

Opinion No. 99-01

BEFORE THE NEVADA COMMISSION ON ETHICS

In The Matter Of The Opinion Request Regarding CHERI EMM, KEVIN PASQUALE, LAURA LOUIE, and PAM AUSTIN

This Opinion is in response to a third-party request for opinion filed with the Nevada Commission on Ethics ("Commission") by Pam Giovanetti regarding Kevin Pasquale, former District Attorney for Churchill County; Cheri Emm, former assistant district attorney for the Churchill County District Attorney's Office ("DA's office"); Laura Louie, assistant district attorney for the DA's office and Pam Austin, legal secretary for the DA's office. At the time of the hearing in this matter, Mr. Pasquale and Ms. Emm were in private practice.

A closed hearing was held by the Commission on June 10, 1999, in Reno, Nevada. Commissioner Recanzone abstained from participating in this matter. Testimony was received from Mr. Pasquale, Ms. Louie, Ms. Emm and Ms. Austin. Tom Stockard, Deputy District Attorney for the DA's office, provided counsel for Ms. Austin and Ms. Louie. Mr. Pasquale and Ms. Emm represented themselves. As a result of the testimony and evidence presented, the Commission determined that just and sufficient cause did not exist to proceed further with the matter, and the matter was dismissed with regard to the allegations against Ms. Emm, Mr. Pasquale, Ms. Louie and Ms. Austin.

The Commission also found that Ms. Giovanetti's request and testimony contained false and misleading information and was submitted in bad faith in violation of NRS 281.525 and 281.551(2). The Commission now issues these findings of fact and order which solely address Ms. Giovanetti's violations of NRS 281.525 and 231.551(2).

FINDINGS OF FACT

1. The Commission has jurisdiction over this matter pursuant to NRS 281.511(2) because, at all times relevant to the opinion request, Ms. Emm, Ms. Louie and Ms. Austin were public employees pursuant to NRS 281.436 and Mr. Pasquale was a public officer pursuant to NRS 281.4365.
2. On December 23, 1998, Ms. Giovanetti filed a request for an opinion with the Commission. Ms. Giovanetti's request alleged that (1) the DA's office willfully failed to act on the numerous harassment/domestic violence charges Ms. Giovanetti filed against her ex-husband; an inaction which was allegedly due to Ms. Austin's friendship with Ms. Giovanetti's ex-husband; (2) the DA's office unlawfully refused to provide her copies of police/sheriff reports and refused to return Ms. Giovanetti's calls; and (3) Ms. Louie violated NRS 281.551, the statute authorizing the Commission to impose sanctions.
3. Ms. Giovanetti testified that, in addition to the allegations in her request for opinion, the DA's office's current office manager, Pam Moore, threatened Ms. Giovanetti when she recently visited the DA's office. Ms. Moore also allegedly went to Ms. Giovanetti's house to threaten her and hit her in the chest twice.
4. Mr. Stockard provided pertinent details which Ms. Giovanetti omitted from her testimony. He stated that the altercation with Ms. Moore occurred as a personal matter between Ms. Giovanetti and Ms. Moore and did not involve the DA's office. Ms. Moore approached Ms. Giovanetti regarding Ms. Giovanetti's personal relationship with Ms. Moore's ex-husband. Because this occurred within the Fallon city limits, the Fallon City Attorney's office handled the matter, not the DA's office.
5. Ms. Giovanetti did not consult with her attorney, Sharon McDonald, prior to or after filing her opinion request because she did not want to incur attorney's fees for such a service.
6. The Commission challenged Ms. Giovanetti's testimony regarding the reason why she decided to file a request for opinion with the Commission. Initially, Ms. Giovanetti stated that the governor's office referred her to the Commission. Then, she stated that "Frankie Sue Del Papa" referred her to the Commission. Backtracking, she said the governor's office gave her the telephone numbers for Ms. Del Papa and the Commission. Later, she testified that she didn't speak with Ms. Del Papa directly but with her secretary. Finally, she said that it was "her secretary or someone" in the Attorney General's office who told her to file a complaint with the Commission.

7. Ms. Emm handled the Giovanetti matter for the DA's office. She was employed with the DA's office until April 4, 1998 and had no contact with Ms. Giovanetti after that time. Ms. Emm recalls reviewing Ms. Giovanetti's complaint and asking the local sheriff's office to conduct an investigation. Based upon the investigation, Ms. Emm decided not to prosecute because (1) the matter was civil in nature, not criminal, (2) she would not be able to meet the evidentiary burden required to prosecute the matter, and (3) Ms. Giovanetti had been in contempt of a restraining order issued by the Washoe County District Court. Further, Ms. Emm determined that more appropriate remedies were available to Ms. Giovanetti. All of this information had been relayed to Ms. Giovanetti's attorney.

8. Ms. Emm testified that she never received a request for records and police reports from Ms. Giovanetti or her attorney. Typically, Ms. Emm stated that the records would be given to the attorney after receiving a written request.

9. Ms. Giovanetti explained that Ms. Austin's husband, who was a neighbor and friend of her ex-husband, Mr. Giovanetti, harassed her by videotaping her comings and goings throughout the divorce proceedings, including the time she had a yard sale. She alleged that the DA's office would not do anything about this harassment. Ms. Emm and Ms. Austin clarified this matter by stating that due to a permanent restraining order issued by the Washoe County District Court prohibiting the Giovanettis' from disposing of community property, Mr. Austin informed his friend, Mr. Giovanetti, that he witnessed Ms. Giovanetti having a yard sale. The information that Ms. Giovanetti was selling community property at a yard sale was presented as evidence to the District Court showing that Ms. Giovanetti was, in fact, disposing of community property in violation of the court order. Ms. Giovanetti's attorney informed Ms. Emm that the court order was a civil one and a violation of it was not criminal in nature. This was one reason why Ms. Emm did not file harassment charges against Mr. Giovanetti.

10. Ms. Austin was not an employee of the DA's office at the time of the yard sale incident. Her employment began in July of 1998 and the Giovanettis' divorce was final in August of 1998.

11. On December 15, 1998, Ms. Giovanetti wrote a letter to Ms. Louie after learning that the DA's office had declined to file charges against her ex-husband. In part, the letter states:

I have contacted Governor Bob Miller, and chatted with his department then to Frankie Sue Del Papa and then to the BAR association after filling out grievance reports with all of them I then proceeded to contact the Ethics department and they also were VERY interested in my report. I of course don't know the outcome of this, however I do not take kindly to personal threats made by you. Nor will I stand for it.

12. The Commission asked Ms. Giovanetti to explain just how the Commission indicated it was "VERY interested" in her report. She replied that "Robin" in the Ethics Commission's office encouraged her to file the opinion request. When informed that no one by the name of "Robin" worked for the Commission, Ms. Giovanetti stated that the person who sent her the materials for filling out the application was the same person that she spoke with on the telephone. Ms. Giovanetti claims that the person in the Ethics office called her back several times to see if she was going to file the request for opinion. Ms. Giovanetti claimed that due to that encouragement, she decided to file her request.

13. It is the practice of the Commission to provide opinion request packets to all persons interested in filing an opinion request. Opinion request packets consist of the following: an instruction letter, opinion request form and the Nevada statutes pertaining to the Ethics in Government law. Commission personnel cannot predetermine the merits of a person's claim or encourage them to file or not file an opinion request.

ANALYSIS AND OPINION

NRS 281.525(1) provides:

It is unlawful for any person to make, use, publish or disseminate any statement which is known or through the exercise of reasonable care should be known to be false, deceptive or misleading in order to induce the commission to render an opinion or to take any action related to the rendering of an opinion.

A violation of NRS 281.525(1) is punishable as a misdemeanor. NRS 282.525(2). NRS 281.551(2) provides in pertinent part:

2. In addition to other penalties provided by law, the commission may impose a civil penalty not to exceed \$5,000 and assess an amount equal to the amount of attorney's fees and costs actually and reasonably incurred by the person about whom an opinion was requested pursuant to NRS 281.511, against a person who:
 - (a) Submits to the commission, in bad faith or with a vexatious purpose, an accusation or information that is false;
 - (b) Submits to the commission, in connection with a request for an opinion that the commission determines to be without merit, an accusation or information that is false;...

The Commission determined that Ms. Giovanetti violated NRS 281.525(1) and 281.551(2)(a) and (b).

The record is replete with Ms. Giovanetti's inconsistent testimony. Of particular concern is her testimony regarding who referred her to the Ethics Commission. She stated that Governor Miller referred her, then Attorney General Frankie Sue Del Papa, then someone in Ms. Del Papa's office, etc., until she seriously damaged her own credibility.

The December 15, 1998 letter to Ms. Louie was also damaging to Ms. Giovanetti's credibility as it underscored her willingness to be deceptive. She claimed that she had the support of Governor Miller, Frankie Sue Del Papa and the Ethics Commission. In fact, the letter states that the Commission was "VERY interested in the report." The truth was less extreme. No interest was shown in Ms. Giovanetti's "report" except to the extent that someone assisted her by providing her with the opinion request packet and answered her questions regarding the opinion request form. Her letter inferred that she received approval from the Commission for filing the request, when the Commission staff does not and cannot pre-approve opinion requests. Furthermore, Commission staff cannot and do not comment on the merits of the opinion request with the requester prior to the hearing. Thus, the Commission also took issue with the tone of the December 1998 letter. The content was clearly false and deceptive and written with the intent to threaten.

Ms. Giovanetti's testimony was deliberately misleading. She conveniently omitted pertinent facts from the Commission in her opinion request and testimony. The altercation with Ms. Moore is an example. Ms. Giovanetti inferred that she was being harassed by the DA's office because its office manager, Pam Moore, attacked her at the DA's office and at Ms. Giovanetti's home. Testimony provided by the respondents to the request clarified that the altercation occurred as a result of Ms. Moore's personal issue against Ms. Giovanetti and was not related to the DA's office.

Further, the opinion request claims that the DA's office did nothing about her domestic violence complaints. The truth is that an investigation was performed. The results of the investigation did not support Ms. Giovanetti's claims. Additionally, the issues involved were determined to be civil in nature, not criminal; thus the DA's office did not have jurisdiction over the matter. Ms. Giovanetti had omitted this significant bit of information from her opinion request and testimony.

Ms. Giovanetti claimed that Ms. Austin, in her capacity as a secretary at the DA's office, somehow influenced the office's decision to not prosecute Mr. Giovanetti. Omitted from her testimony is the fact that Ms. Austin was not employed by the DA's office at the time she was supposed to have exerted that influence. Additionally, Ms. Giovanetti failed to mention that the alleged restraining order was a civil order and not a criminal one. Nonetheless, this Commission believes that Ms. Giovanetti knew or should have known, through her attorney, that legitimate reasons existed for the DA's office to refrain from prosecuting the matter.

Ms. Giovanetti claimed that she and her attorney requested documents from the DA's office. However, the DA's office could not locate a written request or subpoena for any documents in their files. Ms. Giovanetti did not have copies of any written requests, either. The Commission found it hard to believe Ms. Giovanetti's claim that the records were critical to her divorce proceedings when her own attorney did not attempt to obtain them.

Egregious to this Commission is an allegation of an Ethics violation without cause. This matter is a perfect example.

Ms. Giovanetti named Mr. Pasquale for no other reason than he was the District Attorney at the time. She admitted that he did not violate any provision of the Ethics in Government law. Furthermore, Ms. Giovanetti could not identify any provision of the Ethics in Government law violated by any of the remaining respondents. Additionally, she claimed that Ms. Louie violated NRS 281.551 without being able to state how such statute was violated. It was clear that Ms. Giovanetti was careless in filing her request for opinion.

Finally, the DA's office's failure to return telephone calls and failure to prosecute complaints were not violations of an Ethics law unless it can be shown that the individuals failed to take action in order to benefit themselves or others. In this matter, there was no evidence that the decision not to prosecute was motivated by anything other than sound legal reasoning; the reasons which were omitted from Ms. Giovanetti's opinion request.

NRS 281.551(10) provides guidance for this Commission's determination as to whether a given opinion request was submitted in violation of NRS 281.551(2), and it provides:

In determining for the purposes for this section whether a person submitted an accusation or information in bad faith or with a vexatious purpose, the commission may consider various factors, including, without limitation:

- (a) When the accusation or information was filed with or provided to the commission;
- (b) Whether and, if applicable, in what manner the person who submitted the accusation or information publicly disseminated the accusation or information before the commission determined whether there was just and sufficient cause to render an opinion in the matter;
- (c) Whether the accusation or information sets forth alleged facts or details that are misleading or deceptive; and
- (d) Whether the accusation or information or the conduct of the person who submitted the accusation or information:
 - (1) Would be perceived as annoying or harassing by a reasonable person;or
 - (2) Demonstrates conscious disregard for the process and procedures established by the commission.

Utilizing the factors in NRS 281.551(10), we find that Ms. Giovanetti's opinion request was submitted "in bad faith or with a vexatious purpose" for several reasons. First, Ms. Giovanetti was angry with the respondents and held them responsible for the DA's office's decision to not prosecute the claims against her husband. The December 15, 1998 letter to Ms. Louie targets Ms. Giovanetti's ire. Ms. Giovanetti's anger was to such a degree that she felt compelled to threaten Ms. Louie by falsely claiming that the Ethics Commission was "VERY interested" in her opinion request.

Second, Ms. Giovanetti submitted allegations for which she did not know if she had evidentiary support, and she admitted as much under questioning from this Commission. The opinion request was filed carelessly in the hopes that something might "stick." Ms. Giovanetti admitted that no violation occurred on the part of Mr. Pasquale. At the conclusion of the hearing, she admitted that no violation occurred on the part of any of the respondents. Additionally, it is apparent from Ms. Giovanetti's testimony that she alleged Ms. Louie violated NRS 281.551 without first reviewing the statute. It appears that the statute was chosen at random.

NRS 281.511(2)(b)(1) requires that a person submitting a request to the Commission also submit "**all related evidence deemed necessary by the commission** for it to make a preliminary determination of whether there is just and sufficient cause to render an opinion in the matter." (Emphasis supplied.) Pertinent information had been conveniently omitted from the opinion request and Ms. Giovanetti's testimony. These omissions proved Ms. Giovanetti's willingness to be deceptive in order to induce the Commission to render a decision in her favor. She failed to mention that the restraining order was civil in nature and that the DA's office did not have jurisdiction over a violation of that order. It was apparent that her attorney was well aware of the reasons for the DA's decision and would have explained such to Ms. Giovanetti. Ms. Giovanetti also failed to mention that Pam Moore's grievance against her was personal and not related to the DA's office and that the investigation into the matter was the venue of the city attorney's office, not the DA's office.

Third, Ms. Giovanetti was untruthful about why she chose to file an opinion request. She maintained her vague and wavering testimony about whom she spoke with prior to making her decision to file. First it was Governor Miller, then Attorney General Del Papa, then someone in Ms. Del Papa's department, and so on, until her story was rendered unbelievable. Additionally, she claimed that the "someone" in the Ethics Commission's office encouraged her to file the request without being able to identify the person in question.

Fourth, Ms. Giovanetti's actions could only be "perceived as annoying or harassing by a reasonable person." NRS 281.551(10)(d)(1). Ms. Giovanetti admitted under questioning by this Commission that she was forum shopping. She did not know if the respondents violated any provision of the Ethics in Government law prior to filing her opinion request. However, she willingly twisted the facts, omitted pertinent details from her opinion request and testimony in order to follow through on a threat directed at Ms. Louie and the DA's office in the December 15, 1998 letter. It was apparent that she had attempted to make an argument for an ethics violation by twisting the facts in order to induce the Commission to render a decision against the respondents. This failure to be comprehensive and truthful about the facts and failure to identify specific violations proves Ms. Giovanetti's intent to misuse the processes of this Commission in order to vex and harass the respondents.

This Commission will not be used as a weapon to strong-arm or threaten public officials or public employees. We are not a forum for speculation or innuendo. Any intentional misuse of this Commission's processes exposes the subjects of the request to undeserved public scrutiny, harassment and financial hardships, and treats this Commission's salutary public mandate with contempt.

We conclude that Ms. Giovanetti made false statements to this Commission and that she did so in bad faith and with the intent to vex Mr. Pasquale, Ms. Emm, Ms. Louie and Ms. Austin. Such a blatant misuse of this Commission's processes deserves and necessitates an appropriately stiff sanction. Consequently, this Commission imposes three civil assessments upon Ms. Giovanetti in the total amount of \$4,500.00 pursuant to NRS 281.551(2). This amount is to be paid the following three ways: (1) \$1,500.00 made payable to "State of Nevada, Office of the Treasurer," to be received by the Commission no later than 5:00 p.m. P.S.T. on June 30, 2000; (2) \$1,500.00 for the amount of attorney's fees actually and reasonably incurred by Kevin Pasquale in defending this matter and made payable to "Kevin Pasquale" and received by Mr. Pasquale no later than 5:00 p.m. P.S.T. on June 30, 2000 and (3) \$1,500.00 for the amount of attorney's fees actually and reasonably incurred by Cheri Emm in defending this matter and made payable to "Cheri Emm" and received by Ms. Emm no later than 5:00 p.m. P.S.T. on June 30, 2000. Failure to pay the above fines shall result in such legal action by the appropriate parties that is necessary to collect the penalty.

CONCLUSION

Based upon the substantial evidence in the record, the Commission concludes that Ms. Giovanetti violated NRS 281.525(1) and 281.551(2) in this matter. For these violations, the Commission imposes a civil assessment upon Ms. Giovanetti in the amount of \$4,500.00 divided in the following three ways: \$1,500 in general assessment, \$1,500 in attorney's fees incurred by Kevin Pasquale and \$1,500 in attorney's fees incurred by Ms. Emm.

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, the results which may vary depending on the specific facts and circumstances involved.

Dated: May 18, 2000.

NEVADA COMMISSION ON ETHICS

By: Peter C. Bernhard^[1], Chairman

^[1] Mr. Bernhard was not a member of the Commission at the time of the hearing in this matter. This Opinion is based on the record of proceedings held on June 10, 1999.

