

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION concerning the conduct of

MARK ASTON, Clark County Treasurer

This Opinion is in response to a request filed on August 5, 1997 with the Nevada Commission on Ethics (Commission) by Rudy Stadelmann concerning the conduct of Mark Aston, Clark County Treasurer. A public hearing was held before the Commission on September 26, 1997 at which Mr. Aston appeared and represented himself. The Commission heard testimony from several witnesses and accepted into evidence several documents. At the conclusion of its hearing, the Commission publicly deliberated the matter and rendered its decision. The Commission now issues the following Findings and Fact and Opinion.

FINDINGS OF FACT

1. Mr. Aston was at all relevant times the duly elected Clark County Treasurer. The Clark County Treasurer has three main areas of responsibility: (1) he is the treasurer of the county; (2) he manages the county's investments; and (3) he acts as the *ex officio* tax receiver for Clark County, Henderson, and Las Vegas.
2. As the tax receiver, the Treasurer's Office receives tax payments and deposits them in an account maintained separate and apart from the Treasurer's other accounts. The tax receiver account accrues hundreds of thousands of dollars of interest every year. The principle and interest are to be apportioned on a *pro rata* basis to each of the entities that contribute monies to the account.
3. On April 25, 1990, the Clark County District Attorney, through Deputy District Attorney Zev Kaplan, informed an internal auditor that the Treasurer was not allowed to "get to use this money [proceeds generated by the tax receiver account] at his own discretion. The Treasurer must follow the budget and purchasing acts applicable to local governments to receive appropriations for personnel and capital." Mr. Aston was aware of this ruling by the District Attorney.
4. Mr. Aston's budget is set by the Clark County Commission. His budget is administered by and through the County Manager. Mr. Aston's requests for supplements to his budget to hire additional personnel or purchase additional equipment must be approved by the County Manager and the Clark County Commission. Mr. Aston must purchase goods and materials through the county's regular processes.
5. At hearing, Mr. Aston indicated dissatisfaction and frustration resulting from his relations with the County Manager because Mr. Aston felt that his office required additional personnel and equipment to perform its duties, but Mr. Aston's requests were denied or were not fully met.
6. Mr. Aston used the tax receiver account to purchase or pay for video games, drinking water for the office, CD-ROM games, a \$2,000 bookcase for Mr. Aston's office, two sets of Christmas cards, an employee lunch, a legal settlement, and consultant services provided by Nevada Institutional Investments (NII) and Mr. Kaplan. Mr. Aston explained that the video games, drinking water, and CD-ROM games were not actual expenditures of public money because Mr. Aston claimed that his office's employees paid him for these items and he deposited the funds in the account to cover the checks he had written for these items. The internal audit could not substantiate that funds had been deposited for some of these items, and other of these items were not repaid by personal funds until after the auditor demanded repayment. The internal auditor determined that any payments made from the tax receiver's account other than for apportionment payments to the various entities were improper.
7. Chris Bunker was an employee of the Treasurer's Office, including at the time that Mr. Aston was Treasurer. Zev Kaplan was a deputy district attorney assigned to represent the Treasurer's Office, including at the time that Mr. Aston was Treasurer. When both Mr. Bunker and Mr. Kaplan left their respective public employments, Mr. Aston executed consulting contracts with both of them either before the person left public employment (Mr. Kaplan) or immediately after the person left public employment (Mr. Bunker/NII). Mr. Bunker's/NII's contract was entered in

March 1993 and was terminated in February 1996. Mr. Kaplan's contract for legal services was entered in April 1995 and was terminated in February 1996. Mr. Aston did not use the usual county hiring or contracting processes for these contracts, did not seek any other applicants for these contracts, had never had such private consulting contracts before, and did not seek or receive prior approval for these contracts with either the County Manager or the Clark County Commission. Both Mr. Bunker/Nil and Mr. Kaplan performed essentially the same functions for the Treasurer's Office before and after they left their respective public employments. The payments to Mr. Bunker totaled between \$140,000 and \$150,000 at the rate of approximately \$5,000 per month. The payments to Mr. Kaplan totaled approximately \$27,500 at the rate of approximately \$2,500 per month. Some of the payments were made out of the tax receiver's account.

8. Because of his frustration at not receiving some of his budgetary requests, including requests for computer equipment that Mr. Aston considered necessary, Mr. Aston solicited Merrill Lynch to donate computers to his office. Merrill Lynch donated many computers and other equipment to Mr. Aston for use at the Treasurer's Office. The donations were not formally accepted by the Clark County Commission until after the donations became known to the Clark County Commission through the internal audit. No accounting was ever made of what was donated and whether all that was donated was, in fact, in the Treasurer's Office for the use of the Treasurer's Office. The Treasurer's Office uses Merrill Lynch as one of its investment services. Mr. Aston testified that his office had approximately \$150,000 in the control of Merrill Lynch.

9. When tax payments were delinquent, sometimes Mr. Aston would authorize the waiver of the penalty due from the taxpayer resultant from the delinquency. For most of the time that Mr. Aston gave such waivers, he kept no records of how much the waiver was or to whom the waiver had been granted. One estimate was that tens of thousands of dollars in penalties had been waived. Some of the waivers were for acquaintances and prominent politicians.

ANALYSIS AND OPINION

Four issues arose as a result of Mr. Stadelmann's request and the testimony and evidence at hearing. We will take each of these issues separately.

The Use of the Tax Receiver's Account

As was explained to this Commission, the Treasurer acts as the *ex officio* tax receiver for Clark County, Henderson, and Las Vegas. The evidence showed that this account accrues hundreds of thousands of dollars in interest that must be apportioned and returned to the governments participating in the account. The money in the tax receiver's account was public money. None of the money was Clark County's or the Treasurer's until the money was apportioned and disbursed to Clark County's general account.

At times, Mr. Aston used the tax receiver's account as his office's slush fund. He purchased purely personal items, such as video games, CD-ROMS, and water, with this account. He purchased the services of Mr. Bunker/Nil and Mr. Kaplan from this account. He bought himself an expensive curio cabinet/bookcase for his personal office, a bookcase that, as the internal auditor euphemistically put it, was not "standard, government-type furniture." Mr. Aston bought Christmas cards with this account.

It is clear to this Commission that Mr. Aston used the tax receiver's account to purchase items that he could not purchase through his regular county budget. In fact, that is precisely why Mr. Aston used the tax receiver's account for these purchases, so he could get what he felt he was due but could not get through the county's regular channels. Most disturbing was Mr. Aston's attitude and demeanor at hearing and his actions that gave rise to the hearing. Many of the personal expenditures made from the tax receiver's account were not repaid until they had been discovered by the internal audit, and even then, only after demand had been made for the repayment. The internal auditor could not confirm, even as late as the time of hearing, whether Mr. Aston had fully repaid the tax receiver's account for the personal expenditures. Mr. Aston stated several times at hearing that he felt he could make such use of the tax receiver's account because no statute or regulation told him he could not do it, but it appeared that the District Attorney had already told Mr. Aston that such use of the account was improper and wrong.

Mr. Aston's use of the tax receiver's account and his rationale for such use were wrong, plain and simple. The money in the tax receiver's account was public money. Use of public money for personal purposes and purchases is

and always will be a violation of the public trust and the Ethics in Government Law. There were other ways Mr. Aston could have legitimately enhanced his office budget. A responsible public official does not and cannot simply confiscate public funds within his control to give himself and his office things that he could not obtain through the usual and ordinary governmental processes. The public's money must be handled with the utmost care and accountability; Mr. Aston's constituents deserved no less. Mr. Aston's misuse of the tax receiver's account for his personal purposes was wrong, petulant, juvenile, and damaging to the public's trust and respect. It also violated NRS 281.481(2) and (7).

The Contracts With Mr. Bunker/Nil and Mr. Kaplan

Put plainly, the substantial evidence in this Commission's record showed that Mr. Bunker and Mr. Kaplan were paid tens of thousands of dollars to do in their private capacities what they had previously done for less in their public capacities. The contracts were made immediately after Mr. Bunker and Mr. Kaplan left their public employments. The contracts were never put out to public advertisement. The Treasurer's Office had not used such consulting services in the past. The contracts were never put before the County Manager or the Clark County Commission. In fact, some of the payments for the contracts were made out of the tax receiver's account. All of these facts indicate that Mr. Aston knew that these contracts were ethically questionable and that he did not want these contracts to be easily discovered or scrutinized.

It may be that Mr. Bunker/Nil and Mr. Kaplan performed ably under their respective contracts. It may be that Clark County benefited from Mr. Bunker's/Nil's and Mr. Kaplan's consulting services. It may be that Clark County saved some money through the use of these contracts. All of that is beside the point. NRS 281.481(2) prohibits a public officer such as Mr. Aston from using his position to grant "unwarranted privileges, preferences, exemptions or advantages for ... any other person." Mr. Aston clearly gave Mr. Bunker/Nil and Mr. Kaplan substantial privileges, namely considerable steady income (\$60,000/year to Mr. Bunker/Nil and \$30,000/year to Mr. Kaplan) upon which they could build their fledgling private practices. What made those privileges unwarranted were the circumstances under which the contracts were formed. Had the contracts been above-board, arms-length transactions formed in the county's usual and ordinary processes, they may have been "warranted," and thus not in violation of NRS 281.481(2). As the contracts were actually made, though, they were "unwarranted" because none of the usual and ordinary assurances provided by arms-length negotiation were evident. This Commission and the public served by Mr. Aston will never know whether these contracts were needed, prudent, or fairly entered into because of the way in which Mr. Aston constructed and entered into these contracts.

In granting Mr. Bunker/Nil and Mr. Kaplan unwarranted privileges by entering into the consulting contracts under the circumstances evidenced in this manner, Mr. Aston violated NRS 281.481(2).

The Computers Donated by Merrill Lynch

When Mr. Aston contacted Merrill Lynch and solicited its donation of computers putatively for the use of the Treasurer's Office, Mr. Aston violated NRS 281.481(1).

NRS 281.481 (1) prohibits a public officer such as Mr. Aston from seeking or accepting "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." By Mr. Aston's own testimony, he perceived himself and his office to be victims of bureaucratic neglect and in desperate straits. A gift of tens of thousands of dollars of computer equipment under such perceived need would surely "tend improperly to influence a reasonable person in [Mr. Aston's] position to depart from the faithful and impartial discharge of his public duties."

The rationale underlying NRS 281.481(1) is two-fold. First, NRS 281.481(1) is intended to protect the public from the evil of a public servant who could be tempted to stray from the impartial service to the public through gifts and other similar temptations. Second, and more important to the instant matter, NRS 281.481(1) is intended to protect people who transact business with the government from coercion. In Nevada, a public official or employee cannot extract a donation as an untold price for doing business with the government. Mr. Aston crossed the invisible line provided in NRS 281.481(1) when he solicited thousands of dollars of computer equipment from a company that does considerable business with his office. Every investment decision regarding Merrill Lynch made by Mr. Aston after the gift could be perceived to be tainted, fairly or unfairly. Mr. Aston should never have put Merrill Lynch in the

untenable position that he put it in.

Since a reasonable person in Mr. Aston's circumstances would tend to be improperly influenced to depart from the impartial discharge of his public duties, Mr. Aston's seeking and acceptance of the donated computers from Merrill Lynch violated NRS 281.481(1).

The Waiver of Tax Penalties

The evidence presented at the hearing showed that Mr. Aston granted an unknown number of waivers of tax penalties to an unknown number of people in an unknown amount during a period of years in which Mr. Aston and other county treasurers were not authorized, as a matter of law, to make such waivers. The reason so much detail is unknown is the result of Mr. Aston's conscious design, since he simply chose not to keep such records. Mr. Aston did admit that some of the waivers were given to acquaintances and prominent local politicians and that some of the waivers were for considerable amounts of money. More than that we will never know.

During the period in which he was not legally empowered to make penalty waivers, each and every waiver constituted the granting by Mr. Aston of an "unwarranted exemption" prohibited by NRS 281.481(2), since the term "unwarranted" will always mean, among other things, "not allowed by law." Thus, Mr. Aston violated NRS 281.481(2).

The Willfulness of Mr. Aston's Violations

All of Mr. Aston's violations found above were willfully committed under NRS 281.551(1). In fact, Mr. Aston's willfulness is the essence of each of the violations. As evidenced by his demeanor and testimony before this Commission and by his actions that gave rise to this matter, Mr. Aston was a reckless and obstreperous public servant. Rules that thwarted Mr. Aston's aims were disregarded or subverted. Mr. Aston actively, intentionally, and willfully chose courses of action intended to conceal his actions and to thwart accountability once the improper actions were detected. Through his actions, public money with which he was entrusted was endangered, misused, and unaccounted for. We conclude that Mr. Aston's violations of the Ethics in Government Law were willful under NRS 281.551(1), but we assess no civil penalty.

CONCLUSION

Based upon the substantial evidence in the record of this matter, the Commission concludes that Mr. Aston violated NRS 281.481(1), (2), and (7). Though we conclude that these violations were willful under NRS 281.551(1), we do not assess Mr. Aston any civil penalty.

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