

## Opinion No. 98-41

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

#### RICHARD KIRKLAND, WASHOE COUNTY SHERIFF

This Opinion is in response to a first-party request filed on August 13, 1998 with the Nevada Commission on Ethics (Commission) concerning the conduct of Richard Kirkland, Sheriff of Washoe County. Mr. Kirkland waived his right to confidentiality. A public hearing was held on September 18, 1998. Mr. Kirkland appeared and represented himself. Mr. Kirkland testified and presented evidence which was accepted by the Commission. The Commission continued this matter for further discussion at a telephone conference on September 24, 1998. At the conclusion of the hearing, 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. On August 4, 1998, the Senior Deputy Attorney General who represents the Commission sent a letter to Madelyn Shipman, Chief Deputy District Attorney, Civil Division, Washoe County District Attorney's Office, expressing the concern he and the Chairwoman of the Commission shared regarding Mr. Kirkland's use of his office, title, employees, time, equipment, and other physical accouterments in a televised political advertisement endorsing Jim Hardesty's campaign for district judge. The advertisement at issue showed Mr. Kirkland in uniform with his name and title mentioned and also showed other Sheriffs employees working with county jail inmates in their black-and-white striped outfits while Mr. Kirkland described programs he and his department had instituted with a brief endorsement of Mr. Hardesty at the end of the advertisement.
2. On August 11, 1998, Mr. Kirkland responded to the Commission's letter. Mr. Kirkland explained that prior to endorsing any candidate he informally discussed the political endorsement process with Washoe District Attorney Richard Gammick and that they agreed that as long as Mr. Kirkland refrained from using the term "Sheriffs Office" and limited his description to his name and job title, Mr. Kirkland could endorse political candidates. Subsequent to Mr. Kirkland's receipt of Mr. Ling's letter, Mr. Gammick and Ms. Shipman removed themselves from the process and refused to give advice on how to conform with the law.
3. Mr. Kirkland testified that the photos and video for the Hardesty advertisement were obtained through normal public access. No employee or inmate was forced to be photographed or videotaped, and the process of videotaping did not interfere with the day-to-day operation of the sheriffs office. All efforts were made to avoid using taxpayers' money. Mr. Kirkland was videotaped in the Camrac studios in front of a blank green background screen that was later electronically edited. Two commercials were made, one during Mr. Kirkland's lunch hour and one at 7:00 a.m., before Mr. Kirkland went on shift.
4. Mr. Kirkland was aware of and consented to the digital editing process for the advertisement that showed him appearing in front of a portion of the jail facility even though he was not filmed there.
5. Mr. Kirkland testified that although Mr. Hardesty offered to pay for the use of the Washoe County Jail facility, his offer was denied on the basis of Mr. Kirkland's policy of making the jail facility available to the public and to any candidate. Mr. Kirkland explained that he had a history of authorizing the use of the jail facility free of charge for candidates, even for candidates that he did not endorse. The filming was done at the candidate's cost and subject to the Sheriffs Office's restrictions. Those restrictions required the absence of staging of scenes, the filming of employees or inmates only with their permission, and filming without interfering with security or normal operations.
6. Mr. Kirkland testified that he wore his uniform everyday as his "business suit." He also considered himself to be "on duty" twenty-four hours a day. Mr. Kirkland also testified that his office's policy was to allow the Sheriff and his deputies to endorse candidates.
7. At the conclusion of the September 18, 1993 meeting, the Commission deferred its decision until after the Washoe County District Attorney's Office had an opportunity to clarify whether the Washoe County Sheriff and his

deputies were subject to certain Washoe County Code (WCC) provisions.

8. On September 24, 1998, the Commission held a telephonic meeting at which it considered a written statement from Mr. Kirkland. Mr. Kirkland indicated his interim decision that, pending the Commission's final decision, he would refrain from wearing his uniform in any future political activity because of the negative perception it engendered. Also, at the September 24, 1998 meeting, the Commission considered the written opinion of Ms. Shipman in response to a letter from the Commission dated September 21, 1998. Ms. Shipman opined that Mr. Kirkland was an employee covered by the provisions of WCC Chapter 5 to the extent that he was a county officer in the unclassified service as defined in WCC § 5.093(l)(a) and a public officer of the county as defined in WCC § 5.045. Ms. Shipman did not consider Mr. Kirkland or his deputies to be prohibited from using their uniform or badge while publicly endorsing candidates as it would not be done for personal gain or advantage, but to help other persons. Ms. Shipman also opined that while WCC § 5.341 applied to Mr. Kirkland and generally to his deputies, the endorsement of candidates did not appear to be a specifically prohibited activity of the Hatch Act or the case law construing that act. It was Ms. Shipman's belief that the Merit Systems Protection Board as set forth in 5 U.S.C. § 1504 had the sole authority to interpret the Hatch Act.

### ANALYSIS AND OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(1) because Mr. Kirkland is a public officer as defined in NRS 281.4365.

The question raised by Mr. Kirkland is whether his use of any or all of his position, title, badge, uniform, facilities, deputies, or other accouterments in political advertisements endorsing the candidacies of individuals might violate either NRS 281.481(2) or (7).<sup>[1]</sup> This is a question of first impression with this Commission and requires a careful analysis of the Ethics in Government Law, the federal Constitution, federal statutes, case law, and the WCC.

The First Amendment to the United States Constitution protects political speech, but this protection is not absolute. The Hatch Act (5 U.S.C. §§ 1501-1508 and 7324 et seq.) prohibits all federal employees and some state and municipal employees from using their official authority or influence "for the purpose of interfering with or affecting the result of an election. . ." 5 U.S.C. § 1502(a)(1); 5 U.S.C. § 7324(a)(1). The Hatch Act has been upheld as constitutional. *United States Civil Service Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908 (1973).

Many states, counties, and municipalities have adopted "little Hatch Acts" that similarly seek to prohibit or limit the political activities of their employees. These "little Hatch Acts" have been upheld under a variety of constitutional challenges. *Wachsman v. City of Dallas*, 704 F.2d 160 (5th Cir. 1983); *Paulos v. Breier*, 507 F.2d 1383 (7th Cir. 1974); *Purdy v. Kreisberg*, 391 N.E.2d 1307 (N.Y. 1979); *Ferguson Police Officers v. City of Ferguson*, 670 S.W.2d 921 (Mo.App. 1984). In fact, three of these cases (*Paulos v. Breier*, *Purdy v. Kreisberg*, and *Ferguson Police Officers v. City of Ferguson*) upheld challenges made to restrictions on the political activity of law enforcement officers.

WCC § 5.337(1) provides:

Employees shall not engage in any employment, activity or enterprise which is inconsistent, incompatible or in conflict with their duties as Washoe County officers and employees, or with the duties, functions or responsibilities of their appointing authorities or departments by which they are employed, including but not limited to:

1. The use for private gain or advantage of the county's time, facilities, equipment and supplies, **or the badge, uniform, prestige or influence of their county positions of employment.** (Emphasis supplied.)

Additionally, WCC § 5.341, Washoe County's "little Hatch Act" provision, provides in pertinent part:

Employees shall have the right to vote as they choose and to express their political opinions on all subjects without recourse, except that no employee shall:

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2. Engage in political activity during the hours of his county employment with the purpose of improving the chances of a political party or individual seeking office, or at any time engage in political activity for the purpose of securing preference for promotion, transfer or salary advancement.
3. While off duty, engage in political activity to an extent that it impairs his attendance or efficiency as an employee.
4. As an employee in a department administering federally aided programs, engage in political activities at any time which are forbidden by federal law.

All of this law provides a backdrop for our examination, interpretation, and application of NRS 281.481(2) and (7). Taking up the analysis of NRS 281.481(2) first, this Commission finds that an endorsement by Mr. Kirkland that shows his badge, uniform, and official title would result in an "advantage" to "any other person," namely to the candidate endorsed by Mr. Kirkland. Mr. Kirkland's endorsement is sought precisely because the endorsement is perceived to have value. The question under NRS 281.481(2), though, is whether the advantage worked by Mr. Kirkland's use of his official position and accouterments is "unwarranted," because NRS 281.481(2) prohibits only the conferral of "unwarranted" advantages.

While the term "unwarranted" is not defined in the Ethics in Government Law, we are satisfied that at the very least an "unwarranted" advantage under NRS 281.481(2) would be an advantage conferred in violation of applicable law. Thus, if it was unlawful under the Hatch Act or the WCC for Mr. Kirkland to use his official position, title, or accouterments to endorse a candidate, then Mr. Kirkland's doing so would be tantamount to the conferral of an unwarranted advantage under NRS 281.481(2).

Because this Commission's analysis under NRS 281.481(2) turns on whether Mr. Kirkland's endorsements violated the WCC, we sought the advice of the Washoe County District Attorney for his interpretation of the WCC. The cooperation and assistance of Mr. Kirkland, Mr. Gammick, and Ms. Shipman throughout this matter was appreciated and commendable. The District Attorney, through Ms. Shipman, opined that although WCC §§ 5.337(l) and 5.341 did apply to Mr. Kirkland, these provisions did not prohibit the types of activities and use of position Mr. Kirkland was making in his endorsements at issue in this matter. We will give deference to the import of this opinion.

Thus, based upon the District Attorney's interpretation of WCC §§ 5.337(l) and 5.341, we must conclude that Mr. Kirkland's use of his position, title, employees, badge, and uniform in his endorsements and advertisements on behalf of candidates does not violate NRS 281.481(2) because such use was not "unwarranted."

The analysis under NRS 281.481(7) is different. The general rule under NRS 281.481(7) is a strict prohibition of the use by a public officer or employee of "governmental time, property, equipment or other facility to benefit his personal or financial interest." Under the previous version of NRS 281.481(7), this Commission has opined that the general prohibition in NRS 281.481(7) prohibits the use of governmental time, personnel, equipment, supplies, and telephones for personal political or campaign purposes. *Matter of Bob Nolen*, NCOE Opinion No. 96-26; *Matter of Lonnie Hammargren*, NCOE Opinion No. 95-35.

In 1997, the Legislature added a list of three exceptions to the general rule. The exception pertinent to this matter is found at NRS 281.481(7)(a) which provides:

- . . . This subsection [NRS 281.481(7)] 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.

The evidence adduced at the hearing in this matter showed that Mr. Kirkland satisfied the dictates of NRS 281.481(7)(a)(1), (2), and (3). In fact, Mr. Kirkland was very careful in how and when he filmed his portion of the advertisements at issue. There was no cost to the public for either his participation or the filming of his deputies, since the filming of the deputies occurred while they were publicly engaged in their regular duties.

Our analysis, therefore, turns on whether Mr. Kirkland's use of his title, position, uniform, badge, or employees in his endorsement advertisements created "the appearance of impropriety." The starting point of our analysis is an incontrovertible premise that it would never be proper for a governmental agency to endorse a political candidate. Neither the State of Nevada, Washoe County, nor the City of Reno has any business endorsing the candidacy of a supreme court justice, state legislator, federal legislator, sheriff, district judge, or dogcatcher. Tyranny would be the inevitable mischief that would be worked by a government that could exercise its immense resources to influence the election of the very people that would work within that government.

It follows that if the government cannot endorse candidacies, then its elected, appointed, or employed agents likewise cannot create the impression of government sanction. It is for this reason that the Hatch Act and the little Hatch Acts, including WCC § 5.341, prohibit or limit certain political activities for governmental actors. We find that some aspects of Mr. Kirkland's endorsement advertisements could create such an appearance of impropriety. In particular, we find that the use of his uniform, badge, and his uniformed deputies creates an improper appearance that his endorsement was an official endorsement by Washoe County or the Washoe County Sheriffs Office. This appearance is especially problematic where the office for which Mr. Kirkland's endorsement was district judge. Any appearance of endorsement by the Washoe County Sheriff's Office of one judicial candidate would imply that the favored candidate would better enforce the criminal law and that the public would be less protected if the other candidate were elected. Clearly such a message might greatly and unfairly effect an election.

The uniform and the badge are the critical difference. An endorsement from a citizen named Richard Kirkland is very different from an endorsement from Washoe County Sheriff Richard Kirkland. Similarly, an endorsement by a citizen in a suit and tie or a polo shirt is very different from an endorsement from a man whose uniform and badge allow him to suspend a person's civil rights and to lawfully use force to do so. Mr. Kirkland's popularity as the Washoe County Sheriff with the public he serves is hard earned and deserved; it should not be exploited to further the political ambitions of candidates who have found Mr. Kirkland's personal favor.

We discern a hard line. A public officer will **not** create an appearance of impropriety under NRS 281.481(7)(a)(4) by endorsing a person's candidacy if he or she uses his or her name and official title in an advertisement. A public officer will create an appearance of impropriety under NRS 281.481(7)(a)(4) if, in the course of endorsing a person's candidacy, he uses the physical accouterments of his office or position to bolster the endorsement. So, for example, a public officer should not use his uniform, badge, employees, private office, or other non-public facilities for the purposes of making an endorsement advertisement. At all times, public officers should temper their constitutional right to speak out on political concerns with a common-sensical realization that the reason their endorsement is sought is because of their public position and the respect and deference that that position is accorded by the public.

## CONCLUSION

Based upon the record, this Commission concludes that Mr. Kirkland's endorsement advertisements as he had proposed or participated in did not violate NRS 281.481(2). Furthermore, this Commission advises that in the future Mr. Kirkland not use his uniform, badge, employees, or other physical accouterments of his office in endorsement advertisements so as to avoid the appearance of impropriety under NRS 281.481(7)(a). Mr. Kirkland is commended for seeking this opinion and for making this entire matter public for his guidance and the guidance of other public officials in the future.

## 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: May 7, 1999.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman

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[\[1\]](#) NRS 281.481(2) and (7) provide as follows:

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.

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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 an 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 telephones or other means of communication if there is not a special charge for that use. If a governmental 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.