

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR AN ADVISORY OPINION OF PUBLIC OFFICER

This matter came before the Nevada Commission on Ethics ("Commission") on Friday, January 21, 2000, and Thursday, March 23, 2000, for hearing on the advisory opinion request filed with the Commission on November 12, 1999, by Public Officer, pursuant to Subsection I of NRS 281.511. Notices of the hearings were properly served. The hearings were closed pursuant to NRS 281.511, Subsection 5.

Public Officer seeks an Advisory Opinion from the Commission regarding whether his activities to stimulate local economic development through his employment relationship with a privately funded non-profit corporation (hereinafter "Private Corporation"), and its working relationship with a publicly funded multi-entity economic diversification cooperative (hereinafter "Public Corporation"), create a conflict of interest that violates NRS Chapter 281, the Nevada Ethics in Government statutes.

Public Officer appeared in person and with his attorney. Public Officer was sworn and presented testimony.

During the January 21, 2000, hearing, an issue was raised regarding the implication of NRS 281.230 in light of the facts presented. NRS 281.230 prohibits specified public officials and employees from receiving any commission, personal profit or compensation in any manner, directly or indirectly, and of any kind, resulting from any contract or other transaction in which the employing public entity is in any way interested or affected. Public Officer's attorney requested an opportunity to brief the issue for the Commission prior to its rendering an opinion in this matter. This Commission granted the attorney's request, set a briefing schedule, and continued the hearing to a subsequent agenda. The matter was heard again on March 23, 2000.

The Commission, after full consideration of the request for opinion, the legal briefs submitted by Public Officer's counsel and Commission Counsel, the testimony, and the evidence, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Private Corporation is a privately funded non-profit corporation formed to address economic development issues in a Nevada city. Public Officer formed Private Corporation in or about 1997/1998 in response to community concern about the lack of economic development efforts in the Nevada city. Although Public Officer made no personal financial investment in Private Corporation, he volunteered considerable time to its efforts, received no compensation for his work, and paid all of his related expenses out of his own pocket through September, 1999. His ability to continue supporting Private Corporation in this capacity ceased in September 1999 because he was unemployed and had been unable to find adequate full-time employment since early 1999.
2. Public Officer was elected to an office in the Nevada city. As an elected official, Public Officer receives from the city a salary plus PERS and health insurance. The expressly enumerated duties of his office do not include "economic development."
3. Soon after Public Officer was sworn in as an elected official, adverse business and economic conditions in the city motivated Public Officer to renew efforts to fund Private Corporation. In that regard, he met with area businesses and professionals in an effort to stimulate the business community's interest in investing in Private Corporation's efforts to encourage economic development in the city.^[1] Public Officer was successful in obtaining pledges of financial support from the business community.

4. In October, 1999, after Public Officer informed Private Corporation's investors that he could no longer afford to champion its efforts because he was unemployed and would probably have to leave the area to find adequate full-time employment, Private Corporation's Board of Directors asked him to continue his fund-raising efforts as an independent contractor for which he would be compensated a fixed monthly amount.
5. Public Officer is employed by Private Corporation on a month-to-month basis as "marketing director" to raise funds for Private Corporation by soliciting donations from local private industry. He receives compensation of a sum certain each month, not contingent or variable on his fund-raising successes or failures.
6. Public Officer has no financial stake in the success of Private Corporation. He is not an officer, investor, or shareholder of, nor a contributor to, the corporation. There are no public officials or public employees on Private Corporation's board.
7. Public Corporation is a publicly funded entity formed through a cooperative agreement among the city, the county, the State Department of Economic Development, and the local Chamber of Commerce to address local economic development issues. The Public Corporation board consists of 15 members from designated areas of the private sector, the mayor of the city, and a commissioner from the county's Board of Commissioners. The Chamber of Commerce nominates the 15 private sector board members, subject to approval of the Board of County Commissioners of the county. Public Officer sits on the Public Corporation board. The city contributes funds annually to Public Corporation, none of which flows from Public Corporation to Private Corporation. Public Corporation and Private Corporation are separate organizations working together to create jobs for the local area.
8. As Private Corporation's marketing director, Public Officer serves on a joint Public Corporation/Private Corporation committee, together with three Public Corporation board members, three Private Corporation board members, and the Public Corporation Executive Director. The committee makes decisions regarding issues of local economic diversification.
9. Neither the city municipal code nor any applicable regulation prohibits the Public Official from accepting outside employment while serving as an elected official.

CONCLUSIONS OF LAW

1. Public Officer is a public officer as defined by NRS 281.005 and NRS 281.4365.
2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.511(1).

WHEREFORE, on motion duly made, seconded, and approved by majority vote, the Commission renders the following Opinion:

OPINION

The Nevada Legislature, in 1977 when it enacted the Nevada Ethics in Government Law (NRS 281.411, et. seq.), declared it to be the public policy of this state that (a) a public office is a public trust and shall be held for the sole benefit of the people; and (b) a public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves. NRS 281.421, Subsection 1. Further, in creating the Nevada Ethics in Government Law of NRS Chapter 28 1, the Nevada Legislature found that "(a) [t]he increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests;" and "(b) [t]o enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens." NRS 281.421, Subsections 2(a) and (b).

However, long before the "Ethics in Government" provisions became part of NRS Chapter 281, Nevada law

prohibited public officers from engaging in conduct that created public-private conflicts of interest. See, NRS 281.230. The language of NRS 281.230, Subsection 1, creates a broad proscription: **public officers are prohibited from receiving any commission, personal profit or compensation in any manner, directly or indirectly, and of any kind, resulting from any "contract or other transaction in which the employing [public entity] is in any way interested or affected."** By its own language ("**any** contract or transaction" and "in any way interested or **affected**" (*emphasis added*)), NRS 281.230 addresses situations broader than the obvious one where a public officer attempts to enter into a contract directly with his or her employing government entity.

NRS 281.230, Subsection 1, was added to the Nevada Revised Statutes in 1927 by Assembly Bill 113. There has been virtually no significant change to the language of NRS 281.230, Subsection 1, since. The 1927 legislative history (from which we could glean some understanding of the legislative intent of this statute) is, unfortunately, not available. And, although the Nevada Attorney General has opined with regard to its application in the context of a public officer contracting directly with the employing public agency (not Public Officer's situation), there appears to exist no Nevada case law interpreting NRS 281.230, Subsection 1, in a context similar to Public Officer's situation or otherwise.

However, other sources and authority provide helpful insight to understand the concept and extent of ethics in government laws.[\[2\]](#)

The apparent intent of NRS 281.230 (and other sections of NRS Chapter 281) is to prevent public officers and employees from becoming involved in situations generating conflicts between private and public interests so as to preserve and enhance impartiality of public officers and faith in the integrity of government. Policy objectives for ethics in government laws in general include:[\[3\]](#)

- Impartiality, fairness and equality of treatment toward those dealing with government.
- Assurance that decisions of public importance will not be influenced by private considerations.
- Maintenance of public confidence in government (wherein enters the matter of appearances).
- Prevention of use of public office for private gain.

A conflict of interest (either actual or potential) is a situation requiring a public officer to serve two masters, presenting a *potential*, rather than an actuality, of wrongdoing. The wrongdoing does not have to actually occur in order for a prohibited conflict to exist. A public official may have done no wrong in the ordinary sense of the word, but a conflict of interest may put him in danger of doing wrong. It is *avoiding* even the potential danger of doing wrong which is the focus of ethics in government laws.

For this purpose, ethics in government laws identify certain types of conflicts of interest and prohibit conduct by public officials that would allow these conflicts to occur. Included in the prohibited conflict of interest situations under NRS 281.230, Subsection 1, is **any** transaction where the public officer receives **any** compensation, directly or indirectly, and which in any way even **affects** the employing public entity. NRS 281.230 does not specify that for a violation to occur there must be actual corruption or that there be any actual loss suffered by the public entity as a result of the public officer's conflict of interest. Rather, the danger is presumed to exist even if the public officer actually performs bona fide services for his outside income.

The statute, therefore, establishes an objective standard of conduct. Whenever a public officer or employee fails to meet that objective standard, he or she violates the statute, regardless of subjective intent. Directed not only at dishonor, but also at conduct that tempts dishonor, the statute's broad proscription recognizes that an impairment of impartial judgment can occur in even the most well-meaning public officers, when their personal economic interests are affected by the business they transact on behalf of the government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to

prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships that are fraught with temptation.[\[4\]](#)

In view of the evident purpose of NRS 281.230 and its broad proscriptive language, it is reasonable to conclude that the Nevada Legislature intended to establish a rigid rule of conduct for Nevada's public officers. And, whatever the result, the statute must be applied without discrimination to all public officers in Nevada, whether they be situated in a large or small city or county.

Public Officer's three (3) simultaneous positions as an elected official of the city, as a city representative on Public Corporation, and as a compensated employee of Private Corporation give rise to the potential for the type of conflicts of interest that the ethics in government laws were enacted to prevent.

A potential objective public/private conflict of interest is implicated where Private Corporation and/or the businesses and professionals from whom Public Officer solicits funds (for which he receives private compensation from Private Corporation) have, or may have, business before the city and, necessarily, Public Officer. The request for money from private citizens or private business in the community by an elected official (albeit in his private capacity) creates an appearance of impropriety from the perspective of some of the citizens and some of those businesses because it leaves that individual with uncertainty as to how he may be treated by the city and its elected official when he has business before them. Although Public Officer is required to meet the disclosure, participation, and abstention standards of NRS 281.501 and as articulated in the Commission's "Woodbury Opinion" (Nev. Ethics Comm'n. Op. [99-56](#), Dec. 22, 1999), both of which govern his conduct as an elected official of the city, under the facts and circumstances herein, the Commission questions whether that is enough to adequately protect the public in light of the relationships between Public Officer, Private Corporation, Public Corporation and the city.

Also, the city (Public Officer's employing governmental entity) is arguably *affected by* Public Officer's "contract or transaction" under which he receives compensation from Private Corporation for soliciting funds from the private sector to encourage local economic development. Even though the city may be "affected" in a very positive way, the language of the statute does not allow for such a distinction. For better or worse, the legislature worded NRS 281.230 so as to be all-inclusive and without exception. The plain language of the statute is without ambiguity: ***public officers are prohibited from receiving any commission, personal profit or compensation in any manner, directly or indirectly, and of any kind, resulting from any "contract or other transaction in which the employing [public entity] is in any way interested or affected."*** The Commission understands that as an employee of Private Corporation, Public Officer is working towards the best interest of the city. However, the Commission is concerned about the extent to which the public may perceive the elected official as being overreaching, overbearing, or even intimidating by requesting contributions to Private Corporation. And, although the Commission in no way suggests here that Public Officer has or will engage in such tactics, perhaps a successor elected official would be less dedicated than Public Officer to the best interests of the city and more dedicated to his or her own private interests. Should the Commission render an opinion in this matter allowing Public Officer to continue the activities in question, will a larger problem surface later, if a successor elected official without Public Officer's character and integrity uses the Commission's opinion to "feather" his or her own private-capacity nest while at the same time using his or her public capacity as a hammer to induce private employment in some capacity?

The Commission is troubled by the possible implications of the interrelationships between Public Corporation, Private Corporation, Public Officer and the city. Although there does not appear to be a true violation of NRS 281.230 at this time because no money is flowing from Public Corporation to Private Corporation, as the relationship between Public Corporation and Private Corporation becomes closer, and who is actually paying Public Officer as an employee of Private Corporation becomes less clear, a violation becomes more likely.

Without implicating in any way the motives, character and integrity of Public Officer and Private Corporation, the Commission is also very concerned about the potential for public officers and private entities to fabricate an artificial

structure for the purpose of circumventing the proscriptions of NRS 281.230 and thereby undermining faith in the integrity and impartiality of public officers and employees.

The Nevada Legislature declared in NRS 281.421, "To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens." NRS 281.230 provides one such guideline.

Based on all of the above, and upon approval of a majority vote of the Commission (5 ayes and 1 no), the Commission imposes the following conditions:

1. To remove some of the appearance of impropriety, Public Officer shall forthwith relinquish his seat on the Public Corporation board.
2. If the circumstances change in the future so that any money flows directly or indirectly from or through Public Corporation to Private Corporation, Public Officer will. be required to either resign as an elected official of the city, or resign his position with Private Corporation.
3. Public Officer, in his capacity as an elected official, shall comply with the standards for disclosure, participation, and abstention set forth in NRS 281.501 and the Commission's "Woodbury Opinion" (Opinion No. [99-56](#) dated December 22, 1999) any time any matter comes before him involving any business entity where he has made a solicitation (successful or unsuccessful) on behalf of Private Corporation. All such disclosures shall include Public Officer's employment contract or arrangement with Private Corporation and all compensation he receives thereby, along with a public declaration that anyone who feels that Public Officer has misused his position relating to any such matters may bring the matter to the attention of the Nevada Commission on Ethics for further investigation.

NOTE: THE FOREGOING OPINION APPLIES ONLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES DEFINED HEREIN. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE IN THIS OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION. NO INFERENCES REGARDING THE PROVISIONS OF NEVADA REVISED STATUTES QUOTED AND DISCUSSED IN THIS OPINION MAY BE DRAWN TO APPLY GENERALLY TO ANY OTHER FACTS AND CIRCUMSTANCES.

DATED: May 19, 2000.

NEVADA COMMISSION ON ETHICS

By: /s/ PETER C. BERNHARD, Chairman

[\[1\]](#) Public Officer apparently undertook these efforts as a private citizen rather than as an elected official. Public Officer indicates that he was compelled to do so because "No one person in our community has taken this challenge for over 20 years" and he felt that if he didn't do it, no one would. Public Officer also indicates that he does not use his elected position "to influence anyone to make an investment in Private Corporation." However, Public Officer admits that he is relatively well known within the business community in the city, and people there know that he is an elected official.

[\[2\]](#) See, e.g., *Glazer v. Commission on Ethics for Public Employees*, 431 So.2d 752 (La. 1983); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed. 2d 268 (1961). Also see, Perkins, *The New Federal Conflict of Interest Law*, 76 Harvard Law Review 1113 (1963).

[\[3\]](#) See, Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. Law Rev. 1113, 1118 (1963) (addressing the federal ethics law).

[\[4\]](#) See, *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549-550, 81 S.Ct. 294, 5 L.Ed.2d 268 (1961).