



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct of the
Conduct of **Duncan R. McCoy**, Member, City
Council, City of Boulder City, State of Nevada,

Request for Opinion No. 09-58A

Public Officer. /

OPINION

I. STATEMENT OF THE CASE

Public officer, Duncan McCoy ("McCoy"), requested a confidential¹ advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his past and anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS"). A quorum² of the Commission heard this matter on September 10, 2009. McCoy appeared telephonically and provided sworn testimony. Dave

Olsen, City Attorney for Boulder City, represented McCoy in this matter.

At the conclusion of the hearing, and after full consideration of the facts, circumstances and testimony presented, the Commission deliberated and orally advised McCoy of its decision that under the Ethics Law he did not have a conflict of interest that would require him to abstain from voting.³ The Commission now renders this formal written Opinion stating its findings of fact and conclusions of law.

The facts in this matter were obtained from documentary and testimonial evidence provided by McCoy. The Commission's findings of fact set forth below accept as true

¹ McCoy waived confidentiality with respect to this Request for Opinion pursuant to NRS 281A.440(7)(c).

² The following Commissioners participated in this opinion: Chairman George M. Keele, Esq., and Commissioners Erik Beyer, Gregory J. Gale, CPA, Mark A. Hutchison, Esq., Paul H. Lambole, Esq., John W. Marvel, John T. Moran, III, Esq., and James M. Shaw.

³ Commissioner Shaw disagrees with this determination.

those facts presented by McCoy for the purposes of the advice offered in this Opinion. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTION PRESENTED

Duncan McCoy is a member of the Boulder City Council and, as such, serves on the Board of the Boulder City Redevelopment Agency. McCoy questions whether the Ethics Law required him to abstain in a matter before the Redevelopment Agency Board due to a pecuniary interest or a commitment in a private capacity to the interests of others.

III. FINDINGS OF FACT

1. Duncan McCoy has been a member of the City Council of Boulder City ("City Council") since 2009; his term expires in 2013. As a member of the City Council, he also serves on the Board of the Boulder City Redevelopment Agency ("RDA").
2. The Boulder City Museum and Historical Association ("BCMHA") is a domestic, nonprofit, cooperative corporation that owns the Boulder Dam Hotel ("Hotel"). The Hotel is located in the historic district of Boulder City and the Boulder City Museum resides in the Hotel.
3. McCoy served as a volunteer member of BCMHA's Board of Directors between 2000 and 2003, and for one year during
4. Since the end of his term on the BCMHA Board, McCoy continues to be a dues-paying member of BCMHA, but has not been actively involved in the organization.
5. McCoy's membership in BCMHA carries with it no benefit, no duty and no commitment. BCMHA membership dues are \$20 annually.
6. While serving as a member of the City Council and in response to BCMHA's emergency appeal for financial support, McCoy recently donated \$1,000, his only significant donation to BCMHA.
7. At its July 6, 2009, meeting, a matter came before the RDA concerning BCMHA. BCMHA requested financial assistance in the amount of \$150,000 to pay the Hotel's ongoing operational costs through the end of 2009, as well as the Hotel's mortgage, insurance premiums and payroll.
8. In response to a question raised about a potential conflict of interest, McCoy disclosed at the RDA meeting his present and past affiliation with BCMHA and BDHA. He likewise disclosed that he has no personal financial interest or expectation related to the RDA's decision, but that he does have a strong emotional interest.

that period, represented BCMHA on the Board of Directors of the Boulder Dam Hotel Association ("BDHA").

9. After McCoy disclosed his affiliations, and before discussion and vote by the RDA, McCoy sought guidance from the City Attorney of Boulder City as to the existence of a conflict of interest.

10. The City Attorney opined that based on the totality of McCoy's involvement with the BCMHA and related organizations over the years, McCoy had a commitment in a private capacity to the interests of BCMHA and that the interest was of a nature that his independence of judgment could be, or perceived to be, materially affected by his commitment to the success of the BCMHA.

11. The City Attorney further stated that the use of tax dollars to pay BCMHA's debts is a benefit accruing to BCMHA that is greater than that accruing to any other business in the Boulder City Business District. Therefore, the City Attorney recommended that in addition to his disclosure, McCoy should abstain from the discussion and vote on the issues.

12. Although McCoy disagreed with the City Attorney's analysis, he abstained from the discussion and vote on the BCMHA matter.

IV. DISCUSSION OF RELEVANT STATUTES AND ISSUES

A. ISSUES

BCMHA, a nonprofit entity that owns the historic Boulder City Hotel, requested financial assistance from

the RDA. McCoy previously had served on BCMHA's Board, but has not been actively involved in the organization since his term ended in 2003. He does continue to be a dues-paying member of BCMHA and recently contributed \$1,000 in response to BCMHA's emergency appeal for financial support.

When BCMHA appeared before the RDA, McCoy disclosed his present and past affiliation with BCMHA and, on the advice of counsel, abstained from voting on its request for funds. McCoy requests an advisory opinion from the Ethics Commission regarding whether the Ethics Law required him to abstain on the matter.

The Ethics Law requires abstention "only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others." NRS 281A.420(4)(b). The question before the Commission is thus whether McCoy has either a pecuniary interest in the outcome of the RDA vote or a commitment in a private capacity to the interests of BCMHA that clearly would materially affect the independence of judgment of a reasonable person in his situation.

B. RELEVANT STATUTES

1) Public Policy Favors Disclosure Over Abstention

In this Opinion, the Commission is called upon for the first time to construe the 2009 amendments to NRS 281A.420 regarding abstention.⁴ In particular, we address NRS 281A.420(4)(b), a new subsection added to the abstention provisions, that expressly sets forth Nevada's public policy regarding disclosure and abstention.

NRS 281A.420(4)(b) declares that it is the public policy of this State to favor the right of public officers to vote, provided they have properly disclosed all conflicts of interest, and that abstention is required only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the conflicts. Because abstention disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, this public policy compels proper disclosure, but mandates fewer abstentions. In answering the question before us, the Commission must give

appropriate weight and proper deference to this public policy.

2) Disclosure and Abstention

NRS 281A.420 provides, in pertinent part:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,

- without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the persons to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the

⁴ Senate Bill 160, 2009 Legislative Session, effective May 28, 2009. See 2009 Stat. of Nevada, ch. 257, p. 1037. SB 160, recognizing that public officers must disclose conflicts of interest before determining whether to abstain, rearranged the order of the existing disclosure and abstention provisions by moving the existing disclosure provision from subsection 4 to subsections 1 and 2, and codifying the abstention provisions in subsections 3 and 4. SB 160 also changed the existing law so that the same abstention provisions apply to all public officers who are subject to the Ethics Law.

body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

* * *

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, 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 the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of others.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of

others where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of others, accruing to the other persons, is not greater than that accruing to any other member of the general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section

are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others.

a) Disclosure

The facts before the Commission establish that McCoy publicly disclosed his affiliations with BCMHA at the time RDA considered the BCMHA matter and that he provided sufficient detail concerning his potential conflict of interest to inform the public of the potential effect of the action or abstention on his private interests. McCoy has not asked the Commission to consider whether he was required to disclose, and we do not address the issue in this Opinion. However, given the public policy favoring disclosure, the Commission nonetheless acknowledges that McCoy's disclosure was proper under NRS 281A.420(1).

b) Pecuniary interest

We next turn to the question of whether NRS 281A.420(3)(b) required McCoy to abstain from voting with respect to BCMHA's request for financial assistance due to the existence of a pecuniary interest in the matter. We conclude that there is no evidence

establishing that McCoy had a pecuniary interest in the outcome of the RDA vote based on his cash contributions to the organization. Rather, the evidence presented showed that McCoy received no monetary benefit or return from the organization as a result of his \$1,000 donation or his \$20 annual membership dues payment. Further, it appears that no benefit would accrue to McCoy as a result of the vote that is greater than that accruing to any other resident of Boulder City. NRS 281A.420(3)(b) is therefore inapplicable to McCoy's situation.

c) Commitment to the interest of others

The next question is whether McCoy had a commitment in a private capacity to the interests of BCMHA that required him to abstain from voting pursuant to NRS 281A.420(3)(c). The definition of a "commitment in a private capacity to the interests of others" is set forth in NRS 281A.420(8) as follows:

(a) "Commitment in a private capacity to the interests of others" means a commitment to a person:

(1) Who is a member of the public officer's or employee's household;

(2) Who is related to the public officer or employee by blood, adoption or marriage within the third degree of consanguinity or affinity;

(3) Who employs the public officer or employee or a member of the public officer's or employee's household;

(4) With whom the public officer or employee has a substantial and continuing business relationship; or

(5) Any other commitment or relationship that is substantially similar to a commitment or relationship described in subparagraphs (1) to (4), inclusive, of this paragraph.

Applying this definition, McCoy would have a commitment in a private capacity to BCMHA if he has a "substantial and continuing business relationship" with BCMHA. NRS 281A.420(8)(a)(4). A person who sits on the Board of Directors of a corporation, whether non-profit or for-profit, has a fiduciary obligation to the corporation, which is a commitment to the interest of others. *See Matter of the Opinion Requests of Cornwall, McDowell and Leighton*, Opinion No. 91-6 (1991); *see also, Matter of the Opinion Requests of Wishart and Sims*, Opinion No. 92-11 (1993). Under these prior opinions, if McCoy had remained on BCMHA's Board of Directors he clearly would have a commitment to the interests of BCMHA based on a fiduciary duty to the organization. But that is not the case here. McCoy's term on the Board ended in 2003, some 6 years before the RDA vote, as did his active involvement in the organization.

We thus consider whether McCoy's present affiliations with BCMHA comprise a substantial and continuing business relationship. McCoy has not been actively involved in BCMHA's affairs for the last 6 years, and his only continuing connections to BCMHA are his

membership status, his annual \$20 dues payment, his recent \$1,000 donation and his admitted emotional ties to the organization. McCoy testified that his membership status bestows no benefits and requires no duty or commitment on his part. The same can be said regarding his monetary donation and passion for BCMHA's efforts to save the Hotel. Based on the evidence before us, we conclude that McCoy has no business relationship with BCMHA due to his status as a dues-paying member or his emotional bonds. Even if we considered his membership to be a business relationship, in this instance it is not substantial enough to rise to the level of a commitment to the interests of BCMHA. A donation, with no expectation of anything in return from the BCMHA does not establish a business relationship, let alone one that is substantial or continuing, or a relationship substantially similar to a business relationship.

NRS 281A.420(4)(b) requires the Commission, when interpreting and applying the provisions of NRS 281A.420(3), to give appropriate weight and proper deference to the public policy of this State favoring the right of a public officer to vote or otherwise act upon a matter. In light of this legislative pronouncement, we cannot support the City Attorney's position that McCoy was required to abstain from voting on the BCMHA matter.

Abstention is required only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public

officer's pecuniary interest or his commitment in a private capacity to the interests of others. Here, the evidence presented showed that McCoy is a former BCMHA Board member and a current dues-paying member, that he recently contributed \$1,000, and that he has no financial interest that would be affected by the BCMHA matter, but he has a great emotional interest. We cannot conclude that the facts before us establish a clear case that the independence of judgment of a reasonable person in McCoy's situation would be materially affected. Consequently, the Ethics Law required McCoy to vote rather than abstain on the BCMHA matter.

3) Public Policy

NRS 281A.020 provides in relevant part:

1. It is hereby declared 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.

(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.

The Boulder City Attorney advised McCoy to abstain because, in his view, McCoy's past and present affiliations with BCMHA were of a nature that his independence of judgment could, or could be perceived to be, materially affected by his commitment to BCMHA's goals.

Although the Commission has concluded otherwise, we observe that McCoy clearly has an admitted bias in favor of preserving the Boulder City Hotel. In this respect, the City Attorney's determination that McCoy's judgment could be perceived to be materially affected is right on point. The public may view McCoy's vote as an effort to protect or enhance his recent monetary and past personal contributions which would be lost if the Hotel fails to survive. The perception that McCoy's impartiality may be compromised is of concern because it gives rise to an appearance of impropriety which infringes on the spirit of the public policy declarations.

The Commission therefore reminds McCoy that NRS 281A.020 requires him, as a public officer, to commit himself to avoid conflicts between his private interests and those of the public whom he serves. He is also advised to consult the provisions of NRS 281A.420(1) regarding disclosure and, when appropriate, undertake in public the abstention analysis required by NRS 281A.420(3).

V. CONCLUSIONS OF LAW

1. At all times relevant to this matter, McCoy was a "public officer" as defined by NRS 281A.160. The Commission has jurisdiction over public officers pursuant to NRS 281A.280.

2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. The facts presented do not establish a clear case under NRS 281A.420(4) that the independence of judgment of a reasonable person in McCoy's situation would be materially affected by his past and present affiliations with BCMHA. The Ethics Law therefore did not require McCoy to abstain from voting or otherwise acting on the BCMHA matter.

Dated this 7th day of June, 2012.

NEVADA COMMISSION ON
ETHICS

By: 
Erik Beyer
Chairman⁵

⁵ At the time this written opinion was issued, then-Chair Keele no longer served on the Commission. Current Chair Beyer signs this opinion on behalf of the Commission.