

Opinion No. 97-07

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION concerning the conduct of JANET KUBICHEK, Humboldt County Commissioner

This opinion is in response to a first-party request for opinion filed with the Nevada Commission on Ethics (Commission) by Janet Kubichek concerning her voting and conduct as a Humboldt County Commissioner. A hearing on this matter was held by the Commission on April 24, 1997 in Reno, Nevada, at which Ms. Kubichek and Mr. Michael McCormick, Humboldt County District Attorney, testified and presented evidence. At this hearing, Mrs. Kubichek waived her right to confidentiality for this proceeding. On May 30, 1997, 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. Until September 1995, Ms. Kubichek was married to Keith Kubichek, and the couple has one son. In September 1995, Mr. and Ms. Kubichek divorced in an attempt to avoid some of the effects of the bankruptcy of Ms. Kubichek's prior husband. For all practical purposes, Mr. and Ms. Kubichek still live together as though they were husband and wife.
2. The Kubicheks own and operate Desert Disposal, a hauler of solid waste in Humboldt County. Serving the same area as Desert Disposal is one comparable competitor and a one person operation. Desert Disposal is the source of income for the Kubichek household, and both Mr. and Ms. Kubichek work for and operate the company which is legally owned solely by Mr. Kubichek as a result of the divorce.
3. In January 1997, Ms. Kubichek was sworn in as a County Commissioner for Humboldt County after successfully winning election in November 1996.
4. Prior to and throughout Ms. Kubichek's candidacy, the Humboldt County Commission (County Commission) had been considering and deciding issues related to the County's garbage collection service and the closure of rural landfills. Regarding the garbage collection, the County Commission had considered four options: (1) instituting mandatory pick-up, (2) instituting a drop-box program, (3) instituting a voluntary commercial haul or self-haul program, or (4) leaving the rural landfills open. The District Attorney opined that the only feasible solution for the County would be the closure of the County's rural landfills because of new federal regulations that would become effective in October 1997.
5. Ms. Kubichek had publicly expressed her opinions regarding the garbage collection and rural landfill issues, both before her candidacy and throughout her candidacy. Ms. Kubichek is very knowledgeable regarding these issues because of her extensive personal involvement in Desert Disposal.
6. Ms. Kubichek testified that Desert Disposal would financially benefit from the closure of the rural landfills because some of the county's residents who are presently hauling their own garbage to the rural landfills would be required to contract with the county's three private garbage haulers, including Desert Disposal, for their garbage hauling. Nonetheless, Ms. Kubichek has always publicly argued, both before and after becoming a County Commissioner, that the rural landfills should not be closed.
7. Shortly after being sworn in as a County Commissioner, Ms. Kubichek and Mr. McCormick, the District Attorney, began discussions intended to assist Ms. Kubichek to understand her disclosure and abstention obligations under NRS 281.501(2) and (3) regarding garbage hauling and landfill issues. Ultimately, by letter dated January 21, 1997, Mr. McCormick advised Ms. Kubichek that she should not "partake in any discussion regarding these (solid waste disposal) matters, nor should you vote on these matters." At our hearing, Mr. McCormick explained that he gave the most conservative advice under NRS 281.501(2) and 281.481(2) pending this Commission's opinion, and thus, he instructed Ms. Kubichek not to discuss or otherwise participate in any

matter involving solid waste disposal and landfills when those matters came before the County Commission. At our hearing, Ms. Kubichek indicated that she knew she would need to disclose her interest in Desert Disposal and to abstain from participating in garbage haul and landfill issues, but she believed that Mr. McCormick's advice was unduly restrictive. Mr. McCormick prohibited Ms. Kubichek, after her disclosure and abstention, from going into the audience to participate as a member of the public. Ms. Kubichek contended that this advice kept her from providing the County Commission with her unique and knowledgeable opinion. Nonetheless, Ms. Kubichek did comply with Mr. McCormick's advice even though she disagreed with it.

8. At our hearing, Ms. Kubichek indicated that if the County Commission ultimately decided to put out some or all of the County's garbage hauling to bid, that Desert Disposal would like to be able to submit a bid.

ANALYSIS AND OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(2) because Ms. Kubichek is a public officer as defined in NRS 281.4365. By the time of our hearing, Ms. Kubichek conceded and agreed with Mr. McCormick that she must disclose her interest in Desert Disposal and how that interest would be affected by matters relating to garbage disposal and landfills before the County Commission and that she must abstain from voting as a County Commissioner upon such matters. The real question, therefore, is a novel one in the jurisprudence of this Commission: Where is the line between prohibited advocacy and allowed participation in the consideration of a matter under NRS 281.501(2)?

As a starting point, NRS 281.501(2) explicitly prohibits only two acts by a member of the legislative branch, namely voting and advocacy. The legislative intent, therefore, is that anything that is not a vote or advocacy is allowed a member of the legislative branch. Furthermore, under this construct, a "vote" is readily and objectively ascertainable, since it is a formal and binding acknowledgement of assent in or dissent from a formally made motion to take a particular action. Ms. Kubichek did not vote in contravention of NRS 281.501(2).

Our analysis, therefore, must seek to discern between those acts that would constitute impermissible advocacy and those acts that would be permissible participation. We think the line is most evident through illustration. For example, if Ms. Kubichek were an applicant for a permit before her own County Commission, she would be required by NRS 281.501(2) and (3) to disclose her interest and abstain from voting on or advocating for the passage of her permit **as a County Commissioner**, but she could step out into the audience and testify regarding her permit **as the applicant**. We see nothing in NRS 281.501(2) and (3) or elsewhere in the Ethics in Government Law that would compel the conclusion that once Ms. Kubichek became a County Commissioner, she became barred for the remainder of her term from participating in the ordinary processes of Humboldt County government as any other citizen would. Such a conclusion would be absurd and would severely restrict the pool of potential candidates for any office.

In so saying, though, we must caution that Ms. Kubichek could not use her position as a County Commissioner to affect the outcome of her application, because to do so would violate NRS 281.481(2) and cause her other commissioners to violate NRS 281.481 (1). Thus, Ms. Kubichek could not threaten her fellow commissioners with her opposition to their measures unless they passed hers. Likewise, Ms. Kubichek could not promise that she would act positively toward measures proposed by her fellow commissioners if they supported her personal measures. In other words, if Ms. Kubichek had a personal matter before her County Commission, she would need to be treated by them and she would need to treat them as any other citizen would.

The issues raised in this Opinion present another scenario where the fine line between advocacy and participation can be seen. For example, let us assume a matter involving garbage collection came before the County Commission, so Ms. Kubichek had to disclose her interest in Desert Disposal and abstain from voting or advocating regarding the matter. NRS 281.501(2) would allow Ms. Kubichek to "otherwise participate" in the matter, and in order to render this term meaningful, we find that the Legislature meant that Ms. Kubichek could do **something**. That "something" might be, for example, that Ms. Kubichek could provide facts **as any other citizen**. This is particularly crucial to this Opinion because Ms. Kubichek was, presumably, elected in part because of her unique knowledge of garbage and landfill issues that were pertinent to her constituents. Again, we cannot find in NRS 281.501(2) and (3) or any other portion of the Ethics in Government Law that a public official loses her voice after her election regarding issues about which she might possess unique and valuable knowledge and experience.

We must caution, though, that the line dividing allowable factual testimony and prohibited advocacy is razor thin. Statements that begin, "in my opinion...", "I think...", "I believe...", or "I would hope...", would be signals that the statement might be more advocate than informative. A statement like, "The standard dumpster you see in the back of restaurants holds X cubic yards of garbage," would clearly be an allowable statement of fact. The intent of the statement is guiding. A statement of advocacy is prohibited, even if factual, because the intent of advocacy is to get the hearer to believe the same as the speaker, and where the speaker has special influence and power because of her position, the hearer might be influenced to act not because of the merits of the speaker's argument but because of the speaker's position itself. On the other hand, a statement of fact, without any overtones of advocacy, is allowed because the intent of the speaker is merely to inform the hearer and so theoretically the person of the speaker should be irrelevant because information is information and facts are facts, regardless of who provides them.

As we have said before, the line between a statement of fact and a statement of advocacy will often be razor thin. Because the consequences of crossing the line will always rest upon the elected official proffering the statement, the best general rule we can give is that an elected official who has already disclosed and abstained from a matter because of a disabling conflict of interest should always consider whether what she has to say really needs to be said, and if she thinks so, then she must be very careful with what she says and how she says it. Prudential forethought, common sense, and concern for appearances of impropriety will be the best prophylaxis. We interpret NRS 281.501(2) not to be a strict prohibition, but a stiff caution. In other words, a member of the legislative branch may speak about a matter in which she is interested, but she had better know why, what, and how **before** she does so.

Thus, we interpret NRS 281.501(2) to allow an otherwise legally conflicted elected official to "otherwise participate" in a matter by participating as a citizen applicant before the elected official's body and by participating as a provider of factual information. We appreciate the difficult position Mr. McCormick found himself in when he advised Ms. Kubichek regarding NRS 281.501(2) and NRS 281.481(2) because this Commission had no previous analogous opinions. Mr. McCormick gave the most conservative advice, and Ms. Kubichek abided it, even though she disagreed with it. We applaud both Mr. McCormick and Ms. Kubichek for the civil and appropriate way in which they handled their impasse. Would that more public officials would act so professionally and in the public's best interest.

CONCLUSION

Based upon the record, the Commission concludes that NRS 281.501(2) might allow Ms. Kubichek to "otherwise participate" in matters before the Humboldt County Commission for which she had to disclose and from which she had to abstain, as long as her participation is limited as we have discussed in this opinion.

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: June 11, 1998.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY BOETSCH, Chairwoman