

Opinion No. 96-73
BEFORE THE NEVADA COMMISSION ON ETHICS
In the Matter of the Request for Opinion Concerning HOWARD ROSENBERG

This Opinion is in response to a third-party request for opinion filed with the Nevada Commission on Ethics (Commission) by Chancellor Richard Jarvis concerning the status of Howard Rosenberg who is both a professor at the University of Nevada and a University Regent. A hearing was held on February 27, 1997 at which numerous witnesses testified and presented evidence. Dr. Rosenberg was represented by Byron Bilyeu, and Chancellor Jarvis was represented by Donald Klasic. Immediately thereafter, the Commission publicly deliberated the matter but was unable to reach a decision. The Commission again deliberated on February 28, 1997 and did reach a ruling. The Commission now issues the Findings and Fact and issues the Opinion which follows.

FINDINGS OF FACT

1. Dr. Rosenberg is a professor in the Art Department of the University of Nevada (UNR). Dr. Rosenberg became a tenured professor in 1979. Since 1979, Dr. Rosenberg's contract has been renewed annually by UNR through the device of a letter that sets out the terms of the next year's contract.^[1] Dr. Rosenberg's most recent contract extension was made on June 17, 1996 and will expire on July 1, 1997.
2. The Board of Regents (the Board) for the University and Community College System of Nevada (UCCSN) is the governing board for the entire UCCSN and is composed of eleven elected regents. Among other duties, the Board reviews and approves all recommendations for tenure made by the member institutions of the UCCSN. Thus, the Board reviewed and approved Dr. Rosenberg's tenure in 1979. Once tenure has been approved for a professor, it is unlikely that the Board would ever review or otherwise have dealings with the specific contract of that professor because all future renewals of that professor's contract are done between the professor and his institution. In this matter, there was no evidence that the Board had reviewed or otherwise dealt with Dr. Rosenberg's specific contract after 1979 since all subsequent renewals were done between Dr. Rosenberg and UNR.
3. Once a professor attains tenured status, he is assured that he will have his position for life, subject only to termination for specific conduct defined in various policies and according to specified procedures.
4. Dr. Rosenberg's performance is reviewed annually. First, his performance is evaluated by a peer committee composed of other art professors. Second, the peer committee's recommendations are reviewed by the head of the Art Department, who then evaluates Dr. Rosenberg and forwards his recommendation to college's dean. The dean evaluates Dr. Rosenberg and makes a final recommendation. If Dr. Rosenberg were dissatisfied with his evaluation, there is a grievance and review procedure, all entirely within UNR. At no point is Dr. Rosenberg's contract or performance reviewed, evaluated, or ruled upon by the Board, and there is no appeal to the Board.
5. Based upon this performance evaluation process, professors may receive merit awards. For example, based upon his performance evaluation for the 1995-96 fiscal year, Dr. Rosenberg received a \$1,000 merit award recommended by his department chair.
6. In the 1996 election season, Dr. Rosenberg filed for and sought the office of UCCSN Regent. Before he declared his candidacy and during the pendency of his candidacy, Dr. Rosenberg spoke with Frankie Sue Del Papa, Attorney General, regarding whether there was a legal disability for his candidacy because he was a UNR professor. Dr. Rosenberg was told that there was no legal disability for his candidacy. By letter of April 9, 1996 from Jonathan Andrews, Chief Deputy Attorney General, Dr. Rosenberg was advised that "[o]nce you are elected you will want to request an opinion from the (Ethics) Commission for advice on those matters upon which you must disclose and abstain."
7. On November 5, 1996, Dr. Rosenberg was elected to serve as a UCCSN Regent.
8. On November 18, 1996, Chancellor Jarvis filed his request for an opinion with the Commission. Pursuant to a special request by Dr. Rosenberg, the Commission held a special meeting on December 18, 1996 to consider whether to accept jurisdiction over the matter. The Commission accepted jurisdiction on December 18, 1996 and scheduled the matter for hearing in January upon Dr. Rosenberg's special request for an expedited hearing so that

the matter could be resolved before he was sworn into office as a Regent. Dr. Rosenberg later changed his mind and sought a continuance of the January hearing date, so the matter was not heard until February 27, 1997, after Dr. Rosenberg was sworn into office as a Regent.

ANALYSIS AND OPINION

By J. GUINAN:

The Commission has jurisdiction over this matter because Dr. Rosenberg is a public officer as defined in NRS 281.4365 in his capacity as a Regent and is a public employee as defined in NRS 281.436 in his capacity as a UNR professor. The question in this matter is whether Dr. Rosenberg simultaneous service as both a Regent and a UNR professor violates NRS 281-481(2)[\[2\]](#) or 281.230(1)[\[3\]](#).

The analysis of this question necessarily requires an examination of NRS 396.122 which provides:

A member of the board of regents shall not be interested, directly or indirectly as principal, partner, agent or otherwise, in any contract or expenditure created by the board of regents, or in the profits or results thereof.

The general rule of statutory construction is that the words in a statute should be given their plain meaning. *McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438 (1986). When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning. *City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784 P.2d 974 (1989). On the other hand, a statute must not be read to render an absurd, unreasonable, or mischievous result. *State Dep't of Motor Vehicles v. Lovett*, 110 Nev. 473, 477, 874 P. 2d 1247 (1994); *Allsenz v. Clark County School Dist.*, 109 Nev. 1062, 1065, 864 P.2d 285 (1993). Words in statute should be given their plain meaning unless this violates the spirit of the act. *Neal v. Griepentrog*, 108 Nev. 660, 664, 837 P.2d 432 (1992).

The reading of NRS 396.122 insisted upon by Chancellor Jarvis goes too far to reach conduct never contemplated by the Legislature. NRS 396.122 was intended to prohibit a regent from using his position as a regent to create commercial contracts between the Board of Regents and his or her personal business. It seems absurd to argue that NRS 396.122 was intended to disable a professor or other employee of the UCCSN from becoming a regent. If the Legislature intended to create such a disability - which would work a disenfranchisement of a considerable number of citizens from pursuing an elective office - the Legislature could have done so. It is clear that through NRS 396.122, the Legislature did not do so.

Dr. Rosenberg has been a tenured professor since 1979. Throughout the period of his tenure, his contract with UNR has been annually renewed perfunctorily through a letter. Though it is true that the terms and conditions of that contract may have changed over the last twenty-nine years, it is equally true that the Board has not and will not become personally involved in Dr. Rosenberg's contract. Thus, the character of Dr. Rosenberg's contract is substantially different from the types of commercial contracts that are within the contemplation and coverage of NRS 396.122. Dr. Rosenberg provides a valuable personal service to UNR which will be renewed as a matter of course as long as Dr. Rosenberg performs his professorial duties satisfactorily. The extensive record of this case contains no evidence that Dr. Rosenberg could in any way manipulate his personal contract as a professor with UNR to his benefit as one of eleven regents, thus Dr. Rosenberg could not participate in the evil contemplated within the spirit of NRS 396.122.

Chancellor Jarvis pointed this Commission to a common law doctrine of "incompatibility of offices" and offered several cases where this doctrine had been applied. This common law doctrine has no applicability in Nevada because our Legislature has subsumed the common law principle into the Nevada Ethics in Government Law. Thus, this Commission need not resort to the common law principle enunciated by Chancellor Jarvis because we have, instead, specific statutes to interpret and apply that address the same concept.

Because NRS 396.122 does not prohibit Dr. Rosenberg's contract as a professor, Dr. Rosenberg's simultaneous service as a professor and a regent does not violate NRS 281.481(2) or NRS 281.230(1). The analysis under NRS 281.481(2) requires that Dr. Rosenberg be capable of granting or securing for himself an "unwarranted" advantage, and his continuance in a career as a tenured professor does not constitute an "unwarranted" advantage. If his

contract as a professor violated NRS 396.122, then the continuance of the contract would be unwarranted, but because NRS 396.122 does not prohibit Dr. Rosenberg's contract as a professor, the contract is not unwarranted.

The analysis under NRS 281.230(1) is the same as the analysis of NRS 396.122. NRS 281.230(1) was intended to prohibit the very same conduct and contracts as NRS 396.122 except that NRS 281.230(1) describes a much broader range of public officials and employees subject to its prohibition.

The Commission must caution that Dr. Rosenberg's dual status as a professor and regent presents a unique circumstance that will raise novel questions of disclosure and abstention under NRS 281.501. Those questions are not presently before this Commission, but the Commission raises the issue now to invite Dr. Rosenberg to bring any such questions to the Commission in advance of any participation or vote that could violate NRS 281.501. Regarding questions of disclosure and abstention, an ounce of prevention truly is worth a pound of cure.

CONCLUSION

Based upon the record, the Commission concludes that Dr. Rosenberg's present dual status as a professor and regent does not violate NRS 281.481(2) or NRS 281.230(1) and that further his entry into another of a long series of annual contracts will not violate NRS 396.122, NRS 281.481(2), or 281.230(1).

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 18, 1997.

NEVADA COMMISSION ON ETHICS

By: JAMES GUINAN, Commissioner

BY S. SCHERER, concurring in part and dissenting in part:

I concur in the result reached by Commissioners Guinan and Wines, but for different reasons.

NRS 396.122 provides that:

A member of the board of regents shall not be interested, directly or indirectly, as principal, partner, agent or otherwise, in any contract or expenditure created by the board of regents, or in the profits or results thereof.

In this case, Dr. Rosenberg is employed by UNR as a professor in the Art Department. The Board granted Dr. Rosenberg tenure in 1979. A grant of tenure creates certain contractual rights. UCCSN Code, Title 2, Section 5.4; Title 5, ¶ 18. Specifically, once a professor attains tenured status, his employment may be terminated only for specific conduct defined in various policies and according to specified procedures. UCCSN Code Sections 5.4.5 (Financial Reasons for Termination); 5.4.6 (Curricular Reasons for Termination); 5.4.7 (Procedures for Furlough or Termination of Employment Due to Financial Exigency or Curricular Reasons); Title 2, Chapter 6 (Rules and Disciplinary Procedures for Members of the University Community)- Title 5 (UNR Bylaws), ¶¶ 52, 53, 59, 60, 61, and 62.

Pursuant to a letter agreement, Dr. Rosenberg's employment is renewed annually by UNR. The annual renewal letter specifically provides that "... this letter and the enclosed worksheet constitute a contractual agreement...." While the annual renewals are administered by UNR, the contract is created by the Board. Additionally, the Board may modify the contract by approving recommended increases in a professor's salary or changing employment policies that may constitute grounds for termination.

Dr. Rosenberg, therefore, is directly interested in a contract created by the Board. NRS 396.122 is clear on its face and prohibits Dr. Rosenberg from serving as a member of the Board as long as he is interested in an employment (or any other) contract created by the Board. I can find no basis for concluding that NRS 396.122 does not apply to employment contracts. For example, clearly a majority of the Board could not decide to create jobs for themselves in the UCCSN to supplement their incomes.

Additionally, the evidence indicated that every other state that allowed university employees to serve on governing boards placed certain limitations upon them. University professors are either non-voting members of the governing board, or their numbers are limited to ensure that they do not become a majority of the board.^[4] These states recognize the potential for abuse that arises when university personnel serve as both the employee and the employer.

For all of these reasons, I cannot agree with Commissioner Guinan's conclusion that there is no violation of NRS 396.122 in this case. Nevertheless, NRS 396.122 is not part of the Code of Ethical Standards. Therefore, this Commission lacks jurisdiction to enforce NRS 396.122, and I have no choice but to find no violation of the Code of Ethical Standards.^[5]

This Commission was created by the Legislature. It has only the authority specifically granted by the law that created it.

NRS 281.511 provides, in pertinent part, that the Commission "may render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances." (Emphasis supplied.) NRS 281.481 provides that "A code of ethical standards is hereby established to govern the conduct of public officers and employees..." (Emphasis supplied.)

NRS 281.481 contains ten subsections setting forth various rules of conduct. NRS 281.491, 281-501, and 281.505 set forth additional standards which public officers and employees are required to observe. Taken together, NRS 281.481 through 281.505 et seq. constitute the "statutory ethical standards" that the Commission is empowered to interpret and apply.

Turning to the statutory ethical standards, NRS 281.481(2) is the only provision which appears to apply to the facts before us. Indeed, Commissioners Boetsch and Chisolm found a violation of that section. NRS 281.481(2) provides that:

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.

I agree with Commissioners Boetsch and Chisolm that "unwarranted" includes those privileges that are disallowed by law. In this case, however, there is no evidence that Dr. Rosenberg has "used his position in government to secure or grant unwarranted privileges." I cannot ignore the plain language of NRS 281.481(2) to find a violation any more than I could ignore the plain language of NRS 396.122 to avoid one. Nor can I presume that Dr. Rosenberg will act unethically in the future. When, and if, there is evidence of an ethical breach on his part, it can be presented to the Commission for its consideration.

Since NRS 396.122 is not a part of the "statutory ethical standards" over which the Commission has jurisdiction, and since Dr. Rosenberg has not yet engaged in any affirmative conduct to "secure or grant unwarranted privileges [for himself]," I cannot find any violation of the "statutory ethical standards" at this time. While I am deeply concerned by the potential for abuse whenever a person serving in a public capacity acts as both employer and employee, I cannot reach beyond the Commission's jurisdiction to satisfy my own personal concerns in a particular case.

BY J. WINES, specially concurring:

I concur with the majority opinion, but I feel I need to express my own concerns regarding the manner in which this matter was pursued. I feel that the people who filed this request for opinion were not totally honorable. I also believe that Dr. Rosenberg sought advice several times from appropriate state officials, and he should not be penalized

because of the misinformation he was given.

BY M. BOETSCH AND H. CHISOLM, dissenting:

Respectfully, we must dissent. We cannot agree with the conclusion of the majority opinion that NRS 396.122 does not apply in this matter. The plain language used in NRS 396.122 includes "**any contract or expenditure** created by the board of regents..." For better or worse, the Legislature worded NRS 396.122 so as to be all-inclusive and without exception. We cannot dismiss the "plain language" rule as readily as the majority opinion does, especially where the language of NRS 396.122 is without ambiguity.

Thus, we must conclude that NRS 396.122 will apply to Dr. Rosenberg's next contract with UNR when his present contract expires on July 1, 1997. To this extent, we disagree with Chancellor Jarvis' argument that NRS 396.122 requires Dr. Rosenberg to immediately choose to resign one of his two positions. Instead, we conclude that Dr. Rosenberg must face this difficult choice in July 1997, if and when he is offered a renewal of his contract to be a UNR professor.

We also find that NRS 281.230(l) prohibits this dual activity on the part of Dr. Rosenberg because it contains the same all-inclusive language.

It is necessary to articulate just how the foregoing analysis and conclusions involve the Nevada Commission on Ethics. It is not now, nor has it ever been, the intent of the undersigned Commissioners to "widen" the jurisdiction of the Commission by going beyond the statutory parameters of our jurisdiction. However, this Commission has, and properly so, looked to other statutes of Nevada in order to determine when a privilege, preference, exemption, or advantage is "unwarranted" within the meaning of NRS 281.481(2), which is clearly within our jurisdiction.

Although neither the Legislature, in the statutes themselves, nor this Commission, in previous opinions, have defined "unwarranted," we believe that if that term means anything it must mean "disallowed by law." Thus, in this case, since we believe NRS 396.122 and NRS 281.230 will be violated should Dr. Rosenberg accept a renewal of his contract, we believe that Dr. Rosenberg will be in violation of NRS 281.481(2) at that time. He will be securing or granting to himself an unwarranted privilege prohibited by NRS 281-481(2). Moreover, we see no reason to wait until that time to provide Dr. Rosenberg with our opinion and expose him to the potential of another hearing at that time.

We acknowledge that our conclusion forces us to reach a seemingly harsh result. It must be remembered that the harsh result is not our doing, but is the unavoidable result of the application of the legislative policy contained in NRS 396.122 and NRS 281.230. So long as this language stands as it presently does, it is not the place of the Commission to ignore this clear legislative mandate to craft public policy that we may think the legislature ought to have created. This is why we so strongly urged that the interested parties take the core issue in this case, namely, whether professors and other UCCSN employees should serve as regents, to the Legislature. The Legislature, not this Commission, is the proper forum to test and weight the competing public policies raised by this question.

We do agree with the majority opinion to the extent that the result reached by the majority will place Dr. Rosenberg in a unique position regarding his participation and voting upon matters as a regent. We join the majority in urging and inviting Dr. Rosenberg to seek our advice in advance of any potential violations of NRS 281.501. Our invitation is especially based upon Dr. Rosenberg's persistent misunderstanding of our jurisdiction and purpose. Dr. Rosenberg indicated throughout his presentation that he is an ethical person, and we have been presented no reason to doubt this. Nonetheless, the standards for judging the propriety of one's participation and voting on a matter are objective, not subjective. In other words, it is not enough that Dr. Rosenberg himself feels that he has no disabling conflict. Rather, the test is whether the independence of a reasonable person in his situation would be materially affected by the unique circumstances in which Dr. Rosenberg now finds himself.

Thus, in our opinion, it will be no defense before this Commission, should a question arise in the future about Dr. Rosenberg's participation or vote in a matter, that Dr. Rosenberg did not personally feel that his independence of judgment was unaffected. The processes of this Commission are intended to encourage a public official to seek our advice **before** he violates the Nevada Ethics in Government Law. In other words, we would rather see Dr. Rosenberg the next time of his own volition than see him again dragged before this Commission by third parties who disagree with his participation in or vote on a matter.

[1] Dr. Rosenberg's most recent renewal letter dated June 17, 1996 provided in pertinent part: This letter is formal notification that you have been reappointed for the 1996-97 fiscal year. A worksheet incorporated into and made a part of this letter is attached. The worksheet details the calculation of your 1996-97 salary rate and the resulting monthly pay, including any merit increase awarded as of July 1, 1996. A cost-of-living increase of 3% is also effective July 1, 1996.

All other terms and conditions of employment on your last previously signed contract remain in effect. Because this letter and the enclosed worksheet constitute a contractual agreement, it is important that you notify the Academic Affairs Office and your dean's office by July 11, 1996 if any changes to your contract are necessary. If the Academic Affairs Office has not heard from you by that date, it will be assumed that you are in agreement with the terms and conditions of employment and the salary for the 1996-97 fiscal year.

[2] NRS 281.481(2) provides:

A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person.

[3] NRS 281.230(l) provides in pertinent part:

Except as otherwise provided in this section and NRS 218.605, the following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada"

(b) Deputies and employees of state, county, municipal, district and township officers...

[4] Most states that have adopted this approach allow only one professor to serve on the governing board, although some states have allowed two professors on the board. Ky. Rev. Stat. §164.131 (Two faculty members of University of Kentucky and one member from a Kentucky community college on a 20- member board); see also Ky. Rev. Stat. §164.289 (Faculty members who serve on governing boards, including board of regents, may vote upon any matter except faculty compensation); N.Y. Educ. Law §5703(d)(Two faculty members on 34-member board). California found it necessary to amend its constitution to allow professors and students to serve on the governing board. California Const. Art 9, §9(c).

[5] This does not mean that a court of competent jurisdiction could not enforce NRS 396.122, only that this Commission is not empowered to enforce it.