Advisory Opinion No. 03-48
IN THE MATTER OF THE
REQUEST FOR ADVISORY OPINION OF
DR. JOHN HAWK, Member, Nevada State Board of Education

This matter came before the Nevada Commission on Ethics (hereinafter the “Commission”) for hearing on Thursday, November 13, 2003, on the request for advisory opinion filed pursuant to NRS 281.511, Subsection 1, by Dr. John Hawk, Member, Nevada State Board of Education.

The matter was properly noticed. Dr. Hawk expressly waived the confidentiality provisions of NRS 281.511(5) and requested that this matter be public. Dr. Hawk appeared in person and was sworn and presented testimony.

Dr. Hawk requests the Commission’s advisory opinion addressing whether his private interest in a proposed Nevada charter school conflicts with his public duties as an elected member of the Board of Education in violation of Nevada’s Ethics in Government Law (NRS Chapter 281).

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. In his public capacity, Dr. Hawk is an elected member of the Board of Education. He was elected to that position in 2000 and took office in 2001. His term expires in 2004. Dr. Hawk is undecided on whether he will run for re-election in 2004.

2. Until July 2003, Dr. Hawk served as an appointed member of the Board of Education’s Subcommittee on Charter Schools. The Subcommittee on Charter School makes recommendations to the Board of Education for adoption of regulations governing charter schools. Subcommittee appointments are made by the Chairman of the Board of Education. Dr. Hawk does not intend to be reappointed to the Subcommittee on Charter Schools.

3. In his private capacity, Dr. Hawk is employed full time by the Clark County School District as a “Teacher on Special Assignment” assigned as a regional trainer and is paid an annual salary of $55,000. He was formerly employed by the Clark County School District as a teacher.

4. Dr. Hawk’s wife is employed as an administrator in the Clark County School District and is paid an annual salary of $65,000.

5. Both Mr. and Mrs. Hawk will resign from their employment with the Clark County School District when they become co-directors of Nevada State High School charter school.

6. Dr. Hawk and his wife each hold a doctorate degree.

7. Dr. Hawk and his wife are members of a committee organized to form a charter school called Nevada State High School.

8. The committee organized to form a charter school usually becomes the charter school’s governing board.

9. Applications to form a charter school are submitted to the local school district for approval. If the local school district approves the application, the local school district sponsors the charter school. If the local school district
denies the application, the applicant may resubmit the application. If the local school district denies the application after it has been resubmitted, the applicant may submit a request for Board of Education sponsorship for the charter school to the Subcommittee on Charter Schools of the Board of Education. The subcommittee recommends approval or denial of the application to the Board of Education. If the Board of Education approves the application, the state sponsors the charter school.

10. Renewal and revocation of a school’s charter is within the statutory authority of the charter school’s sponsor.

11. Revocation of the charter of a charter school sponsored by the State Board of Education is initiated by Superintendent of Public Instruction.

12. The Superintendent of Public Instruction is the secretary of and serves at the pleasure of the Board of Education.

13. Both Dr. Hawk and his wife will be employed by Nevada State High School charter school as co-directors. Employment compensation for each of them will include an annual salary of approximately $72,000, retirement benefits in the state teachers retirement system, and health insurance.

14. A charter schools is a “public school” (NRS 385.007) and cannot be operated for profit (NRS 386.553).

15. Charter schools are funded with public money, private donations, and private and public grants.

16. A charter school can build a school building with private funds and/or public grant money or they can lease a building for the school's operations. A charter school building built with private funds and/or public grant money is not a public asset and reverts to private ownership when the charter school ceases its operations in the building.

17. Charter schools recruit students from the entire county. Dr. Hawk anticipates that approximately 70 students will enroll in Nevada State High School charter school.

18. The Department of Education adopts regulations addressing the charter school application process for school district sponsorship (NRS 386.540). The Board of Education is required by statute to review certain statutes and regulations affecting the ability of charter schools to achieve educational goals and objectives (NRS 386.547).

CONCLUSIONS OF LAW

1. In his capacity as an elected member of the Nevada State Board of Education (hereinafter “the Board of Education”), Dr. Hawk is a “public officer” pursuant to NRS 281.4365.

2. The Commission has jurisdiction to render an advisory opinion in this matter pursuant to NRS 281.511, Subsection 1, and NRS 281.521.

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

OPINION

The Commission’s advisory opinion differs based upon whether Nevada State High School charter school is ultimately sponsored by the Clark County School District or the State Board of Education. Since the charter school’s sponsorship has not yet been determined, the Commission’s advisory opinion is presented in alternative form.
In general, however, the Nevada Legislature’s declaration of public policy concerning Nevada’s Ethics in Government Law (NRS 281.411-281.581) offers important guidance under either situation.

In enacting Nevada’s Ethics in Government Law, the Nevada Legislature declared it to be the public policy of this state that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves." Further, the Nevada Legislature has declared that, "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 role of persons who are both public servants and private citizens." NRS 281.421.

The apparent intent of the ethical standards provided in 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.

In performing their public duties, therefore, public officers must be mindful of the Nevada Legislature’s public policy declarations of NRS 281.421 and conduct themselves to avoid conflicts between their private interests and those of the general public whom they serve.

**Alternative 1: Clark County School District Sponsorship**

Should the Clark County School District ultimately sponsor Nevada High School charter school, the State Board of Education’s authority over the charter school would be attenuated to the extent that Dr. Hawk and his wife could serve as the charter school’s co-directors and Dr. Hawk could continue to serve as member of the State Board of Education without offending the letter or spirit of Nevada’s Ethics in Government law so long as Dr. Hawk, while serving as a member of the State Board of Education, diligently complies with the disclosure, participation, and abstention provisions set forth in NRS 281.501 and as interpreted by the Commission in its published opinions.[4]

NRS 281.501 requires public officers to adequately disclose private interests and commitments when considering matters before them and, as appropriate, refrain from advocating the passage or failure of matters and abstain from voting on matters when the independence of judgment of a reasonable person in their position would be materially affected by such personal commitments and/or interests.

NRS 281.501, Subsection 2, provides:

...in 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.
It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 3 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.
NRS 281.501, Subsection 4, provides:

A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act 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 of 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. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

NRS 281.501(8) defines “commitment in a private capacity to the interests of others” as a commitment to a person:
(a) Who is a member of his household;
(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
(c) Who employs him or a member of his household;
(d) With whom he has a substantial and continuing business relationship; or
(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

In accordance with those standards, when a matter is before the Board of Education that implicates Nevada State High School charter school and/or charter schools in general, the burden is on Dr. Hawk, pursuant to the provisions of NRS 281.501 and the Commission’s interpretation of those provisions as set forth in its published opinions, to disclose his private commitments and his pecuniary interests and the effect those commitments and interests 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 and pecuniary interests. In making a disclosure, Dr. Hawk must disclose sufficient information concerning his commitments in a private capacity and his pecuniary interests to inform the public of the potential effect of his action as required by NRS 281.501(4); and, after making such proper disclosure, determine whether the independence of judgment of a reasonable person in his situation would be materially affected by his commitments and/or his interests, under the circumstances presented in a particular matter; and, if so, he must also refrain from advocating the passage or failure of the matter and abstain from voting upon the matter, all in accord with NRS 281.501(2). When Dr. Hawk believes a nexus between a matter before the Board of Education and Nevada State High School charter school would not materially affect the independence of judgment of a reasonable person in his situation under the circumstances presented in a particular matter and, therefore, his abstention in the matter is not required pursuant to NRS 281.501(2), in addition to disclosing sufficient information concerning his private commitments to and interests in Nevada State High School charter school to inform the public of the potential effect of his action as required by NRS 281.501(4), he must also disclose the reason he believes that the independence of judgment of a
reasonable person in his situation would not be materially affected under the circumstances and why, therefore, his abstention is not required.[5]

Alternative 2: State Board of Education Sponsorship

Regulation of charter schools, including renewal and revocation of a school’s charter, is within the statutory authority of the charter school’s sponsor. Where a charter school is sponsored by the State Board of Education, initiation of charter revocation proceedings against the charter school is within the power of the Superintendent of Public Instruction, a position that serves at the pleasure of the State Board of Education and acts as the Board’s secretary. Dr. Hawk, as an elected member of the State Board of Education, is in a position to advocate for or against and vote on employment matters relating to the Superintendent of Public Instruction. In effect, then, if the State Board of Education sponsors Nevada State High School charter school for which Dr. Hawk and his wife serve as co-directors, Dr. Hawk, as an elected member of the State Board of Education, is in a position of being able to exercise authority over and exert pressure on the person who has the power to exercise authority over the charter school’s charter. Consequently, should the Clark County School District reject sponsorship and the State Board of Education becomes Nevada State High School charter school’s sponsor, Dr. Hawk’s dual positions as an elected member of the State Board of Education and as a co-director with his wife of Nevada State High School charter school would create an impermissible conflict of interest between his public duties and his private interests under Nevada’s Ethics in Government law based upon the potential for Dr. Hawk (or any other member of the State Board of Education in the same or a similar situation) to use his public office to benefit the charter school in which he and his wife have personal and pecuniary interests.

Therefore, should the State Board of Education ultimately sponsor Nevada State High School charter school and Dr. Hawk and his wife serve as the charter school’s co-directors, to avoid an inherent conflict of interest under Nevada’s Ethics in Government law, Dr. Hawk will be required to resign his position as an elected member of the State Board of Education.

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.


NEVADA COMMISSION ON ETHICS

By: /s/ RICK HSU, Acting Chairman

[1] Which, by statute it must if the application satisfies statutory requirements. Local school districts have discretion to deny applications to sponsor a charter school.
[2] Charter schools receive $5,168 per student in distributive school account (DSA) funds based upon the number of students enrolled on the day of the DSA student count.
[3] There were five votes in favor of the motion (Commissioners Sheets, Kosinski, Berman, Hsu, and Keele) and one vote opposed (Commissioner Flangas).
[4] See, e.g., Nevada Commission on Ethics Advisory Opinions No. 99-56 (Woodbury) and No. 03-34 (Boggs-
McDonald).