen's conduct as so blatant, so egregious, and so licentious beyond what the public has a right to expect of a reasonable public servant that we cannot condone the conduct. We hope never again to see a public official so willing to accept a handsome salary while all the time planning never to fairly earn it and then finagling his office and staff to assure that he never has to lift a finger to earn it. As one Commissioner noted, if this Commission did not act in this case, it would never act because it would never see a clearer case of misuse of position.

By this opinion, we mean to hold only that a public official may not just "phone in" his job as Mr. Nolen insisted he had a right to: the public has the right to expect that its well-paid elected officials will work assiduously in a dedication to their needs, not his. Mr. Nolen failed the public he served, misused his office for his own personal benefit by accepting a salary he did not earn, and we must say so.

Thus, we conclude that Mr. Nolen violated NRS 281.481(2) by machinating his office's personnel and procedures so that he would not need to work at the office, and then by taking advantage of his machinations by failing ever to work full-time, all the while drawing a handsome full-time salary of $63,000 per year. By these actions, Mr. Nolen obtained an unwarranted advantage for his personal benefit by receiving a salary that he did not truly earn, thus violating NRS 281.481(2).

3. Mr. Nolen's Personal Use of Public Equipment, Time, and Personnel

NRS 281.481(7) is a straightforward and absolute prohibition that a public officer, such as Mr. Nolen, "shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest." In *Matter of*

Lonnie Hammargren, NCOE Opinion #95-35, we held that Dr. Hammargren, the Lieutenant Governor, violated NRS 281.481(7) by using his office's letterhead, computer equipment, copying equipment, postage, and personnel to publish and mail a letter to all Nevada physicians urging their support for a bill that would lower Dr. Hammargren's personal malpractice rates in his practice as a neurosurgeon.

The record in this matter showed that Mr. Nolen violated NRS 281.481(7) by using the Constable Office's cellular telephone and fax machine for his personal purposes, including using this equipment to conduct activities related to his re-election campaign. The record in this matter also showed that Mr. Nolen used Cathy Cooney, a Clark County employee, to keep and schedule his personal calendar, including scheduling appearances related to his re-election campaign. Mr. Nolen and Ms. Cooney themselves admitted to these uses and practices. While Mr. Nolen may have felt that his personal use of office equipment, time, and personnel was *de minimis,* NRS 281.481(7) allows no such *de minimis* exception or consideration. Because of Mr. Nolen's and Ms. Cooney's admissions, we must conclude that Mr. Nolen violated NRS 281.481(7).

4. Mr. Nolen's Hiring and Treatment of Doug Tharp and Cathy Cooney

The question raised by this issue is whether Mr. Nolen's hiring and subsequent treatment of Ms. Cooney and Mr. Tharp constituted his granting of an unwarranted privilege, preference, exemption, or advantage to either or both of them in violation of NRS 281.481(2) because both were his personal friends before they became his employees. We conclude that while Mr. Nolen's hiring and treatment of Ms. Cooney and Mr. Tharp were questionable, his conduct did not constitute a violation of NRS 281.481(2) for the following reasons.

Addressing first Ms. Cooney's hiring and treatment, the record showed that Ms. Cooney was hired through the usual and ordinary processes applicable to all Clark County employees. Assuming that Ms. Cooney passed all the tests and appeared on the hiring lists in due course (and we have no evidence before us that would indicate that Mr. Nolen manipulated the county's hiring process), we cannot conclude the Mr. Nolen violated NRS 281.481(2) by hiring Ms. Cooney through the County's usual process.

Additionally, Ms. Cooney's treatment in the office did not appear to be beyond the legitimate and ordinary course. It may be that Ms. Cooney benefited from the absence created when Mr. Nolen pushed Ms. Duncan-Daniel out of the office, but we cannot conclude that Mr. Nolen pushed Ms. Duncan-Daniel out of the office solely to create a promotion for Ms. Cooney. It may also be that Ms. Sheldon felt that she, not Ms. Cooney, deserved the promotion created by Ms. Duncan-Daniel's departure, but we cannot conclude, based on the record before us, that Ms. Cooney's promotion was wholly undeserved and unreasonable.

Questions abound regarding Ms. Cooney's hiring and treatment on the job because of Ms. Cooney's admitted friendship with the Nolens and because Mr. Nolen's credibility was so lacking. It would be unquestionable that Ms. Cooney was not treated preferentially had we been able to rely upon Mr. Nolen's representations regarding her hiring, but because Mr. Nolen was so incredible, his representations regarding Ms. Cooney's hiring, treatment, and abilities were accepted only warily. Most despicable, though, was our perception that Mr. Nolen had put Ms. Cooney in the awkward position of testifying as he would have her testify. Ms. Cooney's demeanor indicated that she was inextricably wedged between Mr. Nolen and the truth. It appeared that she felt compelled by her job and friendship with the Nolens on the one side and her obligation to her oath on the other. Mr. Nolen should not have put Ms. Cooney in such an untenable position, and both his and her credibility suffered for it.

Addressing Mr. Tharp's hiring and treatment, it does appear that Mr. Tharp was qualified to be hired by Mr. Nolen, regardless of their long acquaintance. While Mr. Tharp was testifying about his extensive training and experience, we found him to be knowledgeable and credible. Mr. Tharp's eagerness to take on service tasks that were undesirable, in combination with his impressive background, made him a good choice for Mr. Nolen. We cannot conclude, therefore, that Mr. Nolen's hiring of Mr. Tharp violated NRS 281.481(2).

Similarly, Mr. Nolen's advancement of Mr. Tharp over other deputy constables, both in terms of Mr. Tharp's receiving top pay for all of his documents and in terms of his promotion, did not constitute an ***unwarranted*** advantage or privilege for Mr. Tharp that would violate NRS 281.481(2). The record did show that Mr. Nolen did lavish upon Mr. Tharp preferential treatment, but the record also showed reasonable explanations for the preferential treatment. For example, Mr. Nolen's favoring Mr. Tharp with top pay for every paper served by Mr. Tharp while paying all other deputies for their papers on a sliding scale was reasonable because Mr. Tharp was serving only small claims summonses, a type of service that was admitted by all to be difficult and less lucrative.

Furthermore, the record provides support for Mr. Nolen's promotion of Mr. Tharp into the position of Chief Deputy Constable as being reasonable. It may be that Mr. Nolen could have managed the promotion more tactfully by inviting others within the office to also interview for the position, but his failure to do so was not unwarranted or unreasonable. We will not hold against Mr. Tharp his acceptance of the position of Chief Deputy, even though we have previously concluded that the creation of the position was part of Mr. Nolen's unethical machination of the office's functions for Mr. Nolen's personal benefit. In other words, while Mr. Nolen's creation of the position of Chief Deputy was part of an unethical scheme, Mr. Tharp's acceptance of the position was not unethical.

As with Ms. Cooney's hiring and treatment, questions can be raised regarding Mr. Tharp's hiring and treatment because of Mr. Tharp's acquaintance with Mr. Nolen and Mr. Nolen's incredibility. We can understand why the other deputies would have been troubled by Mr. Nolen's preferential treatment of Mr. Tharp. From their perspective, Mr. Tharp was a friend of Mr. Nolen's who was immediately paid more than they were from his hiring, and for whom a new position was specially created and by which Mr. Tharp was given supervisorial powers over them (even though he was the lowest ranking deputy in terms of seniority) and by which Mr. Tharp became the only deputy to receive a salary.

Nonetheless, though we agree that Mr. Tharp was treated preferentially, we cannot conclude that the preferential treatment was unwarranted under NRS 281.481(2). Mr. Nolen's choice of Mr. Tharp appeared to result in a competently and effectively run office. As we have previously discussed, Mr. Tharp's hiring and promotion facilitated Mr. Nolen's scheme: Mr. Tharp seemed well-qualified and capable to run the Constable's Office in the frequent and deliberate absence of the Constable. In essence, it appeared that Mr. Tharp was more the Constable than was Mr. Nolen, and it further appears that Mr. Tharp was an able stand-in for Mr. Nolen. The record showed, in fact, that to the extent Mr. Nolen's salary was earned, it was through Mr. Tharp's efforts, not Mr. Nolen's.

Thus, while both Ms. Cooney's and Mr. Tharp's hiring and treatment were preferential, we cannot conclude that the preference was unwarranted, and thus, we cannot find that Mr. Nolen violated NRS 281.481(2) in the way in which he hired and treated Ms. Cooney and Mr. Tharp.

5. Mr. Nolen's Assistance of the Campaigns of Ralph Lamb and Gary Reese

An issue was raised whether Mr. Nolen violated NRS 281.481(2) or (7) in the way in which he supported the candidacies of Gary Reese and Ralph Lamb. Regarding Mr. Reese's campaign, the record was clear that Mr. Nolen did not use the resources of his office or his staff to support Mr. Reese's candidacy.

Regarding Mr. Lamb's candidacy, the record showed that Mrs. Nolen worked on Mr. Lamb's campaign staff and that Mr. Nolen sometimes visited Mrs. Nolen at Mr. Lamb's campaign headquarters during the Constable's Office's regular work hours. The record also showed that Mr. Nolen provided Ralph Lamb campaign t-shirts to the deputy constables.

Though the t-shirts were bitingly ironic, since they read "Another Cop For Ralph Lamb" just before Mr. Nolen would begin doing everything he could to assure that the deputy constables were ***not*** peace officers (cops), irony does not violate the Ethics in Government Law. The record did not support the conclusion that Mr. Nolen forced his deputies to wear Mr. Lamb's t-shirts; in fact, several of the deputies testified that they did not feel compelled to wear the t-

shirts. Thus, the record does not support the conclusion that Mr. Nolen used his office's resources, time, or personnel to support Mr. Lamb's candidacy, and so Mr. Nolen did not violate NRS 281.481(2) or (7).

6. Mr. Nolen's Modification of Office Policies and Procedures Regarding the Deputy Constables

The record clearly showed that when Mr. Nolen first became Constable, his deputies were P.O.S.T.-certified peace officers and that he required that his deputies maintain their P.O.S.T. certification. The record also showed that Mr. Nolen later reversed the longstanding policy of the Constable's Office and prohibited his deputies from carrying firearms. By disarming his deputies, Mr. Nolen's deputies were no longer considered peace officers according to NRS 289.150(5).

The testimony as to why Mr. Nolen disarmed his deputies was in sharp conflict. Mr. Nolen claimed that he disarmed the deputies because armed deputies had misused their authority, because armed deputies presented potential unnecessary liability, and because armed deputies projected an authoritative image that he no longer wanted his office to project. The deputies claimed that Mr. Nolen disarmed the deputies to strip the deputies of rights guaranteed to peace officers under NRS Chapter 289 in retaliation for the deputies' formation of the LVCA.

While we believe that the record supports the deputies' claims (because of the timing of many of Mr. Nolen's changes of policy and because we find incredible Mr. Nolen's claims that deputies are not exposed to danger when they are doing evictions), we need not reach any conclusions regarding this issue. Even if Mr. Nolen's motives were retaliatory, whatever benefit Mr. Nolen would have received would have been a benefit to his public position as Constable. The record did not show that Mr. Nolen ***personally*** benefited from stripping his employees of certain legal rights they may have had previously.

Furthermore, it appears to us that the EMRB is the proper forum to resolve this particular issue. Our focus is necessarily upon Mr. Nolen and his acts, not upon the effect that those acts may have had upon the employees. The focus of the EMRB, though, ***is*** Mr. Nolen, his acts, and the intent and effect of those acts upon his employees. We have been made aware throughout these proceedings that the EMRB matter has been proceeding parallel with this matter, and we must commend the resolution of this particular question to the expertise and authority of the EMRB.

For these reasons, we cannot find that Mr. Nolen violated NRS 281.481(2) by disarming his deputies because he did not personally benefit from the consequences of the change in policy.

7. The Question of Willfulness

NRS 281.551(1) provides: "in addition to any other penalty provided by law, the commission may impose on a public officer or employee or former public officer or employee civil penalties not to exceed $5,000 for a willful violation of this chapter." We interpret "a willful violation" to be the intentional or deliberate commission of an act that would constitute a violation of a provision of the Ethics in Government Law. We find that Mr. Nolen's violation of NRS 281.481(7) was not willful and that his violation of NRS 281.481(2) was willful for the following reasons.

Regarding Mr. Nolen's violation of NRS 281.481(7), the record showed that Mr. Nolen did institute policies and procedures to minimize the personal calls that would be received on his office's telephones and fax machine. Mr. Nolen testified that when he received some campaign materials from his public relations firm, he instructed the firm not to send such materials to the office's fax machine, and the record before us shows that no further campaign materials were sent on the office fax machine. The record shows that while some violations of NRS 281.481(7) occurred, Mr. Nolen attempted to avoid and minimize the violations, so we cannot find these violations to be willful.

Regarding Mr. Nolen's violation of NRS 281.481(2), the record showed that willfulness was the very essence of the violation. Mr. Nolen deliberately, intentionally, and calculatedly used his authority as the elected head of the Constable's Office to machinate the procedures and working of the office so that the office would function without

him. Mr. Nolen's claim that he did not know it was unethical to manipulate his office to his personal benefit was incredible. The Ethics in Government Law was established to codify the public's legitimate expectation that its officials and employees would conduct themselves for the public's benefit. Mr. Nolen, as a highly placed elected official, should have conducted himself with the highest standards, but instead he demeaned himself with reliance upon equivocation, prevarication, and legalism to justify his intentional and contemptuous disregard for his duties and the public that he served.

Mr. Nolen intentionally misused his office and deceived the public that paid him, thus violating NRS 281.551(1). Because this was as serious a matter as we have ever seen, we impose upon Mr. Nolen the maximum available civil penalty of $5,000.

Finally, with respect to Mr. Nolen's continuing in office, this Commission was given a power of recommendation only in those cases involving state officials (impeachment) or employees subject to supervision and discipline. Neither NRS 281.551(5) [recommendation of impeachment] nor 281.551(7) [recommendation of discipline of a public employee] are applicable in this case because Mr. Nolen is a county elected official.

However, NRS 283.440 provides a judicial process whereby any person may file a verified complaint charging a public official with nonfeasance or malfeasance in office and seek the public official's removal from office. While this Commission has found that Mr. Nolen's removal from office would be more than justified, this is a matter beyond our jurisdiction as established by the Legislature.

CONCLUSION

Based upon the record, the Commission concludes that Mr. Nolen violated NRS 281.481(2) by structuring the operation of his office such that he did not need to work to receive his pay, and Mr. Nolen violated NRS 281.481(7) by using his office's equipment, materials, and personnel for his personal benefit. Mr. Nolen did not violate NRS 281.481(2) in his hiring and treatment of Ms. Cooney or Mr. Tharp, did not violate NRS 281.481(2) or (7) in the way in which he supported the candidacies of Gary Reese and Ralph Lamb, and did not violated NRS 281.481(2) when he altered the job duties and responsibilities of his deputies to remove them from peace officer status.

As a result of finding that Mr. Nolen's violation of NRS 281.481(2) was willful, we impose a penalty of $5,000 upon Mr. Nolen, to be paid by cash, cashier's or certified check, or money order made payable to "Nevada State Office of the Treasurer," which payment must be received no later than ten days after the date of the signing of this opinion. Should Mr. Nolen fail to timely pay this penalty, Staff for the Commission is authorized to proceed as it deems necessary to collect the penalty.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific 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: June 16, 1997

NEVADA COMMISSION ON ETHICS

By: /s/ MARY BOETSCH, Chairwoman

Commissioners Scherer and Allen concurring in part and dissenting in part:

We concur in the majority's conclusion that Constable Nolen's personal use of the office fax machine and cellular

telephone violated NRS 281.481(7).

We must, however, dissent from the majority's conclusion that Constable Nolen granted himself an "unwarranted privilege" by "operating his office such that he could work far less than full-time while receiving a full-time salary." Rather, the voters granted him the privilege of serving as Constable. The voters clearly have that authority and Constable Nolen's service in that position is not contrary to law. Therefore, the privilege is not "unwarranted."[4]

The majority admits that there is no law setting specific "working hours" for the Constable. The Nevada Commission on Ethics cannot and should not micromanage the work schedule of every public official in the State. The majority states that it does not intend "to establish a strict requirement that elected officials must work 40-hour workweeks." Majority Opinion at [1] .

This statement begs the question: At what point does an elected official violate the code of ethics? Are 35 hours per week enough? What about 30? Is it better to work 40 hours per week incompetently, running the office into the ground, or to work 25 hours per week skillfully and efficiently, accomplishing the public's business with the least possible use of public resources? We refuse to venture down this slippery slope toward bureaucratic tyranny. Rather, in a democracy, these questions are better left to the voters.

The majority places great emphasis upon the policy and procedure manual of the Constable's Office, which provides that "the Constable shall devote his full time to the Constable's office." This is a typical statement describing many different public offices in this State and means that the Constable may not be engaged in any other gainful occupation. Clearly, it does not require that the Constable spend every minute of his life in the office, that he can never take his wife to a movie, or that he can never take a vacation.

The majority notes that there was "evidence produced that [the Constable] frequently stayed home due to poor health; however, there is no sick day allocation for his position." Does the fact that there is no sick day allocation mean that he can never be away from the office due to illness? Of course not. There is no sick day allocation because there are no set hours he is required to work.

Both the testimony and our observations support a conclusion that Constable Nolen suffers from a chronic respiratory ailment. With the air quality in Clark County, it is not unreasonable to assume (and there was some testimony to this effect) that there are days when it is not advisable for Constable Nolen to venture outside. Do these circumstances constitute an ethical violation? We cannot reach such a conclusion.[5]

There is no doubt that Constable Nolen was in control of the office. In fact, many of the complaints about him stem from the sometimes autocratic way in which he ran the office and from changes in policy and pay structure that he implemented. Constable Nolen's statutory duty was to run the office, not to work a certain number of hours. He performed that duty.[6]

We are concerned by some of the testimony against Constable Nolen. We cannot and do not condone his conduct. Nevertheless, we cannot conclude that Constable Nolen violated NRS 281.481(2) by granting himself an unwarranted privilege. As noted above, the privilege of serving as Las Vegas Constable is granted by the voters.

Through this case, the complainants have brought their concerns about Constable Nolen's conduct to the voters' attention. If the voters are unhappy with the job he has done, they have the right to vote him out of office.

/s/ SCOTT SCHERER, Commission Member

/s/ JUD ALLEN, Commission Member

[1] In discussing Mr. Nolens actual hours worked, we do not intend to establish a strict requirement that elected officials must work 40-hour workweeks. It would be just as abusive of one's public off ice if one were physically in one's office 50-hours per week reading the newspaper and watching one's favorite soap operas and talk shows for 40 of those 50 hours each week. Our intent with this opinion is to disabuse Mr. Nolen of the conception that the hard work ends the day after his election. In our view the hard work, the real work, begins the day after election day.

[2] The Constable's policy and procedure manual provides that "[m]embers shall not consume alcohol while in uniform or on duty," and "[m]embers shall not report for a regular tour of duty while intoxicated, or be unfit for duty because of alcohol use."

[3] Though there is not statute, regulation, or ordinance that requires the Constable to keep any specific work hours, the Constable's policy and procedure manual does provide that the Constable will *"devote his full time to the Constable's office."*

[4] Nor do I agree with all of the majority's factual findings. For example, in response to questions from the Commission, Constable Nolen estimated that he spent an average of approximately 25 hours per week *in the office.* He consistently claimed throughout the proceedings that he performed numerous work responsibilities outside the office. There was no credible evidence to contradict this testimony, since the witnesses could only testify as to the time he spent *in the office,* with the exception of a few occasions when witnesses met with Constable Nolen in bars "during working hours." While I may not agree with the choice of the meeting place, meeting with deputies to discuss work-related problems is part of the Constable's duties. Nevertheless, the deputies with whom Constable Nolen met testified that they had finished their work for the day, demonstrating the difficulty of defining the term "working hours" in the context of the work of the Constable's Office. The majority lists a number of work activities that Constable Nolen performed outside the office, including "consulting with computer specialists to update the office's computer system, meeting with citizens who use the office's services, and meeting and dealing with his staff," so the record clearly supports a finding that he performed at least occasional work *outside* the office in addition to the hours he spent in the office.

[5] During his fourth and final term, Franklin Delano Roosevelt was so ill that he was frequently incapable of performing his duties. Compounding this "egregious misconduct" is the substantial evidence unearthed by historians that FDR and his advisors hid the nature and extent of his illness, arguably duping voters into re-electing him. Under the majority's logic, FDR should have been fined and removed from office. Although the majority acknowledges that the Commission on Ethics does not have the authority to remove the Constable from office, the power to impose fines upon elected officials with whom we do not agree and to recommend their removal from office is a power that could drive officials from office, thereby circumventing the will of the voters. We must exercise this power wisely and only where a public official or public employee has violated clear guidelines established by law, not where we simply disagree with the way one does the public's business.

[6] There is a substantial segment of the public clamoring for government to be run more like a business. In business, few if any CEO's are judged by the number of hours they log. For better or worse, they are judged by results. In this case, the evidence indicated that when Constable Nolen took over, the office was running at a loss, costing taxpayers money, and there was a substantial backlog of work that was not getting done. At the time of our hearings, the office was no longer dependent upon taxpayer subsidies and the backlog (especially in the case of small claims) had been alleviated. Constable Nolen's predecessor may not have been much of a benchmark, but it is for the voters, and not this Commission, to determine whether he sufficiently exceeded that benchmark in the way he ran the office.