

Opinion No. 97-25

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion concerning the conduct of RICHARD FLAVEN, Airport Control Officer, Taxicab Authority, Department of Business and Industry, State of Nevada

This Opinion is in response to a third-party opinion request filed with the Nevada Commission on Ethics (NCOE) by Robert Anselmo regarding the past, present, and future conduct of Richard Flaven.

A public hearing on the opinion request was held on September 26, 1997 in Las Vegas, Nevada. Mr. Anselmo appeared and presented testimony and was represented by Paul Lychuck, Deputy Attorney General. Mr. Flaven appeared and presented testimony and was represented by Patrick MacDonald.

Based on the testimony and evidence presented at hearing, the NCOE makes the following Findings of Fact, Conclusions of Law, and Opinion.

FINDINGS OF FACT

1. Mr. Anselmo is the Administrator of the Nevada Taxicab Authority, Department of Business and Industry, State of Nevada (Authority). Mr. Flaven is an airport control officer for the Authority. Mr. Flaven's father, Robert Flaven, is the Chief Enforcement Officer for the Authority, and as such, is Mr. Flaven Jr.'s supervisor.
2. The Authority is statutorily empowered (NRS 706.881-706.885) to regulate the operation of taxicabs in, inter alia, Clark County.
3. As an airport control officer, Mr. Flaven Jr. inspects for and regulates the condition of taxicabs as they appear at the airport. Mr. Flaven Jr. also assures that the taxicabs at the airport have the proper medallions to be there at the times, places, and conditions allowed by those medallions. Mr. Flaven Jr. also handles consumer complaints.
4. As Chief Enforcement Officer, Mr. Flaven Sr. supervises all of the Authority's enforcement officers, including Mr. Flaven Jr. As Chief Enforcement Officer, Mr. Flaven Sr. also prosecutes his enforcement officers' citations before the Authority's administrative proceedings. Mr. Flaven Sr. routinely does not prosecute his son's citations.
5. Mr. Flaven Jr. has twice applied with the Authority for medallions to serve Boulder City, Nevada, under the name Boulder Cab Company (BCC). BCC's first application was denied by the Authority because BCC lacked certain requirements and experience. In its second application filed in January 1997, which is presently pending, BCC has tentative agreements with Nellis Cab Company, an existing Authority licensee, for dispatching services and with Desert Cab Company, another existing Authority licensee, for physical facilities. At hearing, Mr. Flaven Jr. revealed that BCC's agreement with Nellis Cab would require that BCC only pay Nellis Cab one dollar per year for the dispatching services.
6. If Mr. Flaven Jr. is granted the medallion he seeks, his father would be the chief inspector of Mr. Flaven Jr.'s business, the business of Mr. Flaven Jr.'s collaborators (Nellis and Desert), and Mr. Flaven Jr.'s competitors. Mr. Flaven Sr.'s duties include supervising the other inspectors and prosecuting citations in the Authority's administrative hearing system. As a result of the Commission's earlier letter opinion dated April 17, 1996, Mr. Flaven Sr. has not been involved with Mr. Flaven Jr.'s applications. Mr. Flaven Sr. has also assigned the prosecution of Mr. Flaven Jr.'s citations to other staff.

7. Neither Mr. Flaven Sr. or Jr. has favored Mr. Flaven Jr.'s potential collaborators or disfavored Mr. Flaven Jr.'s potential competitors. In fact, Mr. Anselmo was clear that throughout Mr. Flaven Jr.'s application processes Mr. Flaven Jr. has been an exemplary and fair inspector.

OPINION

The Commission has jurisdiction in this matter pursuant to NRS 281.465(1)(a) and 281.511(2)(b). Both Mr. Flaven Sr. and Jr. are public employees as defined in NRS 281.436.

The Commission was asked by Mr. Anselmo to review and advise him about two issues: (1) do the changed circumstances between Mr. Flaven Jr.'s first and second applications, namely that his second application includes a collaboration with two other cab companies, change this Commission's analysis in its April 17, 1996, opinion?; and (2) if Mr. Flaven Jr.'s second application is granted, what effect will that have upon Mr. Flaven Sr.'s ethical obligations? Regarding the first question, during the pendency of his second application, Mr. Flaven Jr. must continue to refrain from communicating with any employee of the Authority who might be processing or investigating his second application, including his father. Mr. Flaven Sr. must be careful not to be involved with his son's second application in any way and should continue to refrain from prosecuting his son's citations. Mr. Flaven Jr. will still be required to resign from the Authority if and when his second application is granted.

Regarding the second question, NRS 281.481(1) and (2) provide:

A code of ethical standards is hereby established to govern the conduct of public officers and employees:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.

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.

In *Matter of Mike Nevin and Storey County Board of Commissioners*, NCOE [Opinion No. 95-58](#), we held *inter alia* that a father/son relationship was an interest sufficient to invoke NRS 281.481(2). In particular, in that opinion we held that the father's temporary employment of his son constituted a willful and unwarranted granting of a privilege by the father to the son that violated NRS 281.481(2). We also held that the father's employment of his son would constitute an employment that would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties, thus violating NRS 281.481(1). In fact, in that case, the potential harm that NRS 281.481(1) and (2) were designed to prevent occurred when the father stormed into the payroll office for the county to demand that his son be given the same raise as other employees had received, even though temporary employees such as his son were not included within the approval for the raises.

However reluctantly, we must conclude that if Mr. Flaven Jr.'s application is granted, Mr. Anselmo and Mr. Flaven Sr. will be placed in ethically untenable positions. Mr. Flaven Sr., as Chief Enforcement Officer, will oversee the regulation not only of BCC, but BCC's collaborators and BCC's competitors. As such, every regulatory decision Mr. Flaven will make will affect BCC, its allies, and its competitors. Mr. Anselmo, as Mr. Flaven Sr.'s supervisor, will be required either to oversee every regulatory decision Mr. Flaven Sr. makes, to continue to employ Mr. Flaven Sr. at his present salary but remove all regulatory duties, or to demote or transfer Mr. Flaven Sr. At hearing, Mr. Anselmo stated that his only feasible option to address the obvious and ongoing ethical conundrum would be to transfer or

terminate Mr. Flaven Sr. because no other "screening" mechanism is viable. Thus, similar to our ruling in the Mike Nevin matter, we must similarly rule here that Mr. Flaven Sr.'s continued employment with the Authority should Mr. Flaven Jr. become a licensee will violate NRS 281.481(1) and will result in a never-ending potential for violations of NRS 281.481(2).

We must stress the uniqueness of the present circumstances that compel our conclusions. Mr. Flaven Sr. is his own son's boss, and his son has sought to become a licensee of the agency for which his father is the regulatory chief, and all of this within a highly regulated and competitively charged profession. These circumstances are fraught with ethical peril that cannot be alleviated by anything other than a drastic remedy.

NRS 281.521(1) authorizes this Commission to include guidance to a public officer or employee regarding whether: "(a) a conflict exists between his personal interest and his official duty...(c) The conflict would materially affect the independence of the judgment of a reasonable person in his situation...(e) It would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest **or pursue some other designated course of action in the matter.**" (Emphasis supplied.) We have identified a conflict of interest between Mr. Flaven Sr.'s personal interest and his official duty that would definitely influence the independence of judgment of a reasonable person in Mr. Flaven Sr.'s difficult predicament. In this matter, therefore, we must recommend to Mr. Anselmo, our requesting party, that should Mr. Flaven Jr. receive his medallion, Mr. Anselmo must seek to transfer Mr. Flaven Sr. out of the Authority or must terminate Mr. Flaven Sr.'s employment with the Authority.

As a final matter, we need to highlight that our conclusions are not based upon a finding that either Mr. Flaven Sr. or Jr. has, at this time, acted in violation of the Ethics in Government Law. Mr. Anselmo, the supervisor of both Flavens, is our requesting party, and we must render him the advice he seeks. The testimony showed that both Flavens have acted honorably, ethically, and commendably to this point, and we have no reason to believe that either will act otherwise in the future. Nevertheless, our legal standards require that we weigh Mr. Anselmo's predicament (and thereby the Flavens' predicaments too) by an objective, not subjective, standard. Our conclusions, therefore, are that a reasonable man in Mr. Flaven Sr.'s circumstance, should Mr. Flaven Jr. receive a medallion, are such that an insoluble conflict of interest will arise that requires the drastic recommendation we are making.

As one commissioner lamented at the hearing, it is unfortunate that two able and commendable employees are caught in such a difficult ethical bind, but it should be remembered that the bind is of their own making. If Mr. Flaven Jr. withdraws his application or it is denied, the drastic recommendation of this opinion becomes moot. The choices rest with the Flavens; we can only determine the consequences.

CONCLUSION

We conclude that during the pendency of Mr. Flaven Jr.'s application, Mr. Anselmo must assure that Mr. Flaven Sr. and Mr. Flaven Jr. have no communication with other Authority employees regarding Mr. Flaven Jr.'s application. We further conclude that if Mr. Flaven Jr.'s application is granted, Mr. Anselmo will be required to transfer or terminate Mr. Flaven Sr. because Mr. Flaven Sr.'s continued employment with the Authority would constitute an actual violation of NRS 281.481(1) and an insoluble and ongoing potential for violations of NRS 281.481(2).

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances. The provisions of the Ethics in Government Law 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: October 22, 1997.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman