

Opinion No. 01-08B

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING THE CONDUCT OF

EARL L. HAWKES, Jr., Director, Department of General Services, Clark County, Nevada

This matter came before a quorum of the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on August 16, 2001, pursuant to allegations in a Request for Opinion submitted in proper form to the Commission on or about February 12, 2001, under NRS 281.511, Subsection 2, and a Commission panel^[1] determination entered April 12, 2001, finding just and sufficient cause for the Commission to render an opinion in this matter on whether Mr. Hawkes' alleged conduct relating to repairs made to and a compressor installed in the air conditioner at his personal residence by a county employee violated the provisions of NRS 281.481, Subsections 2, 7, and/or 9.

Notice of the hearing was properly posted and served. Mr. Hawkes was present with his counsel, Frank Cremen, Esq., and provided sworn testimony. Other witnesses providing sworn testimony included Mr. Hawkes' wife, Violet Hawkes, and past and/or present Clark County employees Richard Schottmuller, Rudy Sideri, and Jeremiah Carroll.

The Commission, after hearing testimony and considering the evidence presented herein, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Mr. Hawkes is the former Director of the Department of General Services of Clark County, a position he held for approximately 17 years. Mr. Hawkes was employed by Clark County for approximately 22 years prior to his retirement in or about July 2001.
2. At all times relevant to the circumstances of this matter, the Facilities Division was one of several divisions under the administration of the Department of General Services of Clark County.
3. During the time Mr. Hawkes was Director of the Department of General Services, Clark County had a written policy that allowed employees, with county approval, to work outside jobs ("side work") on their own time using their own materials.
4. Over an approximately ten-year period from in or about 1990 until his retirement on or about July 2001, on six or seven different occasions, in accordance with the county's written policy, Mr. Hawkes employed county employees to do "side work" for him. On such occasions, it was Mr. Hawkes' practice to call the Chief of the Facilities Division, Mr. William Barrett, and ask him if anyone in the Facilities Division wanted to do a particular job as "side work." Mr. Barrett would inquire among the Facilities Division employees and whoever was interested in doing the work would get in touch with Mr. Hawkes. If there was no one in the Facilities Division who was interested in doing the work, Mr. Hawkes would employ the services of a private contractor. When Mr. Hawkes employed county employees for such "side work," he would instruct them that they were to do all of the work on their own time and charge him for all parts and labor at the same rate they charged anyone else for whom they did outside work. Over the course of the ten-year period, four individuals employed by the Facilities Division did "side work" for Mr. Hawkes at his personal residence as follows: Joseph Luera (electrical repair work), Fred Prawalski (carpentry work), Pat Black (plumbing work), and Richard Schottmuller (air conditioner repair work).
5. On all but the occasion of the air conditioner repair work performed by Mr. Schottmuller, Mr. Hawkes was present at his residence when the work was performed. Mr. Hawkes was not present at his residence when Mr. Schottmuller repaired the air conditioner because he was involved in a meeting at work.
6. All outside work performed by county employees for Mr. Hawkes was performed outside of county work hours and no work was performed on county time. Mr. Hawkes was charged for all such work, and Mr. Hawkes paid for all such work with a personal check promptly upon completion of the work.

7. On or about the morning of Thursday, June 13, 1996, the air conditioner in Mr. Hawkes' personal residence failed. Mr. Hawkes telephoned Mr. Barrett that morning and asked if there was someone in the Facilities Division skilled in air conditioner repair and who would be interested in doing "side work" for him on the air conditioner. Mr. Barrett telephoned Rudy Sideri, the HVAC unit "team leader" in the Facilities Division, and asked him if he could take care of the matter. Mr. Sideri was not himself interested in doing the air conditioner "side work" for Mr. Hawkes and referred the matter to his subordinate, Gene Smith. Mr. Smith went to Mr. Hawkes' residence to assess the problem with the air conditioner. He determined that the air compressor needed to be replaced and ordered a new air compressor from a county vendor. However, Mr. Smith was not interested in doing the "side work" for Mr. Hawkes either. Mr. Sideri then asked Mr. Schottmuller, a relatively new employee in the Facilities Division, to do the "side work" for Mr. Hawkes on his own time and make arrangements with Mr. Hawkes to get paid for parts and labor.

8. Mr. Schottmuller contacted Mr. Hawkes about replacing the air compressor on the air conditioner at Mr. Hawkes' residence and discussed with him a charge of \$550.00 for parts and labor (including \$190.00 for the air compressor). Mr. Hawkes believed that the charge as discussed was fair and authorized Mr. Schottmuller to do the work. Mr. Hawkes offered to pay Mr. Schottmuller in advance for the air compressor; however, Mr. Schottmuller refused his offer.

9. Mr. Schottmuller worked a 7:00 a.m. to 3:30 p.m. shift for the Facilities Division. On Friday, June 14, 1996, at approximately 4:00 p.m., Mr. Schottmuller installed the air compressor on the air conditioner at Mr. Hawkes' residence. After he completed the work, Mr. Schottmuller received a check in the amount of \$550.00 dated June 14, 1996, from Mr. Hawkes.

10. Without Mr. Hawkes knowledge, Mr. Schottmuller had used a county purchase order to purchase the air compressor he installed on the air conditioner at Mr. Hawkes' residence. After Mr. Schottmuller received payment from Mr. Hawkes, he spoke to Gene Smith and Mr. Sideri regarding the air compressor he had purchased on a county purchase order and attempted to make arrangements to reimburse the county for the cost thereof (\$190.00).

11. In January 1997, Mr. Hawkes learned that the air compressor Mr. Schottmuller had installed on the air conditioner at his residence was county property.

12. In January 1997, Mr. Schottmuller resigned from his position with the county. The county deducted the cost of the air compressor (\$190.00) from Mr. Schottmuller's final paycheck.

CONCLUSIONS OF LAW

1. Mr. Hawkes is a former public employee as defined by NRS 281.436.

2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.465 and NRS 281.511, Subsection 2(b).

WHEREFORE, the Commission, by majority vote, renders the following Opinion:

OPINION

A. NRS 281.481, Subsection 2.

NRS 281.481, Subsection 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. As used in this subsection, "unwarranted" means without justification or adequate reason.

On its face, NRS 281.481, Subsection 2, reasonably appears to require the Commission to apply a two-prong test to determine whether a public officer has violated the statute. First, the Commission must find that a public officer's official conduct benefited some person or business entity.^[2] Then the Commission must find that the public officer

intended such conduct to so benefit the person or the business entity.^[3]

The testimony and evidence in this matter reveals no conduct by Mr. Hawkes as Director of the Clark County Department of General Services by which he secured or granted any "privilege, preference, exemption or advantage" to himself or to any other person or business entity.^[4] "Side work" by county employees was authorized by a written county policy and was an established practice in the Facilities Division. The price Mr. Hawkes paid county employees willing to do "side work" for him may have been somewhat less than industry rates for such work. However, by employing county employees on their own time rather than licensed and insured contractors to do such work, Mr. Hawkes assumed some significant risk. Neither employing county employees to do "side work" nor paying them less than industry rates amounts to an "unwarranted privilege" under NRS 281.481, Subsection 2, since county policy allowed the practice, the practice was available to all employees willing to do "side work," and "side work" was an established practice within the Facilities Division.

The Commission, therefore, finds no violation of NRS 281.481, Subsection 2, by Mr. Hawkes.

B. NRS 281.481, Subsection 7.

NRS 281.481, Subsection 7, provides:

A public officer or employee, other than a member of the legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of his public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

The Commission finds no evidence herein that Mr. Hawkes used any county property or equipment himself, or that he had knowledge of the use of any county property or equipment by anyone else for his benefit. Clearly, the compressor Mr. Schottmuller installed on the air conditioner at Mr. Hawkes' personal residence was county property. However, there is no evidence herein that Mr. Hawkes' knew that it was county property at the time it was installed by Mr. Schottmuller. Had Mr. Hawkes known the compressor was county property, the Commission would have no difficulty finding that he violated the provisions of NRS 281.481, Subsection 7. However, that is not the case.

Therefore, the Commission finds no violation of NRS 281.481, Subsection 7, by Mr. Hawkes.

C. NRS 281.481, Subsection 9.

NRS 281.481, Subsection 9, provides:

A public officer or employee shall not attempt to benefit his personal or financial interest through the influence of a subordinate.

The Commission finds no evidence that Mr. Hawkes attempted to influence subordinate employees to benefit his personal interest by employing them to do “side work” on their own time for him. Rather, the testimony herein reveals that county policy allowed such practice. In fact, the county and everyone involved deemed the practice a win-win situation. Consistent with the county’s policy, Mr. Hawkes hired and paid county employees willing to do “side work” for him on their own time. County employees volunteered for such work on their own time, and no county employee was forced by anyone to do any such “side work.”

Therefore, the Commission finds no violation of NRS 281.481, Subsection 9, by Mr. Hawkes.

CONCLUSION

In determining whether or not a public officer or public employee has violated any provision of NRS Chapter 281, the Commission must look at the evidence actually presented in a matter. By statute, the Commission may not find that a public officer or public employee has violated any provision of NRS Chapter 281 unless such finding is supported by a preponderance of the evidence in the matter.^[5] The Commission is loath to assume any fact not in evidence on the record.

The Commission questions the wisdom behind a county policy as susceptible to potential abuse as the “side work” policy discussed herein. However, deciding the merit of county policy is beyond the jurisdiction of this Commission. Rather, the Commission must determine, based upon a preponderance of the evidence presented herein, whether Mr. Hawkes violated Nevada’s Ethics in Government Law by conduct which complied with that county policy.

Mr. Hawkes had a long and distinguished career in public service. Notwithstanding that, in retrospect, his decision to employ subordinate county employees to do “side work” for him (a decision which complied with common county practice supported by written county policy) may have been less than prudent, such conduct does not amount to an ethical violation under NRS Chapter 281. Neither Clark County’s internal investigation, nor the Commission’s investigation, nor any testimony or evidence presented herein reveals any conduct by Mr. Hawkes that supports such a conclusion. In fact, the testimony and evidence presented herein supports just the opposite conclusion.

It is the Commission’s opinion, therefore, that Mr. Hawkes’ conduct in this matter did not violate the provision of NRS 281.481, Subsections 2, 7, and/or 9.

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: February 12, 2002.

NEVADA COMMISSION ON ETHICS

By: TODD RUSSELL, Chairman

[1] Commissioner Skip Avansino and Commissioner Lizzie Hatcher served as the panel in this matter.

[2] “...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.” NRS 281.481, Subsection 2 (emphasis added).

[3] “A public officer...shall not use his position in government...” NRS 281.481, Subsection 2 (emphasis added).

[4] Since the Commission finds no evidence as to the first prong of the two-prong test, the Commission has no reason to analyze the second prong (i.e., intent).

[5] See, NRS 281.551(11).