

## Opinion No. 01-12

### BEFORE THE NEVADA COMMISSION ON ETHICS

#### IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING THE CONDUCT OF LYNETTE BOGGS-McDONALD, Las Vegas City Councilwoman

This matter came before six members<sup>[1]</sup> of the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on June 21, 2001, pursuant to a Request for Opinion submitted in proper form to the Commission on March 12, 2001, under NRS 281.511, Subsection 2, and a written panel determination entered May 2, 2001, finding just and sufficient cause for the Commission to render an opinion in this matter regarding whether Councilwoman Boggs-McDonald's alleged failure to disclose a "gift" contributed in October 1999 by Station Casinos and action taken on matters concerning Station Casinos before the Las Vegas City Council in September 2000 violated the provisions of NRS 281.501, Subsections 2 and/or 3.

Notice of the hearing was properly posted and served. Councilwoman Boggs-McDonald was present with her counsel, John H. Mowbray, Esq., and was sworn and testified.

The Commission, after full consideration of the record in this matter, makes the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

1. Councilwoman Boggs-McDonald represents Ward 2 of the City of Las Vegas on the Las Vegas City Council. She was appointed to that position in 1999 and re-elected in the spring 2001 primary election.
2. Councilwoman Boggs-McDonald traveled to Chicago in the fall of 1999 to attend a football game at the University of Notre Dame, her alma mater, and network with fellow alumni as it related to her campaign.
3. The trip was at least in part paid for by Station Casinos, and Station Casinos provided to Councilwoman Boggs-McDonald evidence of its value as a campaign contribution for reporting purposes.
4. Councilwoman Boggs-McDonald reported the value of the trip as an in-kind campaign contribution pursuant to NRS 294A.007. The campaign contribution report was timely filed pursuant to NRS 294A.120.
5. Matters concerning Station Casinos came before the Las Vegas City Council in September 2000. Councilwoman Boggs-McDonald made no disclosure of the fall 1999 Chicago trip when she participated in the City Council's deliberations of and voted on matters affecting Station Casinos at the September 2000 City Council meeting.
6. At about the same time as the request for opinion in this matter was filed with the Commission, a complaint was filed with the Office of the Secretary of State challenging the valuation of the trip and its characterization as an "in-kind campaign contribution."
7. After investigating the complaint, on May 15, 2001, the Office of the Secretary of State closed the matter finding that Councilwoman Boggs-McDonald complied with the regulatory requirement for placing a value on the trip and properly reported it as a campaign contribution.

#### CONCLUSIONS OF LAW

1. Councilwoman Boggs-McDonald 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 281.465, Subsection 1(a); and NRS 281.511, Subsection 2(b).

WHEREFORE, on motion duly made, seconded, and approved by majority vote<sup>[2]</sup>, the Commission renders the following Opinion:

## OPINION

NRS 281.501, Subsection 3, prohibits a public officer from approving, disapproving, voting, abstaining from voting, or otherwise acting upon any matter (a) regarding which he has accepted a gift or loan; (b) which would reasonably be affected by his commitment in a private capacity to the interest or others; or (c) in which he has a pecuniary interest; “without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest.” However, NRS 281.501, Subsection 3, expressly does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 in a timely manner.

The Secretary of State’s Office, which has jurisdiction over the provisions of NRS Chapter 294A relating to the definition and reporting of campaign contributions, investigated the issues of how the trip was valued and whether it was properly a campaign contribution and found that Councilwoman Boggs-McDonald valued the trip in accordance with regulatory requirements and properly reported that value as an in-kind campaign contribution pursuant to NRS 294A.120.

So long as Nevada’s campaign finance laws provide for disclosure with regard to campaign contributions, the public interest presumably is served by its access to campaign finance reports filed with the Office of the Secretary of State by public officers and candidates for public office, even though public officers are not required to disclose campaign contributions under NRS 281.501, Subsection 3. The Commission has no statutory authority or jurisdiction to define as a “gift” for purposes of NRS 281.501, Subsection 3, a donation to a public officer’s political campaign that has been defined as a “campaign contribution” by the Office of the Secretary of State, the agency which has jurisdiction to make such a determination.

Therefore, based upon the disclosure safe harbor provision of NRS 281.501, Subsection 3(c), with regard to campaign contributions reported by a public officer in a timely manner pursuant to NRS 294A.120, the Commission finds that Councilwoman Boggs-McDonald had no obligation under NRS 281.501(3) to disclose the in-kind campaign contribution she received in the fall of 1999 from Station Casinos. Her conduct in September 2000 when she acted upon matters before the Las Vegas City Council concerning Station Casinos, therefore, did not violate NRS 281.501, Subsection 3.

However, as the Commission noted in Opinion No. 99-61, NRS 281.501, Subsection 3, clearly does not prohibit a public officer from disclosing any campaign contributions that may appear significant enough in relationship to the public officer’s total campaign budget to raise the question of the contribution’s effect on the public officer’s independence of judgment or that of a reasonable person in the public officer’s position. Such cases may implicate the disclosure standards of NRS 281.501, Subsection 2, and the abstention standards of NRS 281.501, Subsection 3, and the guidance thereon provided in Commission Opinion No. 99-56, the “Woodbury Opinion.”<sup>[3]</sup>

Abstention under NRS 281.501, Subsection 2, however, is a more difficult issue. NRS 281.501, Subsection 2, provides that “[i]n addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by (a) his acceptance of a gift or loan; (b) his pecuniary interest; or (c) his commitment in a private capacity to the interests of others” In Subsection 2 of NRS 281.501, the Legislature did not provide the same safe harbor language regarding campaign contributions as it did in Subsection 3 of NRS 281.501 regarding disclosure. Yet, it would be inconsistent to conclude that a public officer would have no obligation under NRS 281.501, Subsection 3, to disclose a timely and properly reported campaign contribution, but would nevertheless violate the provisions of NRS 281.501, Subsection 2, by participating in the discussion of and voting on matters coming before the public officer concerning the entity that made the campaign contribution.

Unless clearly disqualified, public officers have a public duty to act on matters that come before them. To require otherwise would deprive the public of its elected or appointed representation. As the Commission noted in a prior opinion:<sup>[4]</sup>

[T]he public (and an elected official’s constituents) have an interest in matters which come before such officers and

employees. Abstention deprives the public and that official's constituents of a voice in governmental affairs. And, public officers and employees should have the opportunity to perform the duties for which they were elected or appointed, except where private commitments would materially affect one's independence of judgment. Compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment. And, in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or their appointing authority. The burden, therefore, is appropriately on the public officer or employee to disclose private commitments and the effect those private commitments can have on the decision-making process, and to make a proper determination regarding abstention where a reasonable person's independence of judgment would be materially affected by those private commitments.

Notwithstanding the foregoing discussion, however, public officers must remember that under some circumstances campaign contributions may qualify as a "gift" for purposes of Nevada's Ethics in Government law. In a previous Commission opinion in an unrelated matter,<sup>[5]</sup> the Commission addressed the issue of whether particular campaign contributions were a gift "which would tend improperly to influence a reasonable person in the public officer's position to depart from the faithful and impartial discharge of his public duties" under NRS 281.481, Subsection 1. The Commission concluded, under the facts and circumstances in that matter, that the campaign contributions in issue would not improperly influence a reasonable man in the public officer's place, nor did they improperly influence the public officer. The campaign contributions at issue were "a small percentage [six percent] of [the public officer's] total campaign budget."<sup>[6]</sup> However, the Commission's opinion was based on more than the mere percentage amount.

The record in Opinion No. 95-51 reflected that the campaign contributions at issue were all properly reported and there was no direct evidence of an express quid pro quo between the contributors and the public officer. The Commission, however, was "not prepared to issue a blanket statement that properly disclosed campaign contributions will never qualify as a 'gift . . . which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.'"<sup>[7]</sup> The Commission further stated:

As the test makes clear, the question is not whether money is a "gift," but rather whether the money would improperly influence a reasonable man. It is conceivable that a campaign contribution could be deemed to improperly influence a reasonable man depending upon the amount of the contribution, the identity of the donor, the timing of the gift, and other such factors.<sup>[8]</sup> (Emphasis added).

There is absolutely no evidence in this matter that ties the in-kind campaign contribution Councilwoman Boggs-McDonald received from Station Casinos to any action taken by the Las Vegas City Council on matters concerning Station Casinos. Further, there is no allegation in this matter of unethical conduct of any kind suggesting that the in-kind campaign contribution Councilwoman Boggs-McDonald received from Station Casinos improperly influenced Councilwoman Boggs-McDonald in the exercise of independent judgment on matters coming before her concerning Station Casinos, or that it would so influence a reasonable person in Councilwoman Boggs-McDonald's position. Nor is there any evidence at all that Councilwoman Boggs-McDonald in any way violated the public trust by not abstaining from participating in and voting on matters before the Las Vegas City Council concerning Station Casinos, even though the campaign contribution safe harbor language is absent from NRS 281.501, Subsection 2.

Therefore, the Commission further finds that Councilwoman Boggs-McDonald's conduct as discussed herein did not violate the provisions of NRS 281.501, Subsection 2.

**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: August 8, 2001.

NEVADA COMMISSION ON ETHICS

By: TODD RUSSELL, Chairman

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[1] Commission Chairman Bernhard, Commission Vice Chairman Russell, and Commission Members Avansino, Flangas, Hsu, and Smith. Commission members Hatcher and Kosinski did not participate in this hearing pursuant to NRS 281.462, Subsection 4.

[2] Commissioners Bernhard, Russell, Avansino, Hsu, and Smith voted “aye;” Commissioner Flangas voted “no.”

[3] Commission Opinion No. 99-56, *In the Matter of the Opinion Request of Bruce L. Woodbury*, dated December 22, 1999.

[4] See, Commission Opinion No. 99-56, *In the Matter of the Opinion Request of Bruce L. Woodbury*, dated December 22, 1999.

[5] See, Commission Amended Opinion No. 95-51, *In the Matter of the Opinion Request Regarding David A. Wood*, dated June 6, 1997., and as discussed in Commission Opinion No. 99-61, *In the Matter of the Request for Opinion Concerning the Conduct of Michael J. McDonald*, dated September 18, 2000.

[6] Commission Opinion No. 95-51, pages 9-10.

[7] Commission Opinion No. 95-51, page 9.

[8] Commission Opinion No. 95-51, page 9.