

*Statutory confidentiality was waived
by Mr. Scroggins on May 25, 2005.*



**STATE OF NEVADA
COMMISSION ON ETHICS**

BEFORE THE NEVADA COMMISSION ON ETHICS

CONFIDENTIAL
[pursuant to NRS 281.511(5)]

**IN THE MATTER OF THE
REQUEST FOR ADVISORY OPINION OF
BRIAN SCROGGINS, Member, Contractors' Board,
State of Nevada**

Advisory Opinion No. 05-12

_____ /

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on March 9, 2005, on the request for advisory opinion filed pursuant to NRS 281.511(a) by Brian Scroggins, an appointed member of the State Contractors' Board.

The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511, Subsection 5. Mr. Scroggins appeared in person; he was sworn in and presented testimony. This Advisory Opinion is confidential pursuant to NRS 281.511, Subsection 5(c).

Mr. Scroggins intends to announce his candidacy for the office of Nevada Secretary of State and requests the Commission's confidential advisory opinion (a) determining whether an impermissible conflict of interest exists between his public duties as a member of the State Contractors' Board and his private interests as a political candidate, and (b) regarding his disclosure and abstention obligations as a member of the State Contractors' Board with regard to his political candidacy.

Through his written advisory opinion request and testimony, Mr. Scroggins provided the following relevant facts to the Commission.

FACTS

1. In his public capacity, Mr. Scroggins is an appointed member of the State Contractors' Board. The Governor appointed Mr. Scroggins to the board effective November 2003. His term will end in November 2006.

2. The State Contractors' Board consists of seven members appointed by the Governor. Six of the members must be licensed contractors in Nevada, each holding a different type of contractor's license. The seventh member must be a member of the public who is not a licensed contractor or the spouse, parent, or child of a licensed contractor. Mr. Scroggins' appointment to the State Contractors' Board was based in part on the fact that he is a licensed contractor in Nevada.

3. The State Contractors' Board licenses and regulates contractors in Nevada.

4. Members of the State Contractors' Board rotate as the board's hearing officers. A complaint against a contractor filed with the State Contractors' Board is usually heard and decided by a hearing officer.¹ The contractor has the right to appeal the hearing officer's decision to the full board. Occasionally, a complaint is heard and decided by the full board.

5. Approval or denial of a contractor's license is decided by the full board.

6. Mr. Scroggins is a licensed contractor in the State of Nevada. For the past ten years, he has been licensed as a C-6 sign contractor. During that time, he has become acquainted with and made signs for most of the contractors, developers, and homebuilders in the southern Nevada area.

¹ The complaint is first received and processed by the board's administrative staff and investigated by the board's investigators.

7. Mr. Scroggins intends to announce his candidacy for the elected office of Nevada Secretary of State in the near future. He is currently meeting with potential supporters statewide, distributing information about his intentions to run for office and seeking campaign contributions and support.

8. During his political campaign, Mr. Scroggins intends to solicit campaign contributions from licensed contractors in Nevada.

9. The first Campaign Contributions and Expenditures report Mr. Scroggins will be required to file with the Nevada Secretary of State's Office will be due in January 2006.

10. Should Mr. Scroggins fail to be elected Nevada Secretary of State in November 2006, he intends to seek re-appointment to the State Contractors' Board for a second three-year term.

CONCLUSIONS OF LAW

1. In his capacity as an appointed member of the State Contractors' Board, Mr. Scroggins is a "public officer" pursuant to 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 majority vote,² the Commission renders the following advisory opinion.

OPINION

The Commission is authorized to render an advisory opinion interpreting the statutory ethical standards and applying the standards to a given set of facts and circumstances upon request from a public officer or public employee who is seeking guidance on questions which

² The vote was 6-0, with one abstention.

directly relate to the propriety of his own past, present or future conduct as a public officer or employee. NRS 281.511, Subsection 1.

The Commission's opinion may include guidance to the public officer or employee on questions whether: (a) a conflict exists between his personal interest and his official duty; (b) his official duties involve the use of discretionary judgment whose exercise in the particular matter would have a significant effect upon the disposition of the matter; (c) the conflict would materially affect the independence of the judgment of a reasonable person in his situation; (d) he possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision; (e) it would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter. NRS 281.521, Subsection 1.

The statutes authorizing the Commission to render advisory opinions to public officers and public employees contemplate specific questions on specific facts and circumstances which may present a specific conflict between and public officer's or employee's private interests and public duties. The Commission lacks authority to render an opinion based upon speculation.

Nevada's Ethics in Government law is void of any prohibition against a public officer campaigning for elective public office while serving in public office. However, as Mr. Scroggins campaigns for the office of Nevada Secretary of State while serving as an appointed member of the State Contractors' Board, the Commission directs his attention to the following provisions of NRS Chapter 281.

NRS 281.481(1) prohibits a public officer or public employee from seeking or accepting, *inter alia*, any "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.

In a previous opinion in an unrelated matter,³ the Commission addressed the issue of whether particular campaign contributions were a gift that 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. The Commission concluded, under the facts and circumstances in that matter, that the campaign contributions in issue would not improperly influence a reasonable person in the public officer's place, nor did they improperly influence the public officer. The campaign contributions at issue were "a small percentage" (i.e., six percent) of the public officer's total campaign budget. However, the Commission's opinion was based on more than the mere percentage amount. The record in that opinion 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 official. 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.'" 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.⁴

The Commission, therefore, cautions Mr. Scroggins, as a member of the State Contractors' Board, to consider the provisions of NRS 281.481(1) and the Commission's opinion discussing "gift" in the context of campaign contributions when soliciting and accepting

³ NCOE Amended Opinion No. 95-51, dated June 6, 1997.

⁴ NCOE Opinion No. 95-51, page 9.

contributions to his political campaign, particularly contributions from contractors subject to regulation by the State Contractors' Board.

NRS 281.481(2) prohibits a public officer or public employee from using his position in government to secure or grant unwarranted⁵ privileges, preferences, exemptions or advantages for, *inter alia*, himself. Except for the specific circumstances of this matter, a public officer's efforts to solicit campaign contributions and support from the individuals over which he has regulatory power would create the type of inherent conflict that could result in a violation of the provisions of NRS 281.481(2). However, in this specific case, the conflict is built into the law by the Nevada Legislature in the statute⁶ that requires six of the seven members of the Nevada Contractors' Board to be licensed contractors in Nevada, establishing the Nevada Contractors' Board as a board of contractors regulating contractors. Nonetheless, NRS 281.481(2) prohibits a public officer from using his position in government for an unwarranted benefit, *not* from being in the position to use his position in government for an unwarranted benefit. Therefore, NRS 281.481(2) does not prohibit Mr. Scroggins from being a member of the Nevada Contractors' Board while soliciting and/or receiving campaign contributions and political support from contractors. He is, however, prohibited from *using* his position as a member of the Nevada Contractors' Board to benefit his political campaign. Therefore, in conducting his political campaign, Mr. Scroggins must be mindful of the NRS 281.481(2) prohibition and avoid any conduct that may be construed or perceived as using his position on the State Contractors' Board to assist and/or benefit his political campaign by soliciting campaign contributions and support from the contractors he regulates and thereby securing or granting himself an unwarranted advantage. The timing and circumstances surrounding specific campaign contributions Mr.

⁵ "Unwarranted" means without justification or adequate reason. NRS 281.481(2)(b).

⁶ NRS 624.050.

Scroggins receives from contractors and active participation by a contractor or contractors in Mr. Scroggins' political campaign may cause interest in Mr. Scroggins' conduct as it relates to NRS 281.481(2). Mr. Scroggins must, therefore, exercise diligence in keeping separate his political campaign and his public office as a member of the State Contractors' Board.

NRS 281.501(4) requires a public officer to disclose sufficient information concerning his personal interests, and NRS 281.501(2) requires him to abstain from voting on a matter when his personal interests would materially affect the independence of judgment of a reasonable person in his situation. However, NRS 281.501(4) does not require a public officer to disclose campaign contributions that have been reported pursuant to NRS 294A.120 or NRS 294A.125 in a timely manner.⁷

Notwithstanding that disclosure safe harbor, "NRS 281.501(4) 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 contributions' 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 and abstention standards of NRS 281.501(2) and (4) and the guidance thereon provided in Commission Opinion No. 99-56, the 'Woodbury Opinion.'"⁸

The Commission, therefore, cautions Mr. Scroggins to be mindful of his obligation to comply with these disclosure and abstention standards during his political campaign, particularly during the time before he files his first campaign report pursuant to NRS 294A.120

⁷ "Public policy strongly encourages the giving and receiving of campaign contributions... These contributions do not automatically create an appearance of unfairness or a conflict of interest... Adequate protection against corruption and bias is afforded through the disclosure statutes found in chapter 294A of the NRS... Therefore, without evidence of improper influence, additional disclosure should not be required outside the chapter 294A requirements." AGO 98-29, dated November 5, 1998.

⁸ See the following NCOE Opinions: No. 95-51, No. 99-61, No. 01-12.

or NRS 294A.125 and thereafter with regard to campaign contributions from persons with some nexus to a matter before the State Contractors' Board. When Mr. Scroggins believes he should disclose a campaign contribution in a matter before the State Contractors' Board, but he believes a nexus between the matter and the person from whom he received a campaign contribution would not materially affect the independence of judgment of a reasonable person in his situation under the circumstances presented in the particular matter, in addition to disclosing sufficient information concerning the campaign contribution to inform the public of the potential effect of his action as required by NRS 281.501(4), he should 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.⁹

Finally, the Commission reminds Mr. Scroggins that the Nevada Legislature has 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 Commission is charged with the responsibility of evaluating matters before it in light of public perception and commitment to the public trust, cautioning public officers and public employees of conduct that may undermine the public trust. Further, the Commission is directed to hold public officers accountable when they fail to place public interest and public trust ahead of their private and/or pecuniary interests.

⁹ See, e.g., NCOE Opinion No. 03-34, dated September 30, 2003.

In performing their public duties, public officers should 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.

NOTE: THIS MATTER IS A CONFIDENTIAL FIRST-PARTY ADVISORY OPINION REQUEST. FOR PURPOSES OF A FIRST-PARTY ADVISORY OPINION REQUESTED PURSUANT TO NRS 281.511(1), ALL FACTS IN THE MATTER ARE PROVIDED BY THE PUBLIC OFFICER REQUESTING THE ADVISORY OPINION, AND THE COMMISSION MAKES NO INDEPENDENT INVESTIGATION AS TO THE TRUTH OF THOSE FACTS. THE RECORD HEREIN, THEREFORE, CONSISTS SOLELY OF FACTS PROVIDED ON THE RECORD BY THE PUBLIC OFFICER, AND THIS OPINION IS BASED SOLELY UPON THOSE FACTS. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE PROVIDED BY THE PUBLIC OFFICER IN THIS ADVISORY 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: May __23__, 2005.

NEVADA COMMISSION ON ETHICS

By: _____/s/_____
RICK HSU, Chairman