

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING THE CONDUCT OF

JOHN C. CLAYPOOL, KEN McGUIRE, and GEORGE NEWELL, Palomino Valley General Improvement District (PVGID) Trustees

This Opinion is in response to a third-party request filed on July 2, 1997 with the Nevada Commission on Ethics (Commission) by Wanda Wright concerning the conduct of John Claypool, chairman of the Palomino Valley General Improvement District (PVGID), and Ken McGuire, trustee of the PVGID (Request #97-36), and a third-party request filed on September 8, 1997 by John Vander Meer concerning the conduct of George Newell, trustee of the PVGID (Request #97-47). The two opinion requests were consolidated for purposes of hearing and disposition. A series of public hearings were held from October 1997 through July 1998 at which numerous witnesses testified and a number of exhibits were accepted into evidence. Throughout these hearings, the PVGID board members were represented by Louis Test, and Ms. Wright and Mr. Vander Meer represented themselves. At its hearing on July 23, 1998, the Commission publicly deliberated the matter and rendered its decision. Because each of the three sets of allegations rely upon distinct facts and analyses, each will be taken up separately. The Commission now issues the Findings and Fact and Opinion which follows.

MATTER OF JOHN CLAYPOOL (Request #97-36)

FINDINGS OF FACT

1. On June 7, 1994, Mr. Claypool entered into a water rights agreement with the PVGID to allow the PVGID to pump water from one of Mr. Claypool's wells for the use of the PVGID's maintenance equipment. The agreement provided that Mr. Claypool would be paid by the PVGID for the water the PVGID used.
2. On February 28, 1995, Mr. Claypool was appointed to serve as a PVGID trustee. At the PVGID's meeting on February 28, 1995, the PVGID's legal counsel explained that Mr. Claypool could legally continue to provide water to the PVGID, but he advised Mr. Claypool to not vote upon matters related to the paying of the payment of money pursuant to the water rights agreement.
3. The decision to continue to use Mr. Claypool's well after Mr. Claypool's appointment to the PVGID was necessary because Mr. Claypool was the only resident in the PVGID who both had the necessary water capacity and was willing to allow the PVGID to draw on the water.

ANALYSIS AND OPINION

Ms. Wright's opinion request showed concern that Mr. Claypool's water rights agreement with the PVGID was allowing Mr. Claypool to personally benefit from his public service as a PVGID trustee in violation of NRS 281.481(2).^[1] We conclude that the facts in evidence do not support Ms. Wright's contentions.

Specifically, Mr. Claypool entered into the water rights agreement almost one year before he was appointed to serve as a PVGID trustee. The sequence of events shows that Mr. Claypool did not use his position as a PVGID trustee to give himself a private benefit since he was not a PVGID trustee at the time the agreement was made. Furthermore, this Commission commends the PVGID's counsel for recognizing and acknowledging the legal and ethical implications of Mr. Claypool's situation and advising Mr. Claypool from his first day of service as a PVGID trustee as to what course of action Mr. Claypool must take to avoid the legal and ethical pitfalls. This Commission will only add to Mr. Test's advice to Mr. Claypool that for any matter in which abstention is required under NRS 281.501(2), full and fair disclosure of the nature and extent of the reason for the abstention is required under NRS 281.501(3).

In view of the substantial evidence presented to this Commission, we must conclude that Mr. Claypool has not violated NRS 281.481(2) and will not do so as long as he complies with Mr. Test's and this Commission's advice.

MATTER OF KEN McGUIRE (Request #97-36)

FINDINGS OF FACT

4. Ken McGuire's son, John, and Mr. Wes Smithart, a PVGID employee, agreed that they would get together to help place a mobile home on a temporary foundation on land owned by Ken McGuire. Mr. Smithart and John McGuire had discussed that John McGuire had been having difficulties maneuvering the mobile home with a jack that John McGuire had been using.
5. The next day, Mr. Smithart showed up at the mobile home site with a loader that belonged to the PVGID. Mr. Smithart explained that he decided to bring the loader to the site because in his judgment the equipment John McGuire had been using was unsafe. John McGuire had not requested that Mr. Smithart bring the PVGID's loader to assist in the setting of the mobile home. Mr. Smithart used the PVGID's loader to lift the mobile home so that jacks could be positioned underneath the mobile home. Once the jacks were in place, Mr. Smithart drove the loader back to the PVGID yard. The total time that the PVGID equipment was in use, from driving the loader from the yard to the McGuire property and back, was approximately 45 minutes.
6. Ken McGuire was unaware that John McGuire and Mr. Smithart had made arrangements to work on the setting of the mobile home. Both Ken and John McGuire were unaware that Mr. Smithart planned to use the PVGID's loader to assist in the lifting of the mobile home. In fact, because of where Ken McGuire was during the process of setting the jacks, he was unaware that Mr. Smithart had been using the PVGID's loader until after the use of the loader was completed. Once Mr. McGuire became aware that the PVGID's loader had been used on his personal property for personal purposes, Mr. McGuire immediately called two other PVGID trustees to explain what had happened.
7. All parties involved, Ken McGuire, John McGuire, and Mr. Smithart, offered to repay the PVGID for the time that the PVGID's loader had been used on Mr. McGuire's property. Repayment had not been made by the time of hearing only because the PVGID's counsel had instructed the parties not to make such a payment until the matter could be heard and resolved by the Commission.

ANALYSIS AND OPINION

Ms. Wright's concerns regarding Mr. McGuire were that he had used PVGID equipment and personnel for his personal purposes, namely to set up his son's mobile home on land owned by Mr. McGuire, in violation of NRS 281.481(2). Ms. Wright was right in bringing this matter to the Commission's attention because if her suspicions had been borne out by her observations, a clear violation of the Ethics in Government Law would have been committed.

The evidence showed, though, that Mr. McGuire was a victim of Mr. Smithart's well-intended but, nonetheless, poor judgment. Neither of the McGuire's asked Mr. Smithart to bring the PVGID loader to the site. Ken McGuire did not even know that the PVGID's loader had been used on the site until after the use of the equipment was over. Mr. Smithart was not being paid by the PVGID at the time that he was assisting the McGuires.

Thus, the substantial evidence before this Commission showed that Mr. McGuire did not violate NRS 281.481(2). Nonetheless, this Commission admonishes Mr. Smithart never again to use PVGID equipment for personal purposes, no matter how much he thinks such use is justified. It is one thing to use the PVGID equipment to pull a resident's car out of a ditch; it is quite another to purposely drive PVGID equipment onto a resident's private property to be used for a period time for the private purposes of that resident. Any such future personal use of the PVGID's equipment by Mr. Smithart or any other PVGID employee or trustee will be deemed a willful violation of the Ethics in Government Law and may subject the employee or trustee to fines up to \$5,000.00.

MATTER OF GEORGE NEWELL (Request #97-47)

FINDINGS OF FACT

8. The PVGID maintains approximately 98 miles of unpaved roads on a budget of approximately \$230,000.00. The funds available to the PVGID are inadequate to maintain all of the roads in a perfect condition.

9. Because the PVGID's funds are limited and inadequate, the PVGID set priorities for the roads based upon their use and designation. The roads that received the highest priority were roads that were major arterials for the PVGID. These roads were used by most residents, were used by the Washoe County School District's buses, and were designated for use by emergency vehicles. Roads lower in priority were minor arterials, collectors, and local use roads. The roads lowest in priority were seasonal use roads.

10. Mr. Newell lived on Sharrock Road. Sharrock Road is designated by the PVGID as a high-priority road because it is used by the school buses and emergency vehicles.

11. The PVGID's records regarding the maintenance of the PVGID's roads showed that the priorities set by the PVGID generally controlled the use of the PVGID's limited resources.

ANALYSIS AND OPINION

Mr. Vander Meer alleged that Mr. Newell used his position as a PVGID trustee for Mr. Newell's personal benefit and advantage by assuring that roads adjacent to Mr. Newell's personal real property were better maintained than other roads in the district, thus violating NRS 281.481(2). Had the evidence showed that Mr. Newell had manipulated the PVGID's maintenance routine so that his roads were better maintained than other roads in the district, such conduct would have violated NRS 281.481(2). We conclude, though, that the substantial evidence before this Commission does not support such a conclusion.

Though there was tremendous disagreement regarding factual details, the wider factual picture that emerged was clear. The wider view of the facts showed that the PVGID is being asked to maintain too many roads with too small a budget and that this difficulty was intractable. The wider view of the facts showed that the PVGID's response to the difficulties it faced was rational, reasonable, and in good faith. The priorities set by the PVGID were the inevitable result of these difficulties, and the priorities -- not the domiciles of the trustees -- seemed to govern the allocation of the PVGID's limited resources.

In such straitened circumstances, apparent inequities will result. This Commission was impressed that the concerns expressed by the PVGID's residents who testified before the Commission were genuine and heart-felt. When privation is the rule and all are footing the bill, any apparent inequity will be noticed and magnified.

Before this Commission, and apparently as a PVGID trustee, Mr. Newell was abrasive, confrontational, and imperious. While these qualities can be quite useful in some situations, they acted like salt in the wounds of the PVGID's residents, all of whom were suffering from the intractable difficulties inherent in the operation of the district. The incivility between Mr. Newell and his constituents undermined any cooperative spirit among the similarly situated denizens of Palomino Valley and exacerbated an already unpleasant situation.

Nonetheless, rudeness and imperiousness do not constitute violations of the Ethics in Government Law, no matter how egregious. The ballot box is the proper forum to address unlikable public servants. Our surmise is that Mr. Newell's obstreperous manner invited the scrutiny of the PVGID's residents and that in such an unfriendly atmosphere, any improvement of Sharrock Road, no matter how justified, would be suspect. Regardless, the substantial evidence in this matter showed that Mr. Newell did not personally benefit from the maintenance of Sharrock Road in an unwarranted way because the maintenance of Sharrock Road was made in accordance with the reasonable and necessary priorities assigned by the PVGID board. It simply cannot be unwarranted for a cash-strapped district to expend its precious resources maintaining its most necessary roads first and best according to a rational priority system, even where some of the better maintained roads run adjacent to property owned by one of the district's trustees.

For these reasons, Mr. Newell did not violate NRS 281.481(2).

CONCLUSION

Neither Mr. Claypool, Mr. McGuire, nor Mr. Newell violated NRS 281.481(2).

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, Chairman

[\[1\]](#) 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.