

Opinion No. 97-33

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion concerning the conduct of JOHN GONZALES, Public Employee

This Opinion is in response to a third-party request filed on June 29, 1997 with the Nevada Commission on Ethics (Commission) by Curtis Duff concerning the conduct John Gonzales, an employee of the city of Sparks. Upon a determination that just and sufficient cause existed to proceed with the matter, the Commission authorized an investigation. The investigation was extensive. After the investigation was concluded, two hearings were held in the matter. The first hearing was held on April 23, 1998, and the second hearing was held on July 23, 1998. Throughout these hearings, Robert Dickey represented Mr. Gonzales and Thomas Hale represented Mr. Duff. At the April 23, 1998 hearing, the following witnesses testified: Donald Bruce "Butch" Gorshing, Terry Reynolds, Jim Manatt, Jonnie Pullman, Gary Hutchinson, and Duane Baker. At the July 23, 1998 hearing, the following witnesses testified: John Scott, Gordon Mayer, Starlin Gene Jones, Raoul Agundez, Mike Goss, Steve Howard McQueen, Randall Gray, Mr. Duff, and Mr. Gonzales. Numerous exhibits were accepted into evidence in both hearings. At its hearing on July 23, 1998, the Commission publicly deliberated the matter and rendered its decision. The Commission now issues the Findings and Fact and Opinion which follows.

FINDINGS OF FACT

1. In 1992 and at all times pertinent to this matter, Mr. Gonzales was the Plant Engineer at the Truckee Meadows Water Reclamation Facility (the Sparks Plant). The Plant Engineer is the top managerial position at the Sparks Plant.
2. In March 1992, Mr. Gonzales met Butch Gorshing at a meeting of the Nevada Water Environment Association, during which meeting Mr. and Mrs. Gonzales went to dinner with Mr. Gorshing and other people from Mr. Gorshing's business. Mr. Gorshing is a principal in a business called JM Squared & Associates, Inc. (JMS), a company that represents manufacturers of water and wastewater equipment over a region of the western United States.
3. In August 1992, Mr. Gorshing invited the Gonzaleses to his summer home in South Lake Tahoe. The Gonzaleses spent a weekend with Mr. Gorshing. Subsequent to this weekend visit, the Gonzaleses socialized occasionally with Mr. Gorshing. This socializing included Mr. Gorshing or JMS sending Mr. Gonzales occasional seasonal presents such as a tin of popcorn at Christmas 1992.
4. In early October 1992, JMS became the representative of V-Ram Solids (V-Ram) for a region that included northern Nevada. V-Ram manufactures, among other things, heavy pumps that it claimed could be used in wastewater treatment plants. Also, in October 1992, JMS began doing business with the Sparks Plant. When JMS began doing business with the Sparks Plant, Mr. Gorshing and JMS dealt exclusively with Jim Manatt, who was the Maintenance Superintendent at the Sparks Plant.
5. Through 1991 and 1992, specifications were being developed for new solid waste pumps for the Sparks Plant. Mr. Manatt had originally been assigned to research and develop the specifications for the pumps, but on September 30, 1992, Mr. Manatt became injured and did not return to work until December 1992. After Mr. Manatt's injury, Mr. Gonzales assumed the responsibility for the development of the specifications.
6. On October 14, 1992, Mr. Gorshing sent a fax to Mr. Gonzales confirming a conversation on the same date that Mr. Gonzales would meet Mr. Gorshing on November 10, 1992 to tour the Millbrae Wastewater Treatment Plant in California. The Millbrae plant had an installation of V-Ram pumps that were similar to those that might be proposed

for the Sparks Plant. On the same day, Mr. Gorshing sent a fax to Mr. David Olson of V-Ram in which Mr. Gorshing asked Mr. Olson to also be at the Millbrae plant tour because Mr. Olson's presence "would certainly 'ice' this job [the Sparks Plant bid]."

7. On October 15, 1992, Mr. Gorshing sent a letter to Mr. Gonzales, again confirming the November 10 tour of the Millbrae plant. The letter also provided some pricing and technical descriptions of V-Ram's pumps that might fulfill the Sparks Plant's needs.

8. On November 5, 1992, Mr. Gorshing sent a fax to V-Ram representatives. Mr. Gorshing put a special note on the top of the fax stating, "Need your input by 10:00 our time today!!!" The text of Mr. Gorshing's fax follows:

Gentlemen -

John Gonzales is putting together specs today (!) for the sludge cake pumps and needs your input on the following:

1) He wants to include ~ trips by V-Ram installation/start-up personnel as the units will be installed @ 2 weeks intervals.

2) He's writing his performance spec around the R11XF3D double w/2845-20 power pack to require the ability to handle 60 GPM @ 200 psi and 14-35% cake solids. The design point was taken off your pump curve. Any problem?

3) Is the flow measure system a part of your control package?

4) They will require a 5% bid bond or cashier's/certified check...Problem?

5) They will require evidence of your insurance coverage to cover V-Ram personnel while at their plant for installation/start-up.

6) Job will advertise 11/16; bids due 12/11; contract award 12/29.

9. On November 10, 1992, Mr. Gonzales visited the Millbrae plant and an East Bay Municipal Utility District (EBMUD) plant with Mr. Gorshing. The Millbrae plant had V-Ram pumps installed; the EBMUD plant had pumps manufactured by Schwing and Abel.

10. On November 11, 1992, Mr. Gorshing sent a fax to V-Ram representatives in which he detailed shortcomings of the V-Ram pumps as compared to the Schwing and Abel pumps that were noted by Mr. Gonzales during the tour the day before. The letter concluded, "John [Gonzales] would like to review these items during your 11/19 visit."

11. JMS timely submitted a bid to sell V-Ram pumps. Another bid was submitted by another company to sell Schwing America pumps.

12. Because there was concern about the two bids, a committee was formed to evaluate the two bids. At this committee, Mr. Gonzales argued for the more expensive V-Ram pumps and against the less expensive Schwing America pumps. Mr. Gonzales' primary concern was that the pipes used in the Sparks Plant had a maximum rating of 300 p.s.i., that the piping was not to be replaced as part of the pump replacement, and that as far as he knew, Schwing pumps operated at ordinary operating pressures of 400 p.s.i. and higher and that Schwing did not manufacture a pump that pumped below 400 p.s.i. Based upon Mr. Gonzales' familiarity with the Sparks Plant, his expertise, and his representations, the committee ruled as requested by Mr. Gonzales in favor of the more expensive V-Ram pumps. Therefore, although the Schwing America bid was considerably lower, the contract was awarded to JMS.

13. Throughout the period of the fall and winter of 1992, Mr. Gonzales received several packages in the mail. Some were from JMS. Mr. Duff and other employees opened some of the packages before delivering them to Mr. Gonzales, and some of these employees believed that at least one of the packages contained a sleeping bag and a note from Mr. Gorshing to Mr. Gonzales referring to a camping trip that they had taken together. Mr. Gonzales

explained that the packages from JMS contained parts and books and that the package that the employees believed to be a sleeping bag was, in fact, a cover for Mr. Gonzales' boat and did not come from JMS. Mr. Gonzales did admit to receiving some salsa, which he shared with the employees, and a tin of popcorn in December 1992.

14. In 1995 and 1996, Mr. Gonzales appeared in advertisements in trade magazines promoting V-Ram pumps. Mr. Gonzales testified that he understood that videotapes to which he consented were made only for the purposes of training. When he discovered that advertisements had been made from material taken from the videotapes, Mr. Gonzales contacted JMS and had the use of his likeness and comments discontinued in the advertisement.

13. Since their installation in 1993, the V-Ram pumps have not performed as expected.

ANALYSIS AND OPINION

In the Notice of Hearing in this matter, this Commission stated that it would examine three questions, which were:

1. Did Mr. Gonzales violate NRS 281.481(1) and (4) by accepting gifts from Mr. Butch Gorshing or any other representative of JM Squared & Associates, Inc. or V-Ram Solids?
2. Did Mr. Gonzales violate NRS 281.481 (2) and (5) by his involvement in a bidding process in late 1992 by which Mr. Butch Gorshing, JM Squared & Associates, Inc. and/or V-Ram Solids were awarded a contract to sell and install equipment at the Truckee Meadows Water Reclamation Facility?
3. Did Mr. Gonzales violate NRS 281.481 (1), (2), and (4) by appearing in advertisements in 1995 and 1996 endorsing V-Ram Solids' pumps where the advertisements indicate Mr. Gonzales' official capacity as Plant Engineer for the Truckee Meadows Water Reclamation Facility?

We will take each of these questions seriatim.

The Gifts from JMS

Mr. Gonzales acknowledged that he received and accepted several gifts from Mr. Gorshing and JMS at the Sparks Plant in the fall and winter of 1992, namely some salsa and a tin of popcorn at Christmastime. These gifts, without more, would not "tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties," and, thus, Mr. Gonzales did not violate NRS 281.481 (2) by accepting the gifts. Additionally, there was no proof offered that the gifts were accepted as an augmentation from Mr. Gorshing or JMS for Mr. Gonzales' "performance of his duties as a public officer or employee," and, thus, Mr. Gonzales did not violate NRS 281.481 (4) by accepting the gifts. While it is surely possible that the circumstances surrounding a gift, such as a Christmas, birthday, wedding or baby shower present, may be so valuable, necessary, or unique that it would violate NRS 281.481 (2) or (4), such circumstances were not evident in the gifts Mr. Gonzales acknowledge receiving from Mr. Gorshing and JMS in this matter.

Additional allegations were made that Mr. Gonzales received a sleeping bag from Mr. Gorshing. Both Mr. Gorshing and Mr. Gonzales denied that this gift was made or received. The evidence regarding the supposed sleeping bag was insufficient for this Commission to conclude whether such a gift had been made. Even if such a gift had been made, the conclusion that Mr. Duff urged this Commission to draw --namely that these gifts would and did improperly influence Mr. Gonzales in the impartial discharge of his duties -- could not be sustained by such casual and inexpensive gifts. Thus, we conclude that Mr. Gonzales did not violate NRS 281.481 (2) or (4).

Mr. Gonzales' Involvement in the Bidding Process

Mr. Gonzales and Mr. Gorshing both testified that Mr. Gonzales intentionally tailored the bid specifications to match the specifications for the V-Ram pumps sold by Mr. Gorshing and JMS. In fact, their collaboration would be impossible to deny in view of their correspondence. It was also shown that the V-Ram pumps have never performed as expected and that they are so unsatisfactory that they likely will be replaced at great expense to the taxpayers of Washoe County. This Commission, though, cannot agree that these facts lead to a conclusion that Mr. Gonzales violated NRS 281.481 (2) and (5).

Two facts at hearing stand unrefuted and exculpate Mr. Gonzales. First, the pipes at the Sparks Plant were not rated to run at the operating pressures that would be generated by any pumps other than the V-Ram pumps. Had any of competitors to V-Ram produced evidence that their pumps could operate at or below the 300 p.s.i. rating of the Spark Plant's pipes, then the use of the V-Ram specifications for the bid would be questionable. As the evidence before this Commission stands, though, no pump other than the V-Ram would suffice.

Second, the evidence showed that Mr. Manatt had showed interest in the V-Ram pumps well before Mr. Gonzales and Mr. Gorshing became personal friends. In fact, up until Mr. Manatt's injury on the last day of September 1992, Mr. Gorshing and JMS had only dealt with Mr. Manatt. Mr. Gonzales' involvement in the creation of the bid specifications, and thus his involvement with the V-Ram pumps, Mr. Gorshing, and JMS, was mere happenstance. This evidence seems to belie any allegation that Mr. Gonzales was "rigging" the bid process to benefit his friend Mr. Gorshing, since it appears that the Sparks Plant's interest in the V-Ram pumps preceded by quite some time the development of the personal relationship between Mr. Gonzales and Mr. Gorshing.

Thus, the substantial evidence presented to this Commission is insufficient to support a conclusion that Mr. Gonzales violated NRS 281.481 (2) or (5).

The V-Ram Advertisements

Mr. Gonzales admitted that he consented to appear in a videotape being made by V-Ram. Mr. Gonzales denies knowing that material from the videotape was going to be used in advertisements promoting V-Ram pumps. No evidence was produced that refuted Mr. Gonzales' denial. Instead, this Commission was given supposition and surmise that Mr. Gonzales must have known how the videotape was going to be used because of the circumstances under which the videotape was made, but supposition and surmise cannot support a finding of a violation by this Commission. At most, Mr. Gonzales is guilty of poor judgment in consenting to participating in the videotape, but poor judgment is not a violation of the Ethics in Government Law.

We conclude, therefore, that insufficient evidence was presented to support a finding that Mr. Gonzales violated NRS 281.481 (1), (2), or (4) in participating in the creation of a videotape for V-Ram which was subsequently used to create advertisements in which Mr. Gonzales was portrayed as endorsing V-Ram pumps.

CONCLUSION

Insufficient evidence was presented to support a finding by this Commission that Mr. Gonzales violated NRS 281.481 (1), (2), (4), or (5) in this matter.

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 30, 1999.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman