

Abstract of Advisory Opinion No. 99-03

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Advisory Opinion of a NEVADA CITY

This Opinion is in response to a first-party request for opinion filed with the Nevada Commission on Ethics (Commission) by a Deputy City Attorney (Mr. A) on behalf of the Nevada City (City X) he represents. Mr. A sought guidance from the Commission regarding whether a conflict of interest exists with City X's law enforcement heads, who are members of City X's management, from participating in the same health plan as the rank and file officers. A confidential, closed hearing was held by the Commission on March 25, 1999. The Commission received testimony from Mr. A; City X's chief of police; City X's chief of detention; a representative for City R's police association (Association R); a representative for City X's police association (Association X) and the deputy chief of police for City X's police department. 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 follows.

FINDINGS OF FACT

1. At all times relevant to this opinion request, chiefs and deputy chiefs of police, detention and corrections for City X are either public officers as defined in NRS 281.4365 or public employees as defined in NRS 281.436.
2. The chiefs and deputy chiefs of police, detention and corrections pay membership to Association X. Even though they have the right to attend meetings and vote on matters before Association X, they do not do so.
3. Association X consists of police and detention officers who are employees of City X's police department. All police officers are eligible for membership in Association X. Membership in Association X is not a requirement for eligible non- members to receive the same benefits, including health care coverage, as members. All eligible employees of the same bargaining unit are covered by the same contract whether they pay dues to the union or not. Association X is one employee bargaining unit.
4. At the time of the hearing on this matter, members of Association X were in protracted labor negotiations. There were ongoing efforts in those negotiations to create separate bargaining units for supervisors and non-supervisors within the new agreement in order to comply with NRS 288.170. NRS 288.170(3), (4) and (6) provide:
 3. A head of a department of a local government, an administrative employee or a supervisory employee shall not be a member of the same bargaining unit as the employees under his direction. Any dispute between the parties as to whether an employee is a supervisor must be submitted to the board. An employee organization which is negotiating on behalf of two or more bargaining units consisting of firemen or police officers, as defined in NRS 288.215, may select members of the units to negotiate jointly on behalf of each other, even if one of the units consists of supervisory employees and the other unit does not.

 4. Confidential employees of the local government employer must be excluded from any bargaining unit but are entitled to participate in any plan to provide benefits for a group that is administered by the bargaining unit of which they would otherwise be a member.

 6. As used in this section, "confidential employee" means an employee who is involved in the decisions of management affecting collective bargaining.

In summary, NRS 288.170 permits department heads and administrative officers to be members of employee organizations, but prohibits them from being in the same bargaining unit as the persons they supervise.

5. The chiefs of police and detention and the deputy chiefs are at-will employees who are appointed to their positions by City X. They hold positions of management in City X and have elected to join Association X.

6. The health plan for Association X members is purchased from Association R. City X's city council does not negotiate the terms of this package, but does negotiate a monthly fee which it pays to Association X for health insurance coverage for the police and detention officers who are members of Association X.

7. The department heads who are members of Association X receive the same health benefits as the rank and file members. The prior city manager for City X allowed the chiefs and deputy chiefs to participate in Association X's health plan.

8. In the last four or five years, the chiefs and deputy chiefs have not participated in the bargaining negotiations with management in regard to monetary types of items or benefits such as health care. However, they may have been consulted or may continue to be consulted on the wording of a particular article that a manager wants to change. Since the chiefs and deputy chiefs of the police and detention department are management representatives, they may also participate in labor contract negotiations or be privy to management strategy.

9. City X offers an independent health insurance plan for the chiefs and deputy chiefs. However, these individuals may wish to continue participating in Association X's health plan because of the better retirement benefits which include a reduced premium, out-of-area benefits and additional medical coverage. If management participates in the plan at the time they retire, they have the ability to retain that health benefit package as a retiree at a reduced premium.

10. The only way membership with Association X can be terminated is through voluntary withdrawal, resignation or dismissal from service in City X's police department/detention/corrections department, municipal court or through impeachment proceedings. If the member leaves Association X, he will not be eligible for the reduced rate insurance benefit. He would be eligible for coverage under the insurance program, as a former member, but would have to pay the full amount of the premium. The member also could elect to be covered under COBRA.

11. Article VI, Section 7 of Association X's By-laws states,

Upon compliance with State law and the Constitution and By-laws (Article VI, Section IA & Section 3A), the Chief of Police, Chief of Detention/Corrections, Deputy Chief of Police, Director of Detention/Corrections, Chief of Marshals and Assistant Chief of Marshals may become and/or remain a member while serving in one of the aforementioned positions.

Therefore, management can also be excluded from membership in Association X by a By-law change.

ANALYSIS AND OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(1).

The issue presented in this matter is whether the chiefs and deputy chiefs of police, detention or corrections for City X, in their supervisory capacities, have violated NRS 281.481(1) and/or 281.481(2) by participating in Association X, a single bargaining unit, with the rank and file police and correction officers.

NRS 281.481(1) and (2) provide:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.
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.

Based upon the facts and circumstances presented, this Commission finds the chiefs and deputy chiefs of police, detention or corrections for City X have not violated NRS 281.481(1) or 281.481(2) by their participation as members in Association X.

However, this Commission cautions that until the concerns regarding NRS 288.170 are resolved, these persons need to continue to refrain from any direct or indirect participation in the bargaining negotiations.

This Commission was concerned that the chiefs and deputy chiefs of police, detention or corrections for City X (1) would use their position to do something improper with respect to bargaining in order to retain their membership in Association X and thereby retain their retirement benefits and (2) the possibility that the economic inducement to retain membership in Association X might cause a reasonable person to not carry out the faithful discharge of their duties.

The Commission feels the chiefs and deputy chiefs (management) of City X's police department/detention/corrections are allowed to maintain their membership or join Association X. Association X is a single bargaining unit that negotiates with City X for insurance reimbursement to its members for the insurance policy provided by Association R. Association X ostensibly does not represent management at the bargaining table. While management has the option to attend meetings and vote, it appears that they have not done so in the past. Nonetheless, there is the potential that they could participate in the bargaining process on the side of management and on the side of the union for negotiating the amount of money to be paid to Association X for insurance reimbursement, wages or work hours. Hanging over management's heads is their membership in Association X, which is extremely desirable. Management desires to remain a member of Association X because of the economic benefit provided by Association X in the form of health insurance retirement benefits. As such, this Commission is concerned about the potential threat of Association X's ability to exert influence over their management. To this end, Association X can terminate management's membership at any time by amending the By-laws or by impeachment proceedings.

Testimony indicates that management does not negotiate Association R's contract with Association X nor do they negotiate terms with the city manager or city council regarding the funds allocated by City X for insurance premiums paid by City X. The city council uses outside counsel as a chief labor negotiator. Eventually, City X plans to leave the negotiations to the counsel and staff attorneys so that management will be completely out of the negotiating loop.

Mr. A has advised City X that Association X needs to be split into two bargaining units among supervisors and non-supervisors to become compliant with NRS 288.170 which prohibits the two groups from being in the same bargaining unit. He anticipates that the new contract will likely create these two bargaining units. In the meantime, in order to comply with NRS 288.170, City X and Association X are required to exclude the management members of Association X from directly or indirectly participating in any contract negotiations. Since this is the current practice of both entities, it should not create a hardship.

CONCLUSION

Based upon the substantial record and foregoing facts and circumstances presented, this Commission finds that the chiefs and deputy chiefs of police, detention or corrections for City X have not violated NRS 281.481(1) or NRS 281.481(2) by their participation as members in Association X. This Commission further finds that City X needs to make the appropriate accommodations regarding exclusion of management's participation in future contract negotiations with Association X.

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: November 18, 1999.

NEVADA COMMISSION ON ETHICS

By: /s/ MARIO RECANZONE, Vice Chairman