

Opinion No. 02-19

BEFORE THE NEVADA COMMISSION ON ETHICS

**In the Matter of the Request for Opinion concerning the allegation that
DEAN HELLER, Secretary of State, impeded the success of the campaign of
CHRISTOPHER H. HANSEN, Candidate for the office of Secretary of State,
in violation of NRS 294A.345**

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on October 23, 2002, pursuant to NRS 281.477, upon a Request for Opinion submitted by Christopher H. Hansen, candidate for the office of Secretary of State, on or about October 3, 2002, and supplemented on or about October 11, 2002. Mr. Hansen alleges that Secretary of State Dean Heller impeded the success of his campaign in violation of NRS 294A.345 by a making false statement of fact as reported in a September 27, 2002, *Las Vegas SUN* newspaper article.

Notice of the hearing was properly posted and served. Mr. Hansen appeared by telephone. Secretary of State Dean Heller appeared in person with his legal counsel, Deputy Attorney General Jim Spencer, and presented sworn testimony.

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. Christopher H. Hansen is a candidate for the office of Nevada Secretary of State.
2. Dean Heller is the elected Secretary of State and a candidate for re-election.
3. On September 27, 2002, the *Las Vegas SUN* newspaper published an article entitled "Hansens are heart of the IAP." In that article, Secretary of State Dean Heller, referring to candidate Hansen, was quoted as stating: "That guy wants to be secretary of state and he won't even follow the rules he's supposed to enforce."
4. NRS 294A.380 charges the Secretary of State with the duty to administer the provisions of NRS Chapter 294A, including the provisions which require candidates for public office in a primary or general election to file reports of campaign contributions and expenses which candidates must sign under penalty of perjury.
5. Candidate Hansen has refused to file completed and signed campaign contributions and expenses reports as required by NRS Chapter 294A.

CONCLUSIONS OF LAW

1. At all times relevant to the allegations presented in his request for opinion, Mr. Hansen was a candidate for public office as defined by NRS 294A.005.
2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.477 and NRS 294A.345.

WHEREFORE, on motion duly made, seconded, and unanimously approved, the Commission renders the following Opinion:

OPINION

NRS 294A.345 provides:

1. A person shall not, with actual malice and the intent to impede the success of the campaign of a candidate, impede the success of the candidate by causing to be published a false statement of fact concerning the candidate, including, without limitation, statements concerning:
 - (a) The education or training of the candidate.
 - (b) The profession or occupation of the candidate.
 - (c) Whether the candidate committed, was indicted for committing or was convicted of committing a felony or other crime involving moral turpitude, dishonesty or corruption.
 - (d) Whether the candidate has received treatment for a mental illness.
 - (e) Whether the candidate was disciplined while serving in the military or was dishonorably discharged from service in the military.
 - (f) Whether another person endorses or opposes the candidate.
 - (g) The record of voting of a candidate if he formerly served or currently serves as a public officer.
2. Any candidate who alleges that a false statement of fact concerning the candidate has been published in violation of subsection 1 may file a request for an opinion with the commission on ethics pursuant to NRS 281.411 to 281.581, inclusive. Such a request must be filed with the commission not later than 10 days after the date on which the false statement of fact is alleged to have been made. The commission shall give priority to such a request over all other matters pending with the commission
3. A person who violates the provisions of this section is subject to a civil penalty that may be imposed by the commission on ethics pursuant to NRS 281.551.
4. As used in this section:
 - (a) "Actual malice" means knowledge of the falsity of a statement or reckless disregard for whether a statement is true or false.
 - (b) "Publish" means the act of printing, posting, broadcasting, mailing, speaking or otherwise disseminating.

In pertinent part, NRS 281.477 provides:

2. [A request for opinion filed with the Commission pursuant to NRS 294A.345] must be accompanied by all evidence and arguments to be offered by the requester concerning the issues related to the request. Except as otherwise provided in this subsection, if such evidence and arguments are not submitted with the request the commission may:
 - (a) Draw any conclusions it deems appropriate from the failure of the person or group of persons requesting the opinion to submit the evidence and arguments, other than a conclusion that a person alleged to have violated NRS 294A.345 acted with actual malice; and
 - (b) Decline to render an opinion.
 - (c) The provisions of this subsection do not prohibit the commission from considering evidence or arguments presented by the requester after submission of the request for an opinion if the commission determines that consideration of such evidence or arguments is in the interest of justice.

7. The person or group of persons that filed the request for the opinion pursuant to NRS 294A.345...has the burden of proving the elements of the offense, including that a person alleged to have violated NRS 294A.345 acted with actual malice. The existence of actual malice may not be presumed. A final opinion of the commission rendered pursuant to this section must be supported by clear and convincing evidence. In addition to the other requirements for issuing an opinion pursuant to this subsection, the commission shall not render a final opinion determining that a person has violated NRS 294A.345 unless the commission makes specific findings that:

- (a) The person caused to be published a false statement of fact concerning a candidate;
- (b) The person acted with actual malice in causing the false statement to be published.
- (c) The person acted with the intent to impede the success of the campaign of the candidate in causing the false statement to be published; and
- (d) The publication of the false statement did in fact impede the success of the campaign of the candidate.

13. As used in this section:

- (a) "Actual malice" has the meaning ascribed to it in NRS 294A.345.
- (b) "Publish" has the meaning ascribed to it in NRS 294A.345.

Mr. Hansen alleges that the statement, "That guy [referring to Mr. Hansen] wants to be secretary of state and he won't even follow the rules he's supposed to enforce" published in the *Las Vegas SUN* on September 27, 2002, is false. However, the record in this matter clearly and convincingly controverts that allegation. The Commission finds that the statement is one of opinion based upon facts that are true. Such statements are protected by the First Amendment of the United States Constitution and do not implicate a violation of NRS 294A.345.

Mr. Hansen has, therefore, failed to meet his burden of proving the first element of the alleged offense – that Secretary of State Dean Heller caused to be published a false statement of fact concerning candidate Hansen. Without proof of a false statement of fact, the Commission need not consider the matter further. The request for opinion is, therefore, dismissed.

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: October 29, 2002.

NEVADA COMMISSION ON ETHICS

By: TODD RUSSELL, Chairman