Abstract of Advisory Opinion No. 01-16

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR ADVISORY OPINION OF

PUBLIC OFFICER, an elected local government official

This matter came before a quorum[1] of the Nevada Commission on Ethics (hereinafter the "Commission") on April 19, 2001, on the request for advisory opinion filed by Public Officer pursuant to NRS 281.511, Subsection 1. The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511, Subsection 5. Public Officer appeared in person, was sworn and presented testimony. The Opinion is confidential pursuant to NRS 281.511, Subsection 5(c).

Public Officer is considering an opportunity to become an individual investor in a company that will provide specific services to public agencies in Nevada while serving as Public Officer. Before making this investment decision, Public Officer seeks an opinion from the Commission advising him whether such an investment will conflict with his public duties and violate any provision of NRS Chapter 281, Nevada's Ethics in Government law.

The Commission, after full consideration of the request for opinion, the testimony, and the evidence makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. In his public capacity, Public Officer presently serves as a local government elected public officer.

2. Temporary, part-time, and seasonal employees of the local government presently participate in a federal program.

3. Through the Governor's recent fundamental review of State government, Public Officer learned of a provision in the Federal Omnibus Budget Reconciliation Act of 1990 (OBRA) that provides the opportunity for government employers to substitute a privately managed program for participation in the federal program. Public Officer believes that implementing such a program in his jurisdiction would save the local government tens of thousands of dollars a year.

4. For the past six months, Public Officer has been investigating options available to the local government to implement a privately managed program for its temporary, part-time, and seasonal employees and discontinue participation in the federal program.

5. During the course of his investigation, Public Officer has communicated with two large companies that presently provide similar services to the State of Nevada and the local government. Both providers declined the opportunity to administer a program for temporary, part-time, and seasonal employees because the administrative costs would be more than the reasonable fee they could charge for such services.

6. The Finance Department of the local government declined to undertake the responsibility of managing the proposed retirement program because it lacked both the expertise and the desire to do so.

7. Only temporary, part-time, and seasonal employees will participate in the proposed program. Public Officer will not participate in the proposed program or be covered by its benefits. However, temporary, part-time, and seasonal employees hired by Public Officer's department would participate in the proposed program.

8. At different times through the year, the local government employs between 200 and 350 temporary, part-time, and/or seasonal employees.

9. Public Officer's friend has worked in the banking industry for a number of years. Public Officer and friend discussed the possibility of forming a private company to manage a program for temporary, part-time and seasonal

employees of Nevada public agencies.

10. Friend is presently in the process of forming a limited liability company to provide third-party administrative services in Nevada.

11. The limited liability company will offer its services to government employers in Nevada, including the local government.

12. Public Officer would like to invest in, and participate as a member of, the limited liability company. He anticipates investing approximately $3,000. For his investment, Public Officer will hold approximately a 50% membership interest. Friend will actively manage the business and receive a salary from the limited liability company. Public Officer's son will contribute office space, telephone service, and provide computer programming services, including building a company website. Friend and Public Officer's son will also hold membership interests.

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, Subsection 1, and NRS 281.521.

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

OPINION

The Nevada Legislature, in 1977 when it enacted the Nevada Ethics in Government Law in NRS Chapter 281 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, 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).

Public Officer's proposed equity participation in a limited liability company that provides to local government services for a program for temporary, part-time, and seasonal employees as proposed herein while simultaneously serving as local government public officer would, at the very least, create the appearance of impropriety and would border on actual violations of the provisions of NRS Chapter 281, Nevada's Ethics in Government Law.

For example:

1. NRS 281.230(1) prohibits municipal officers, among others, from receiving any personal profit or compensation from contracts in which the municipality is involved. NRS 281.230(1) states:

> Except as otherwise provided in this section and NRS 218.605, the following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way interested or affected:
> (a) State, county, municipal, district and township officers of the State of Nevada;
> (b) Deputies and employees of state, county, municipal, district and township officers; and
> (c) Officers and employees of quasi-municipal corporations.

Therefore, since Public Officer, as a member of the proposed limited liability company, would presumably be entitled to receive a percentage of the company's profits, should the company contract or otherwise enter into a transaction with local government to provide and receive a fee for third-party administrator services to manage a retirement program for local government's temporary, part-time, and seasonal employees, Public Officer could potentially violate NRS 281.230(1).

2. NRS 281.481(2) prohibits a public officer from using "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." For purposes of NRS 281.481(2), "unwarranted" means "without justification or adequate reason." NRS 281.481(2) would, therefore, prohibit Public Officer from using his position as public officer to secure or grant to himself, the limited liability company, or, arguably, his son and/or Friend (the other members of the limited liability company) any privilege, preference, exemption or advantage related to the business of the limited liability company, for which there is no justification or adequate reason.

3. NRS 281.481(3) prohibits a public officer from participating as an agent of government in the negotiation or execution of a contract between the government and any private business in which the public officer has a significant pecuniary interest. Public Officer's fifty percent interest in the limited liability company would arguably be a "significant pecuniary interest." Therefore, should Public Officer, in his public capacity on behalf of local government, participate in the negotiation or execution of a contract between local government and the limited liability company in which he holds a fifty percent membership interest to provide services to manage a program for local government's temporary, part-time, and seasonal employees, he would risk being found to have violated NRS 281.481(3).

4. NRS 281.481(5) prohibits a public officer from using information which he acquires through his public duties or relationships and which is not at the time available to the general public to further his pecuniary interests or the pecuniary interests of any other person or business entity. As a member, Public Officer would own a pecuniary interest in the limited liability company. The extent of his pecuniary interest would, of course, be directly related to the company's profitability. And, the extent of the company's profitability would, to a great extent, turn on the quantity and quality of its client base. Therefore, should Public Officer, in his capacity as public officer, acquire information which is not at the time available to the general public and use that information or convey it to another person so as to advantage the business of the limited liability company, he would violate NRS 281.481(5). Even if Public Officer did not affirmatively use such information to advantage the business of the limited liability company, the fact that he may, in his position as public officer, have access to information not generally available to the public provides the opportunity for information to be used to advantage the business of the limited liability company, thus raising the question of appearance of impropriety and a public officer's duty to hold office for the sole benefit of the people.

5. NRS 281.481(6) prohibits a public officer from suppressing any governmental report or other document because it might tend to affect unfavorably his pecuniary interests. Again, Public Officer, as a member of the limited liability company, would have a pecuniary interest in the company. Therefore, if in his capacity as public officer, should he take any action to suppress a governmental report or other document because it might tend to affect unfavorably the limited liability company, he would violate NRS 281.481(6).

6. NRS 281.505(1) and (4) generally prohibits a public officer such as Public Officer from bidding on or entering into a contract between a governmental agency and any private business in which he has a significant pecuniary interest, unless (a) the contracting process is controlled by rules of open competitive bidding, (b) the sources of supply are limited, (c) he has not taken part in developing the contract plans or specifications, and (d) he will not be personally involved in opening, considering or accepting offers. A fifty percent ownership interest is arguably a "significant" pecuniary interest. If other companies exist which provide the same services as does the limited liability company, the sources of those services may not be deemed "limited." Under those circumstances, if the limited liability company in which Public Officer owns a significant pecuniary interest bids on or enters into a contract to provide services to any governmental agency, Public Officer would violate NRS 281.505. Even if the sources of services proposed to be provided by the limited liability company are, in fact, limited, the limited liability company in which Public Officer holds a significant pecuniary interest could not bid on or enter into a contract to provide services to any governmental agency unless the open competitive bidding and other conditions of NRS 281.505(4) are met.

7. Finally, although the Commission has no jurisdiction over the provisions of local government's codes, Public Officer is directed to the Section thereof which prohibits the person holding Public Officer's office from engaging in any other business or occupation that creates a conflict of interest between his personal interests in the business or occupation and his official duties.

It is, therefore, the opinion of this Commission that a violation of the foregoing statutory sections, or at least an appearance of impropriety, may be implicated if Public Officer, while serving as public officer, owns an equity interest in a limited liability company offering and/or providing services to manage a program for local government's temporary, part-time, and seasonal employees. Whether or not the same implications would apply to Public Officer should the limited liability company offer and/or provide such services to governmental agencies in other political subdivisions of Nevada would depend on specific facts and information not presently before the Commission.

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: June 13, 2001.

NEVADA COMMISSION ON ETHICS

By: /s/ PETER C. BERNHARD, Chairman

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[1] Commission members Skip Avansino, Bill Flangas, Richard Hsu, Jim Kosinski, Vice Chairman Todd Russell, and Chairman Peter Bernhard constituted the quorum. Commission members Lizzie Hatcher and Hal Smith were absent.