

BEFORE THE NEVADA COMMISSION ON ETHICS

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

MIKE NEVIN, Storey County Fire Chief

This Opinion is in response to a third-party request for opinion filed with the Nevada Commission on Ethics (Commission) by Robert A. Fielding concerning the conduct of Mike Nevin, Storey County Fire Chief. A public hearing was held by the Commission on February 18, 1999, in Reno, Nevada. The Commission received testimony from Mr. Nevin, Mr. Fielding, Charles Haynes, Gary Hames and Mary Lou Walling. At the conclusion of the hearing the Commission publicly deliberated the matter and rendered its decision. The Commission now issues the Findings of Fact and Opinion which follows.

FINDINGS OF FACT

1. On October 21, 1974, Storey County entered into a fire protection agreement with the Nevada Division of Forestry (NDF) to more efficiently protect 150,400 acres of state and private lands in Storey County from fire damage. The agreement created a fire district pursuant to NRS 473. The agreement specified that during the period of November 1 through April 30, the agreement could be terminated by one party giving written notice to the other. During the period of May 1 through October 31, the high fire season, the agreement could only be terminated by mutual consent of both parties.
2. Pursuant to NRS 474.530, twenty-five percent of the property owners in the NRS 473 fire district must agree to petition the State Forester Fire Warden to dissolve the NRS 473 fire district and create an NRS 474 fire district within the provisions of NRS 474.460 to 474.540, inclusive.
3. According to the 1974 fire protection agreement, in order to meet a mutually agreed upon budget, the County agreed to match State and Federal funds on the basis of one-half County and one-half State and Federal funds. The County contribution originated from either the County general fund or from a special tax levy. Matching funds were to be used only for the benefit of Storey County.
4. On July 7, 1998, the Board of Storey County Commissioners (Board) held a public meeting. At the meeting, Commissioner Haynes informed the Board that the NDF was required by the 1974 agreement to man the fire stations in Virginia City Highlands and Lockwood from July 1 through October 31. As of July 7, 1998, NDF had not yet manned the fire stations. Furthermore, NDF did not plan to do so until October 1998. This was in violation of the provisions of the agreement. Because the Virginia City Highlands has the highest fire incident rate in Storey County (County) (approximately 90%), the Board decided to review alternative options to immediately man the fire stations. One of the alternatives discussed involved the County dissolving the NRS 473 fire district and forming a County controlled NRS 474 fire district. An NRS 474 fire district would require the County to fund an additional seven to eight full time firemen and a full time fire chief. Commissioners Hess and Trink urged an immediate resolution. The Board then instructed Gary Hames and Fire Chief Nevin to work up the figures to determine what the cost would be for the County to provide full time personnel for the two sites. The matter was then continued until the July 21, 1998 meeting.
5. On July 21, 1998, the Board held a public meeting, in part, to discuss the County's options to man the stations in the Virginia City Highlands and Lockwood from July through October 1998. A representative from NDF apologized to the Board and informed them that temporary qualified staff now manned the stations and that in October 1998 NDF planned to hire full time staff for training. This arrangement was unacceptable to the Board as the Board felt there was an immediate need for full time staffing of the stations. At this time, Chief Nevin presented the Board with the proposal he and Mr. Hames created. He recommended converting the part-time fire chiefs position to full-time status, providing full-time staffing for Lockwood and the Highlands with 8:00 a.m. to 5:00 p.m., seven days per week coverage and funding additional communications equipment. The proposed costs would increase the Fire Fund Budget by \$466,707.00 and the Equipment Acquisition Budget by \$112,000.00. The

remaining \$35,000.00 in the Fire District Budget would provide wildland fire protection to areas outside of the town limits of Virginia City and Gold Hill. The total for the proposed budget was \$625,394.00. This was an estimated savings to the County of \$22,611.00. The funds would also provide for three seasonal positions from June through October; the heavy-threat fire period. Additionally, Chief Nevin offered to accept the position of fire chief on a full-time basis if the Board so desired. The Board unanimously voted to accept the portion of the proposal to allow the County to control and man the stations at Lockwood and Virginia City Highlands. The matter of whether to convert the fire chief position from part-time to full-time and to approve the appointment of Mike Nevin as full-time fire chief was placed on the Board's August 4, 1998 agenda.

6. Three full-time fire fighters were hired by the County personnel officer. Two were hired on July 27, 1998 and the third was hired on August 3, 1998. A list of applicants had been readily available because the County had recently completed the hiring process for another position. Mr. Nevin was not involved in the hiring process in any way.

7. At the August 4, 1998 Board meeting, District Attorney Janet Hess urged the County to negotiate with NDF regarding the dissolution of the agreement. Chief Nevin indicated that the NRS 473 district was formed in 1964 by Board action. Ms. Hess was instructed to research this action. Commissioner Haynes stated that they were not eliminating the 473 district, just reducing what was needed. Rich Harvey of NDF informed the Board that a reduction of the NDF budget to \$35,000 required approval of the State. Commissioner Hess urged for the transition in order to keep the coverage of the Highlands. The Board agreed to have NDF, Ms. Hess, Chief Nevin, Budget Officer Marilou Walling, Recorder/Auditor Maggie Lowther and Commissioner Haynes meet on August 5, 1998. The Board unanimously approved to upgrade Mr. Nevin's part-time County fire chief position to a full-time position. Chief Nevin took a pay cut by accepting the full-time fire chief position with the County. He submitted pay stubs verifying this statement.

8. On August 5 and August 25, 1998, the Board and NDF representatives met. Their goal was to reach an amicable working relationship. The Board remained dissatisfied with NDF's proposals.

9. At the August 18, 1998 Board meeting, Commissioner Haynes explained that if the County wanted to operate their own independent fire protection district, they could do so under the provisions of NRS 474. Rich Harvey, NDF Regional Manager, indicated that the NDF budget was \$626,000.00. Mr. Fielding commented that he wanted affordable fire protection and called for a meeting with the County and NDF in order to come to terms. The Board and Ms. Hess scheduled a meeting with the County and NDF for August 25, 1998. Mr. Fielding submitted a written objection to the Board pointing out that a petition was required for the dissolution of the NRS 473 fire district.

10. On August 18, 1998, Roy Trenoweth, State Forester/NDF, wrote to Commissioner Haynes, "it is our understanding, based on the advice of our legal counsel, that your desire to expand coverage by a local entity to include the area currently protected by the Division of Forestry cannot be accomplished under the provisions of a 473 District. However, local governments wishing to operate independent fire protection districts may do so under the provisions of NRS 474, NRS 318 and General Improvement Districts." Mr. Trenoweth informed Commissioner Hess that if the County wanted to establish an independent fire district, it must be done legally. Further, Mr. Trenoweth acknowledged NDF had given permission to the County to dissolve their agreement in order to satisfy the condition that the termination be approved by both parties.

11. At the September 3, 1998 Board meeting, the Board discussed the budget agreement between the County and NDF. Commissioner Haynes indicated that the County paid \$635,000 for coverage. Rich Harvey of NDF explained that if the County wanted to dissolve the NRS 473 district, it would have to circulate a petition pursuant to NRS 473.530. The Board unanimously voted to establish an NRS 474 fire district for the County. District Attorney Hess presented her draft petition to the Board. Pending approval by the Attorney General's Office, the petitions could be circulated as early as September 7, 1993. Chief Nevin stated that the volunteer firemen had offered to circulate the petition. The Board also requested a cover letter to accompany the mailings and the volunteers during their circulation.

12. Chief Nevin testified he did not believe his job would be jeopardized if the petition process to approve the NRS 474 fire district failed. Mr. Haynes testified that it was never the Board's intention to change Mr. Nevin's status. Further, Mr. Haynes was uncertain if the three full-time fire fighters would remain employed if the NRS 473 district was not dissolved. Mr. Haynes stated that due to the increased County growth and need, the Board would

have considered the option of keeping the additional fire fighters if the NRS 473 fire district remained.

13. Mary Lou Walling, Assistant to the Board and Personnel Director for the County, testified that she hired the three firemen. She prepared the job description. She never addressed the issue of potential lay-offs with the firemen, because she was not aware of the issue at that time.

14. In between responding to alarms, doing map work, etc., the ten (10) full-time firemen voluntarily circulated the petition while dressed in uniform and driving government owned vehicles. They only wore their uniforms and drove government vehicles when they were on duty. When they were not on duty, they circulated the petitions as any other citizen would.

15. The petition was circulated from approximately September 18, 1998 through October 26, 1998.

16. As of the date of the Commission's hearing on this matter, the County received enough signatures on the petition to dissolve the NRS 473 fire district.

ANALYSIS AND OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(2) because Mr. Nevin is a public employee as defined in NRS 281.436.

The issues presented in this matter are whether Mike Nevin, as fire chief, violated NRS 281.481(2), 281.481(7) or 281.481(9).

NRS 281.481(2), (7) and (9) provide:

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.

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.

9. A public officer or employee shall not attempt to benefit his personal or financial interest through the influence of a subordinate.

After hearing testimony, reviewing the evidence presented and deliberating on the matter, the Commission determined that Mr. Nevin, in his capacity as fire chief of the County, did not violate NRS 281.481(2), NRS 281.481(7) or NRS 281.481(9) when he, at the Board's direction, administered the County's petition to dissolve the NRS 473 fire district in order to absorb it into and enlarge the County's own NRS 474 fire district.

The initial concern before the Commission was the Board's seeming lack of compliance with NRS 474.530, the statute controlling the dissolution of the NRS 473 fire district. Mr. Fielding claimed that there was a conspiracy to illegally dissolve the NRS 473 fire district at Mr. Nevin's instigation. The Commission made no such finding. In fact, there was a distinct lack of evidence to support a violation of NRS 281.481(2), (7) and (9).

The evidence revealed that the Board was first and foremost concerned about the apparent lack of NDF personnel at two of the County's most critical locations during the height of the fire season. This concern helped to generate discussion with the Board about what to do with the fire protection situation in the County. From July through August 1993, there were ongoing negotiations between the County and NDF to decide whether the County was going to handle all of its fire protection needs or just certain portions of them with the State continuing to handle the rest. The County's goal was to negotiate a reasonable, workable arrangement that would satisfy both parties by providing adequate fire coverage at the Virginia Highlands and Lockwood locations. In the end, the County remained dissatisfied with NDF's proposals. There was no evidence that Mr. Nevin instigated the change.

Mr. Nevin and the Board were under the belief that to appropriately dissolve the NRS 473 fire district, they would need to comply with the provision of the 1974 agreement between the parties which stated: "This agreement when signed by both parties shall continue in effect from year to year until terminated by one party giving written notice to the other, except that during the period of 1 May through 31 October, this agreement may be terminated only by mutual consent of both parties." (Emphasis added.)

Until August 18, 1998 the County, Board and the District Attorney were unaware of the statutory requirements for dissolving the current NRS 473 fire district and incorporating the area into the County-controlled NRS 474 fire district. It was not until the September 3, 1998 meeting that the issue of the petition was discussed at length. The Board voted to proceed with the NRS 474 fire district process and District Attorney Hess submitted her draft petition for review by the Board. An NDF representative discussed the petition process needed to dissolve the NRS 473 fire district. From all indications, the Board made every effort to comply with the appropriate statutory requirements for dissolving the NRS 473 fire district when the matter was brought to their attention. Again, there is no evidence that Mr. Nevin played any role in the Board's decision.

The Commission further found that Mr. Nevin did not seek to dissolve the NRS 473 fire district for his own personal benefit. During the negotiation stage, the Board wanted to man the fire stations with the County's own personnel in order to insure adequate coverage through October 1998. To determine if this was feasible, the Board instructed Mr. Nevin and Mr. Hames to prepare a proposal and provide budgetary figures in support of their proposal. The resulting proposal satisfied the Board. The proposal included hiring three full-time firemen and enlarging the part-time fire chief position to a full-time position. There was no evidence that Mr. Nevin initiated the fire redistricting or that he had his own private agenda to promulgate, nor was there evidence that he used his position as fire chief to secure that agenda or that he influenced subordinates to benefit his own personal means.

A violation of NRS 281.481(2), (7) and (9) requires that the public employee use his position, governmental property or employees to further his own personal benefit. In Mr. Nevin's case, he acted at the direction of the Board and was not the instigator of their decision. The Board instructed him to run a program feasibility study. The Board voted to hire him as fire chief full-time. Further, Mr. Nevin's move from the part-time positions with the County and NDF to the full-time County fire chief did not benefit him financially. Pay stubs prove he received an overall pay cut. Further, the premise that Mr. Nevin was motivated to pass the petition to secure his County employment is faulty. While Mr. Nevin may not have been guaranteed a return to his former position with NDF, he would have been assigned a position with NDF in the event the NRS 474 fire district plan failed. He was never at risk of unemployment. Therefore, the Commission found no underlying motivation for personal benefit, pecuniary or otherwise, on the part of Mr. Nevin. Further, Mr. Nevin testified that, at the time of the petition process, he did not believe his employment with the County would have been affected by the results of the petition.

The next concern of the Commission was whether Mr. Nevin, in his capacity as County fire chief, violated NRS 281.481(7) by using County owned vehicles and full-time staff to circulate a petition to benefit his own personal or financial interest. As discussed above, the Commission determined that the outcome of the petition process would not have benefited Mr. Nevin's personal or financial interest. In any case, NRS 281.281(7) allows a limited use of governmental property or equipment for personal purposes if [Mr. Nevin] has the authority to authorize such use or the use is necessary as a result of emergency circumstances; the use does not interfere with the performance of his public duties, the cost for such use is nominal; and the use does not create the appearance of impropriety. Testimony revealed that the full-time fire fighters wore their uniforms and drove County vehicles while soliciting signatures for the petition only while on duty. However, it was ascertained that while the full-time fire fighters volunteered to circulate the petition, the activity did not interfere with their regular duties and the cost to the County was nominal.

The next NRS 281.481(7) question of impropriety is whether it was proper to allow the employees to circulate the petition while on duty, in uniform and using government owned vehicles. The off-duty firemen did not wear their uniforms. According to Mr. Nevin and Mr. Haynes, the precedent was set in 1973 to allow uniformed firemen to circulate petitions when the NRS 473 fire district was established. There was also a tacit understanding among the Board that the fire department would assist in circulating the petition. The volunteer firemen who offered their services to pass the petition around were unpaid and therefore had no financial interest in the outcome of the petition. Therefore, this issue pertains to the full-time, paid firemen, only. There was no departmental policy to allow the firemen to wear their uniforms or drive governmental vehicles per se. However, OSHA rules and regulations require that the on duty firemen wear their uniforms in order to be ready to respond to any official call.

Because they were on duty, the firemen were mandated to wear their fire resistant uniforms.

The remaining test of impropriety hinges on whether it was proper for the uniformed firemen to circulate the petition due to the level of authority that the uniform provides. The Commission reviewed these concerns and determined that a reasonable person would not be intimidated or coerced into signing the petition proffered by a uniformed fireman.

Finally, the Commission found that Mr. Nevin did not violate NRS 281.481(9) by attempting to benefit his personal financial interest through the influence of his subordinates, i.e., the firemen. The evidence showed that Mr. Nevin would not have benefited personally or financially from the fire district change, nor was there evidence of him influencing the fireman to circulate the petition. From all indications, the full-time and volunteer firemen willingly offered to assist in the petition process.

CONCLUSION

Based upon the record, the Commission concludes that Mr. Nevin, in his capacity as fire chief of Storey County, did not violate NRS 281.481(2), (7) or (9) when he, at the Board's direction, administered the County's petition to dissolve the NRS 473 fire district and enlarge the NRS 474 fire district.

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