

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE OPINION REQUEST OF A PUBLIC OFFICER

This Opinion is in response to a first-party request for opinion filed with the Nevada Commission on Ethics (Commission) by a public officer seeking guidance from the Commission regarding whether an ethical conflict of interest exists by having his fiancée work in a state department (Department) while he serves on the Department's Board of Trustees (Board). A confidential hearing was held by the Commission on February 18, 1999, in Reno, Nevada. The Commission received testimony from Mr. A, Mr. A's fiancée (Ms. K) and Ms. K's supervisor (Supervisor). Mr. A did not waive statutory confidentiality, so the proceeding was not open to the public. The Commission now issues the Findings of Fact and Opinion which follow.

**FINDINGS OF FACT**

1. Mr. A is an elected member of the Board. The Board is composed of 11 members. The Board is statutorily responsible for establishing policies to govern the administration of all functions of the state relating to the supervision, management and control of [the programs run by the Department] not conferred by law. The Board appoints the Supervisor. It has the authority and responsibility to annually evaluate his/her job performance. The Supervisor serves as the executive head of the Department. The Board does not have any direct authority or responsibility regarding the firing, supervising or evaluating of Ms. K or any other Department employee.
2. Ms. K is the coordinator of a program within the Department. She is promoted based upon her employee evaluations. She was hired by the Department in December 1988 and is currently at the top of her pay grade.
3. The Supervisor is an at-will, unclassified employee who serves at the will of the Board.
4. Mr. A was sworn in as a member of the Board in January 1997. He testified that as a member of the 11-panel Board he is in a position of evaluating the Supervisor's work evaluations. He could also propose renewal or termination of his/her services as Supervisor.
5. By statute, the general duties of the Supervisor are as follows:
  1. Execute, direct or supervise all administrative, technical and procedural activities of the Department in accordance with policies prescribed by the state board.
  2. Employ personnel for the positions approved by the state board and necessary for the efficient operation of the department.
  3. Organize the Department in a manner which will assure efficient operation and service.
  4. Maintain liaison and coordinate activities with other state agencies performing functions [overseen by the Department].
  5. Perform such other duties as are prescribed by law.

6. The Supervisor executes, directs and supervises all administrative, technical and procedural activities of the Department in accordance with policies prescribed by the Board. The rule making by the Board deals with certain programming and policy issues. The policy issues that pertain to supervision and evaluation of staff are those generated by state personnel. The Department follows the state personnel policies and regulations. The Board develops administrative policies in certain areas including approval of certain programs. The Board adopts the budget for the Department and approves each of the approximately 25 budget accounts on a line by line basis. Ms. K's position belongs to one of these accounts. New positions for the Department also require approval of the Board.

7. There are several layers of Administration between Ms. K and her Supervisor. Ms. K is directly supervised by her team leader. Ms. K and the team leader both report to the Supervisor. The team leader performs Ms. K's employee evaluations. The Supervisor's deputy signs off on the team leaders evaluations of Ms. K before they are sent to the Supervisor for final approval.

8. Similarly, recommendations for disciplinary action against Ms. K would follow the same pattern. They would originate with the team leader, work up the chain of command to the deputy before going to the Supervisor for final approval. In other words, the team leader would make the recommendation, but the recommendation would have to be approved by the deputy before it would be brought to the Supervisor's attention.

### **ANALYSIS AND OPINION**

The Commission has jurisdiction over this matter pursuant to NRS 281.465(1)(a) and 281.511(2)(b). As a member of the Board, Mr. A is a public officer as defined in NRS 281.4365.

The Commission reviewed the question of nepotism and determined that NRS 281.210<sup>[1]</sup> does not apply in this instance because MS. K's date of hire with the Department predates Mr. A's appointment to the Board. Furthermore, the couple has not yet married nor are they cohabiting or sharing household expenses.

In order to conform with NRS 281.501 and NRS 281.481(2), the Commission determined that Mr. A must disclose and abstain from voting on issues which directly or indirectly affect his fiancée. The Commission then deliberated as to what conflicts of interest could possibly affect Mr. A's ability to impartially participate in voting on matters that come before the Board that directly or indirectly affect his fiancée's employment within the Department or which may give the appearance that his vote is impartial.

NRS 281.501(2) prohibits Mr. A from voting or advocating the passage of or failure of a matter in which the independence of judgment of a reasonable person in his situation would be materially affected by his commitment in a private capacity to the interest of others.

Further, NRS 281.501(3) provides in part:

A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter: \* \* \*

(b) Which would reasonably be affected by his commitment in a private capacity to interest of others; \* \* \*

without disclosing the full nature and extent of the ... commitment or interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the

matter is considered.

It is understood that Ms. K's employee evaluations are performed by the team leader and are then signed off by the Supervisor's deputy. The Supervisor only reviews and approves the evaluations after these individuals have approved them. While there seems to be two levels of authority between Ms. K and her Supervisor, testimony indicates that Ms. K reports to her Supervisor in a more direct manner. Also, Ms. K's promotions are based upon her employee evaluations and are therefore critical to her success in furthering her career.

The Commission's concern is that there not be any undue influence or appearance of undue influence on the part of Mr. A over the Supervisor that in some way would or could provide an unwarranted benefit to Ms. K in violation of NRS 281.481(2).<sup>[2]</sup> This concern is heightened due to the fact that the 11-member Board, inclusive of Mr. A, evaluates the Supervisor's job performance. Further, the Supervisor's position is unclassified and he/she is considered an "at-will" employee subject to the will of the Board. Mr. A theoretically could propose the Supervisor's termination of employment. This proposal would require a majority vote of the Board for its execution, but it provides an example of the authority that Mr. A maintains over the Supervisor who in turn maintains a level of authority over Ms. K. Mr. A needs be mindful of his influential position when matters come before the Board.

The testimony provided by Mr. A and the Supervisor suggest that there are a multitude of budgetary issues that go before the Board pertaining to the Department. The testimony also showed it would be unreasonable and unlikely to hold that all budgetary issues would directly or indirectly impact Ms. K. However, the Commission reasoned that all budgetary concerns within the Department which would impact Ms. K or her program require Mr. A to disclose and abstain in those instances.

For example, Mr. A should disclose and abstain from voting on a budget request for a new program which could be filled with someone of Ms. K's caliber and qualifications. Should Mr. A vote on this matter, his vote could be construed as advocating funding for a new position in order to create a potential employment opportunity for Ms. K within the Department. Alternatively, matters such as the flow-through accounts and the distributive school accounts would be appropriate to vote on as they do not have any impact on Ms. K's program. Therefore, Mr. A should take a conservative approach when deciding whether a matter poses a conflict in terms of departmental budgets.

In addition to budgetary issues, Mr. A should disclose and abstain from the Supervisor's annual evaluations. He should also disclose and abstain from voting on any programs proffered by Ms. K or anyone in her program regarding issues affecting her program. Ms. K testified that she is required, on occasion, to request approval of the Board of certain activities for her program such as the acceptance of federal funds received for her program. Mr. A should refrain from participation in instances such as this.

While this opinion provides examples of prohibitions, it does so in an effort to provide guidance. It does not attempt to provide an exhaustive list of possible conflicts that may arise. The Commission cannot possibly cover every practical eventuality or issue which may occur in front of the Board. Mr. A must take responsibility for the analysis of a particular issue that may come up and make a reasonable determination as to whether his relationship with Ms. K would tend to influence his vote-making decision or whether there would be an appearance that his vote would be influenced by his private relationship with her.

## **CONCLUSION**

Based upon the record, the Commission concludes that in order for Mr. A to comply with NRS 281.501 and NRS 281.481(2) he should disclose and abstain, at the least, from voting on all issues pertaining to the Supervisor, her performance evaluations and budgetary issues involving his fiancée's program within the Department as outlined in the opinion above. Mr. A must be mindful that there may be other issues which require disclosure and/or abstention using the foregoing analysis.

### **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 17, 1999.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman

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[\[1\]](#) NRS 281.210(1) provides in part: "Except as otherwise provided in this section, it is unlawful for any person acting as ... an employing authority of ... any state or local board, . . . elected or appointed, to employ in any capacity on behalf of the State of Nevada ... any relative or such a person or of any member of such a board, agency or commission who is within the third degree of consanguinity or affinity."

[\[2\]](#) 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."