

Opinion No. 98-21

IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING

BRUCE BRESLOW, Mayor of Sparks

This opinion is in response to a third party opinion request filed with the Nevada Commission on Ethics (Commission) by David Farside concerning the conduct of Sparks Mayor Bruce Breslow. An evidentiary hearing was held by the Commission on February 19, 1999, in Reno, Nevada at which Mr. Farside and Mr. Breslow presented evidence. Deana McIntyre-Breslow, Terri Thomas, Terry Reynolds, Philip Zive, and John Mayer also testified. Mr. Farside represented himself. Mr. Breslow was represented by Kent Robison. Chester Adams, the Sparks City Attorney, was also present. Based on the testimony and evidence presented at the hearing, the Commission now issues the Findings of Fact, Conclusions and Opinion which follow.

FINDINGS OF FACT

1. At all times pertinent to this matter, Bruce Breslow was the mayor of Sparks, Nevada.
2. Diana McIntyre-Breslow, former wife of Bruce Breslow, testified that Mr. Breslow told her in the summer of 1997 that he was instructed by Sparks City officials that he should not use his cell phone to make personal calls.
3. Ms. McIntyre-Breslow also testified that she and her friends had used Mr. Breslow's cell phone to make personal calls. She also testified that she and Mr. Breslow took the phone out-of-state with them on vacations where they used the phone for personal calls. Even though the cell phone had a City of Sparks inventory tag on the front of it, Ms. McIntyre-Breslow stated that she was not aware that the phone belonged to the City of Sparks, rather than Mr. Breslow, until the summer of 1997.
4. Terri Thomas has been the finance director for the City of Sparks for over eight years. She testified that there have been a number of occasions where her staff had brought bills to her showing roaming charges and long distance charges on Mr. Breslow's cell phone bill. She said she has previously written memos to others stating that this was a violation of city policy.
5. Her main concern regarding Mr. Breslow's cell phone bills were the excessive costs to the city for the phone, the use of the phone outside the city and the long distance calls. She stated that the general consensus around the office was that Mr. Breslow utilized more airtime than others who had city issued cell phones. She further asserted that since 1991 it was common knowledge that Mr. Breslow's cell phone bill reflected personal calls. She also testified that no money was set aside in the mayor's budget for personal cell phone calls.
6. Ms. Thomas testified that if she had any problems, she communicated directly with the city manager. She testified that she had specifically asked the city manager to obtain reimbursement from Mr. Breslow for long distance calls he made using his city issued cell phone. However, she did not recall ever seeing payment from Mr. Breslow for his cell phone long distance charges.
7. Ms. Thomas testified that she never had a personal conversation with Mr. Breslow regarding his cell phone usage but that she had contacted the city manager about it.
8. Finally, Ms. Thomas testified that she first became aware of Nevada's Ethics in Government Practice Act when she completed her first Statement of Financial Disclosure approximately three years ago. She also stated that the City of Sparks now has a policy that precludes employees from using city issued cell phones for personal use.
9. Terry Reynolds is the Sparks City Manager and has been so for almost seven years. When he became city manager, he was not familiar with the city's cell phone policy. Mr. Reynolds stated that he is the boss of salaried Sparks employees, but not Sparks elected officials. He stated that the Sparks City Council regulates its own conduct.
10. Mr. Reynolds stated that the Sparks policy which regulates cell phone usage for Sparks employees had not

been disseminated to council members. He is not aware of any disciplinary actions taken against any Sparks employees regarding cell phone use.

11. Mr. Reynolds testified that he knew Mr. Breslow was making personal calls on his city issued cell phone but he never told Mr. Breslow not to use the phone for personal calls. He did tell Mr. Breslow to try and cut back on its use and to refrain from using the cell phone in public because the media would pick up on it. He also stated that in January 1997, he told Mr. Breslow not to use the phone for long distance or roaming calls because it would be more cost effective to make these calls from a landline.

12. Philip Zive has been a Sparks City Councilman for over five years. He did not know that Mr. Breslow's cell phone belonged to the City of Sparks until he used it one year ago.

13. Mr. Zive believes Mr. Breslow should have a city issued cell phone. When this issue appeared on a Sparks City Council agenda, Mr. Zive voted against an audit of Mr. Breslow's cell phone usage because he thought the audit would cost more than the costs of the calls Mr. Breslow was making. Further, Mr. Zive didn't believe the issue of whether or not Mr. Breslow should be able to use the city issued phone for personal calls ever came up.

14. John Mayer has been a Ward I councilman for eight years. Mr. Mayer knew that Mr. Breslow had a city issued cell phone prior to Mr. Farside's opinion request. Mr. Mayer saw Mr. Breslow use the cell phone to call his son to tell him he was running late.

15. Mr. Mayer knew that Mr. Breslow turned in his cell phone in June 1998 and that Mr. Breslow had paid for all his personal long distance and roaming charges. As such, he voted against the audit because he was happy with the payment to the city for the long distance and roaming charges. However, when voting to deny the audit, he admitted that he did not look at any of Mr. Breslow's cell phone bills. He also felt that Mr. Breslow had been through enough and he felt that Mr. Breslow's behavior was admirable.

16. Mr. Mayer never talked to Mr. Breslow about his use of the city issued cell phone for personal use. He would not approve of Mr. Breslow using the city issued cell phone to conduct personal business which would lead to Mr. Breslow making money for himself.

17. Bruce Breslow has been the mayor of Sparks since 1991. He married Diane McIntyre-Breslow on September 7, 1997. They were married eleven weeks before divorce proceedings began.

18. Mr. Breslow testified that when he was issued the city cell phone, he was not aware of NRS 281.481 and that he was never told that he could not use the phone for personal use or private business calls. He also stated that both he and Ms. McIntyre-Breslow used the city issued cell phone for personal calls. Furthermore, he was never told at city council meetings or by the city attorney that he was violating the law when he used the city issued cell phone for personal business or personal calls.

19. Mr. Breslow testified that he thought the conversations with Mr. Reynolds, the Sparks City Manager about the cell phone usage for calls generating long distance or roaming charges concerned economics, not personal use. He further testified that he did not intentionally violate NRS 281.481(7) regarding the misuse of government property.

20. Mr. Breslow testified that when he originally asked the city for the cell phone, he told them he wanted to return all calls, not just calls relating to city business. As such, he testified that when he was issued the cell phone by the city, he thought he could use it for official city business, personal business, and personal calls to his family. He admitted making calls to both his family and for personal business on the city issued cell phone.

21. When he was originally issued the cell phone, Mr. Breslow testified that he did not seek a legal opinion from the Sparks City Attorney as to whether or not he could use the city issued cell phone for personal business and family calls. Mr. Adams, the Sparks City Attorney stated that he never told Mr. Breslow that he could not use the city issued cell phone for personal use.

OPINION

The Commission has jurisdiction in this matter pursuant to NRS 281.511(l). Based upon the Findings of Fact, the Commission concludes that Mr. Breslow is a public officer as defined in NRS 281.4365.

NRS 281.481(7) and NRS 281.551(6) contain the relevant statutory provisions in this matter. NRS 281.481(7) provides:

7. A public officer or employee, other than a member of the legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:
 - (a) A limited use of governmental property, equipment or other facility for personal purposes if:
 - (1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;
 - (2) The use does not interfere with the performance of his public duties;
 - (3) The cost or value related to the use is nominal; and
 - (4) The use does not create the appearance of impropriety;
 - (b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or
 - (c) the use of telephone or other means of communication if there is not a special charge for the use.If a government agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

NRS 281.551(6) states:

6. An action taken by a public officer or employee or former public officer or employee relating to NRS 281.481, 281.491, 281.501 or 281.505 is not a willful violation of a provision of those sections if the public officer or employee:
 - (a) Relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents or by the employer of the public employee;
 - (b) Was unable, through no fault of his own, to obtain an opinion from the commission before the action was taken; and
 - (c) Took action that was not contrary to a prior opinion issued by the commission to the public officer or employee.

The questions before the Commission are: (1) whether Mr. Breslow's use of the City of Sparks issued cell phone for personal business and family calls violated NRS 281.481(7); and (2) whether or not these violations were willful.

After careful analysis, the Commission determined that NRS 281.551(6) does not offer Mr. Breslow a safe harbor. Mr. Breslow never sought legal advice from the Sparks City Attorney's office about using his cell phone for personal business or family calls and never sought a confidential first party opinion request from this Commission regarding the use of his cell phone.

Mr. Breslow is not a member of the legislature so he is not exempt from NRS 281.481(7). As such, the Commission must focus on the language of NRS 281.481(7) and apply that language to Mr. Breslow's actions regarding the use of his cell phone.

NRS 281.481(7) clearly states that "this section does not prohibit the use of telephones ... if there is not a special charge for that use." However, it is clear from the testimony and exhibits that Mr. Breslow's cell phone use created special charges for the City of Sparks. Depending on the air package, charges are incurred each time a call is made or received on a cell phone. Even if the phone call is absorbed by the air package, the incoming or

outgoing call diminishes the remaining airtime. Long distance calls always generate additional charges. Finally, depending on where the call is made or received, additional roaming charges may be incurred. Unlike a landline that comes with unlimited free local calls in Nevada, all calls made or received with cell phones generate some type of charge.

The Commission feels that it is common sense for a public officer or employee to realize that taxpayers should not be expected to pay for a public officer's or employee's cell phone call to schedule a personal haircut, contact friends, or to conduct personal business. That is not an appropriate use of taxpayer dollars. To allow such use would be against public policy and a violation of NRS 281.481(7).

As such, after analyzing the facts in this matter, the Commission concludes that Mr. Breslow did violate NRS 281.481(7) when he used his cell phone for personal business. Furthermore, based on the testimony presented at this hearing, including Mr. Breslow's own statements, the Commission finds that Mr. Breslow's violation was willful. Since the Commission determined that Mr. Breslow's violation was willful, pursuant to NRS 281.551, the Commission also imposes a civil penalty of One Thousand Dollars (\$1,000.00). This penalty must be made payable to the State of Nevada Controller's Office and received by 5:00 p.m. Pacific Standard Time on July 15, 2000. Finally, the Commission agrees to accept the amount of Three Thousand One Hundred and Thirty-Nine Dollars (\$3,139.00) as agreed upon by all parties, as restitution to the City of Sparks for Mr. Breslow's personal calls on the City of Sparks cell phone.

This is not to say, however, that the Commission feels public officers or employees should not have government issued cell phones. The Commission realizes that cell phones serve a valuable purpose in today's society in that they allow public officers and employees to conduct state business when they are away from their offices, waiting in airports, in between off-site meetings, etc. However, the Commission wishes to make it clear that government issued cell phones should only be used for official business, not personal use.

Finally, the Commission wishes to compliment Mr. Farside on the manner and methodology he used during the processing of his opinion request. He exemplifies how matters should be handled and gave the Commission a wonderful lesson in civics.

CONCLUSION

In this specific instance, the Commission found that Mr. Breslow's personal use of his government issued cell phone violated NRS 281.481(7). Furthermore, the Commission determined that the violation was willful and imposed a civil penalty of One Thousand Dollars (\$1,000.00) as allowed pursuant to NRS 281.551. Government issued cell phones must be used only for official business. It is common sense to realize that the taxpayers of this State should not be expected to pay for personal calls made on a government issued cell phone. This is not an appropriate use of taxpayer dollars.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances. The provisions of the NRS 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: May 23, 2000.

NEVADA COMMISSION ON ETHICS

By: /s/ MARIO RECANZONE, Vice-Chairman