

## Opinion No. 99-17

### BEFORE THE NEVADA COMMISSION ON ETHICS

#### In the Matter of the Opinion Request Regarding Susan Brager

This Opinion is in response to a third-party request for opinion filed with the Nevada Commission on Ethics (Commission) by E. Louis Overstreet regarding the conduct of Susan Brager, Clark County School District Trustee. A just and sufficient cause hearing was held in closed session on May 21, 1999. Mr. Overstreet appeared and represented himself. Ms. Brager appeared and was represented by her counsel, William Hoffman, General Counsel for the Clark County School District. 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, so the Commission dismissed the matter against Ms. Brager. The Commission also found that Mr. Overstreet's request contained false information and was submitted in violation of NRS 281.525 and 281.551(2). The Commission now issues the Findings of Fact and Order which follow solely addressing Mr. Overstreet's violations of NRS 281.525 and 281.551(2).

#### FINDINGS OF FACT

1. At all times pertinent to this matter, Ms. Brager was a Clark County School District Trustee for District F. She served as an ex-officio non-voting trustee member of the Board of Trustees Bond Oversight Committee (BOC). Mr. Overstreet was a voting member of the SOC.
2. Ms. Brager served on a selection committee that was responsible for issuing a request for proposal for a construction consultant, interviewing applicants and bringing a selection recommendation to the BOC and the Board. The selection committee was a working group comprised of three Board members, including Ms. Brager, and three BOC members.
3. On March 18, 1999, Ms. Brager presented the selection committee's choice of consultants to the BOC which they felt would meet the consulting needs of the Board and BOC. The selection committee chose to recommend two firms; a Nevada public accounting firm and a construction management firm. At that meeting, Mr. Overstreet objected to the qualifications of the construction management firm and indicated his intention to legally challenge the recommendation. Mr. Overstreet was also one of the bidders for the contract. Mr. Overstreet left the meeting in order to disrupt the quorum and thereby deny any action by vote.
4. At the March 18, 1999 meeting, Mr. Overstreet questioned the right of the selection committee to choose the consultants without first seeking approval of the Board. The transcript of the meeting indicates that Ms. Brager replied, "To my knowledge, from what staff said, no. And what legal said, that has taken place; the board was given the authority from this committee to choose someone and move it on to bond oversight. And I'd be happy to look into that for you." Ms. Brager testified at the just and sufficient cause hearing that she had simply forgotten to check into this issue. Mr. Overstreet could not provide proof that Ms. Brager had been untruthful. Further, Fred Smith stated at the March 18, 1999 meeting, "Yes. I think that the answer to the question, as professional services contract, there is not necessarily a requirement for that to go to the Board by name of the contractor for approval." This indicated that the staff was confused. The apparent confusion was cleared up one week later at the March 25, 1999 meeting of the Board. The President of the Board, a member of the selection committee, clearly indicated that the awarding of consultant contracts would be decided by the Board. Mr. Overstreet also attended the March 25, 1999 meeting and provided public comment.
5. On March 29, 1999, a request for an opinion was received from Mr. Overstreet by the Commission. The request was signed by Mr. Overstreet on March 22, 1999. Mr. Overstreet alleged that Ms. Brager violated a provision of the Ethics in Government law "by *unilaterally* awarding consultant contracts up to a combined \$85,000.00 to Resolution Management and Leland Pace with no formal action ever being taken by the full Board of Trustees in a public meeting." (Emphasis added.)
6. On April 22, 1999, the Board met and considered the BOC consultant proposal. The Board voted to table

consideration of the item until April 23, 1999, the next Board meeting, as part of the scheduled work session. On April 23, 1999, the Board voted in favor of the accounting firm and to consider employment of the construction management firm until such time as the firm could staff the Nevada office with a professional engineer licensed in Nevada. Mr. Overstreet was present at this meeting as a member of the SOC.

7. During his testimony, Mr. Overstreet was asked about his use of the term "unilaterally" when describing Ms. Brager's authority to award contracts. Mr. Overstreet then stated that Ms. Brager *attempted* to unilaterally award the consultant contracts. He used this opportunity at the hearing to request that his opinion request be amended to include the word "attempt".

8. Ms. Brager testified that at no time did she have the sole authority to award contracts and that no attempt was made to unilaterally award contracts. The testimony presented supported her position. Each member of the committee privately completed a scoring sheet, a 12-question questionnaire, for each applicant. The results were tabulated and a unanimous decision was determined.

### **ANALYSIS AND OPINION**

The Commission has jurisdiction over this matter pursuant to NRS 281.465(1)(a) and 281.511(2)(b) because Ms. Brager is a public officer as defined in NRS 281.4365.

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 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;...

Additionally, there are several crimes that address the making or presenting of false information to a governmental agency. See NRS 197.190 (Obstructing public officer) and NRS 199.120 (Perjury).

Mr. Overstreet violated NRS 281.525(1) and 281.551(2). Mr. Overstreet's statement that Ms. Brager had "unilaterally" awarded the consultant contracts was false. The evidence adduced at the just and sufficient cause hearing showed that Ms. Brager did not have the sole authority or ability to unilaterally award contracts in her position on a six member panel, a panel who privately scored each applicant through a regimented process of evaluation. The panel's decision was unanimous. Further, Mr. Overstreet knew or should have known that no contracts were awarded at the March 18, 1999 meeting. At the very least, on March 25, 1999 he knew the contracts were not awarded at the March 18, 1999 meeting. He made no attempt to amend or withdraw his opinion request. By April 23, 1999, Mr. Overstreet knew that the Board had awarded the contract because he attended that particular Board meeting, yet Mr. Overstreet made no attempt to withdraw his opinion request after learning this information.

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). 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 Mr. Overstreet's opinion request was submitted "in bad faith or with a vexatious purpose" for several reasons. First, Mr. Overstreet cannot use ignorance as a defense. He claims that he did not know that the contracts were not awarded at the March 18, 1999 meeting at the time he filed his opinion request. However, he had the ability and duty to obtain that information before he filed his opinion request. Further, he understood the process of the selection committee and knew or should have known that Ms. Brager was not in a position to "unilaterally" award the consultant contracts. In any event, one week later and three days after he signed his opinion request, he attended a Board meeting at which time he was apprised of the fact that no contracts had been awarded at the March 18, 1999 meeting. At that time, the Board cleared up the confusion regarding the final approval of the awarded applicants. Furthermore, approximately one month before the just and sufficient cause hearing (after the April 25, 1999 Board Meeting), he knew that the Board, not Ms. Brager, had awarded the contract.

Second, Mr. Overstreet displayed his ire and anger at the selection committee and the BOC by his grandstand exit from the March 18, 1999 meeting which was purposely done to disrupt the meeting process by ending the quorum. He made it very clear that he was determined to seek legal retribution. This behavior reflects badly on Mr. Overstreet when determining Mr. Overstreet's intent to file the opinion request.

Third, Mr. Overstreet submitted allegations which he knew he did not have evidentiary support, and he admitted as much under questioning from this Commission. 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 added.) Mr. Overstreet stated at the just and sufficient cause hearing that he did not feel it necessary to verify the truth of Ms. Brager's statement that the selection committee's decision was unanimous by inquiring of each member of the committee who they voted for. He felt justified to file the request without care or concern of its veracity or truth. Mr. Overstreet's uncaring response to the Commission's serious and simple question regarding his use of the term "unilateral" by requesting at that time that he be able to amend his complaint to include "attempt" displays his obvious intent to misuse the processes of this Commission in order to vex Ms. Brager or to seek some type of retribution for not being chosen as a consultant.

Finally, Mr. Overstreet's failure to amend or withdraw his complaint prior to the hearing demonstrated "a conscious disregard for the process and procedures established by the commission." NRS 281.551(1)(d)(2). Mr. Overstreet clearly knew at the hearing in this matter that there was no contract awarded at the March 18, 1999 BOC meeting and he certainly was aware that Ms. Brager did not have "unilateral" authority to award the contract by March 25, 1999 and April 23, 1999. His response under questioning was to request an on-the-spot amendment of his opinion request, which was contrary to the provisions of the Ethics in Government law and disfavored by this Commission. Further, Mr. Overstreet's failure to amend or withdraw his request prior to the hearing on this matter could only be "perceived as annoying or harassing by a reasonable person." NRS 281.551(10)(d)(1). In view of Mr. Overstreet's lack of regard toward Commission's procedures and his insistence that the Commission proceed on innuendo and supposition without a basis of witness support or evidentiary fact, we find that a reasonable person being subjected to Mr. Overstreet's unfounded filing would conclude that he intended to annoy and harass Ms. Brager.

This Commission will not be used as a weapon to further anyone's private aims. We are not a forum for speculation, innuendo, rumor-peddling, or vituperation. Any intentional misuse of this Commission's process exposes the subject

of the request to undeserved public scrutiny and treats this Commission's salutary public mandate with contempt.

We conclude that Mr. Overstreet made false statements to this Commission and that he did so in bad faith and with the intent to vex Ms. Brager. Such a blatant misuse of this Commission's processes deserves and necessitates an appropriately stiff sanction. Consequently, pursuant to NRS 281.551(2), this Commission imposes upon Mr. Overstreet an assessment of \$1,500.00 for the amount of attorneys fees actually and reasonably incurred by the Clark County School District for the services of Mr. Hoffman regarding his representation of Ms. Brager in defending this matter. Mr. Hoffman represented to this Commission, by affidavit and under oath, that he incurred over \$1,500.00 in attorneys fees since he spent over ten hours of preheating preparatory work. His hourly rate is \$150.00 per hour. Mr. Overstreet shall submit payment by cash or cashiers check or money order made payable to the "Clark County School District" at their office no later than 5:00 p.m. P.S.T. on August 13, 1999. Furthermore, because Mr. Overstreet's violations are so obvious and so abusive of this Commission's purpose, this Commission will refer this matter for criminal review and potential prosecution to the Clark County District Attorney pursuant to NRS 281.525(3).

### **CONCLUSION**

Based upon the substantial evidence in the record, the Commission concludes that Mr. Overstreet violated NRS 281.525(1) and 281.551(2) in this matter. For this violation, the Commission imposes a monetary assessment upon Mr. Overstreet in the amount of \$1,500.00 for reimbursement of attorney's fees incurred by the Clark County School District for William Hoffman's defense of this matter on Ms. Brager's behalf. Pursuant to NRS 281.525(3), the Commission will also inform the Clark County District Attorney of Mr. Overstreet's violation of NRS 281.525(1) so that the District Attorney can determine whether to proceed against Mr. Overstreet under NRS 281.525(2) or other applicable criminal statutes.

### **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: July 10, 1999.

NEVADA COMMISSION ON ETHICS

By: Mario G. Recanzone, Vice Chairman