



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for
Advisory Opinion by **MICHAEL BELL**,
Commissioner, Humboldt County and
Information Technology Director,
Humboldt General Hospital,

Advisory Opinion No. 10-10A

Public Officer and Employee.

OPINION

Public officer, Mike Bell (Bell), requested this confidential advisory opinion (Advisory Opinion) from the Nevada Commission on Ethics (Commission) pursuant to NRS 281A.440(1). A quorum¹ of the Commission heard this matter on May 13, 2010. Bell appeared in person and provided sworn testimony. At the conclusion of the hearing, Bell waived his right to keep this opinion confidential.

Bell sought the Advisory Opinion from the Commission on the propriety of his anticipated conduct as it relates to the Ethics in Government Law (Ethics Law) set forth in chapter 281A of the Nevada Revised Statutes (NRS). Bell serves as a member of the Humboldt County Commission and is employed by the Humboldt County Hospital (“Hospital”).

¹ The following Commissioners participated in this opinion: Chairman Keele and Commissioners Gale, Hutchison, Lamboley, Marvel and Moran.

Bell questioned whether he may serve as an appointee of the County Commission to the Humboldt County Hospital Board of Trustees (“Hospital Board”) and maintain his employment with the Hospital. Specifically, Bell is concerned about the ethical implications of serving as a trustee of the Hospital Board, the governing body of the Hospital which employs him in his private capacity.

After fully considering Bell’s request and analyzing the facts, circumstances and testimony presented, the Commission deliberated and orally advised Bell of its decision. The Commission now renders this written Opinion.

The facts in this matter were provided by Bell. Facts and circumstances that differ from those used by the Commission in this Advisory Opinion may result in a different opinion.

I. FINDINGS OF FACT

1. Bell is a public officer who serves as a County Commissioner in Humboldt County, Nevada.
2. In his private capacity, Bell is employed as the Information Technology Director of the Hospital.
3. Pursuant to Hospital bylaws, the Humboldt County Commission appoints one of its commissioners to serve on the Hospital Board. The County Commission desires to appoint Bell to the Hospital Board in 2011. Bell has not responded to the appointment pending the outcome of this Advisory Opinion.
4. As the Information Technology Director, Bell is responsible for providing direction to the Hospital Board regarding any matters concerning information technology which affect the Hospital. Bell is also responsible for all technology purchases, repairs and maintenance, including the network of the entire hospital, the technology requirements of hospital instruments and other equipment and electronic medical records.

II. DISCUSSION

A. Procedural/Historical Background

Bell requested this Advisory Opinion in response to conflicting information he received from other Hospital Board members and his legal counsel. He also considered former Commission opinions relating to whether an individual can simultaneously serve as an employee of a public entity and a member of the public entity's governing body.

Two other Hospital employees, Dr. Soon Kim and Sharlene Cooney, presently serve as members of the Hospital Board. Dr. Kim, a contract employee of the Hospital, recently was the subject of an ethics complaint alleging that she did not disclose her pecuniary interest in a reimbursement check issued pursuant to her employment contract before voting to approve the check run. *In Re Kim*, RFO 09-11C.

The Commission ultimately found that Dr. Kim had committed a non-willful violation of NRS 281A.420 for failure to disclose her interest. The allegations brought in the request for opinion and the Commission's decision were limited to whether Dr. Kim was required to disclose her pecuniary interest in a matter before the Hospital Board.

Likewise, the request for opinion filed against Sharlene Cooney alleged that she had not disclosed an alleged conflict of interest and abstained on a matter before the Hospital Board. *In re Cooney*, RFO 09-26C. A panel of the Commission found insufficient evidence regarding this allegation and dismissed the matter. The Commission neither considered nor made a determination regarding whether Dr. Kim or Ms. Cooney could simultaneously serve as Hospital employees and trustees of the Hospital Board under the Ethics Law.

Prior to the requests for opinion regarding Dr. Kim and Ms. Cooney outlined above, the Commission had occasion to consider whether Dr. Kim and Ms. Cooney could serve in both capacities. The Humboldt County District Attorney filed requests for opinion regarding Dr. Kim and Ms. Cooney during their campaigns for election to the Hospital Board.

Relying upon a former confidential advisory opinion, RFO 98-71A, the District Attorney argued that a person could not simultaneously serve as an employee of a public entity and as a member of the public body charged with governing the same public entity. The Commission staff and panel rejected these requests for opinion because the subjects were not yet public officers over whom the Commission had jurisdiction.

After Dr. Kim and Ms. Cooney were elected to the Hospital Board, the District Attorney did not renew his requests for opinion to the Commission. Therefore, whether it is appropriate for a Hospital employee to serve as a member of the Hospital Board has not been directly addressed by the Commission. The Commission would make an independent determination based on the type of employment, including the responsibilities and duties of the position. The demands of different positions may result in different opinions from the Commission.

B. Prior Commission Opinions

The Commission's prior opinions relating to serving as a public employee and member of the public entity's governing body vary based on the type of public employment, the powers and responsibilities of the governing public body and the types of conflicts or appearances of impropriety that exist between the employment and governing body's powers. Several relevant Commission opinions relating to this issue (hereafter referred to as the "Pre-*Ancho*" Opinions") imply a general prohibition of this dual public service. However, the Commission's most recent opinion regarding this issue (*In re Ancho*, RFO 06-26) clarifies the Commission's intention to

evaluate each request for opinion based on the facts presented.

1. Pre-*Ancho* Opinions

The Pre-*Ancho* Opinions collectively held, in general, that a person may not serve in a position where he is "the boss of himself" or "the boss of his boss." See *In re Public Employee X*, RFO 98-71A (confidential advisory opinion), *In re Klosowski-King*, RFO 06-05 and *In re Public Employee Y*, RFO 02-01 (confidential advisory opinion). The Commission held in these cases:

[T]he mere opportunity for an employer to effect undue or unwarranted influence over a subordinate in order to advance his own pecuniary interest would create an appearance of impropriety; a hurdle that [Public Officer] would not be able to surpass unless he were to resign his employment . . . [t]he mere act of being the 'boss of himself' appears improper. He would be fair game for a host of accusations and complaints.

RFO 98-71 (Similar language is articulated in each of the other Pre-*Ancho* Opinions).

The Commission also held in a separate Pre-*Ancho* Opinion that regardless of the number of management levels between an employee and elected official serving on a public governing body, an employee may "very well feel undue pressure to follow instructions by [the] elected official." *In re Boggs-McDonald*, RFO 04-77.

Based on these cases, the Commission generally advised public employees that while nothing in the Ethics Laws precluded a public employee from seeking such a public office, if the individual was elected or appointed, he must choose between

accepting the position or resigning from his employment.

2. Ancho Opinion

After considering the history of opinions stating generally that one may not serve two masters under the auspices of being the “boss of yourself” or the “boss of your boss,” the Commission recently clarified its position. Rather than a general prohibition, the Commission found the specific circumstances concerning the type of employment and public office determinative in finding a conflict of interest or appearance of impropriety. *See Ancho*.

Notably, the *Ancho* opinion did not overrule the Commission’s *Pre-Ancho* Opinions. Under the facts and circumstances of those opinions, the Commission found that conflicts of interest or appearances of impropriety respecting those public employees and the specific offices they sought. Therefore, *Ancho* is consistent with those opinions and the effect of *Ancho* on the *Pre-Ancho* Opinions is limited to clarifying that each case will be evaluated based on its distinct factual merits.

Consistent with its policy to limit its advice in each request for opinion to the facts presented, the Commission offered nonexclusive factors or criteria that may be considered in determining whether a public employee will have a conflict of interest or appearance of impropriety.

Ancho was a county employee who sought an advisory opinion regarding whether she could serve as a member of the Board of County Commissioners. The Commission considered the population served by the public officer and the number of qualified candidates for the Board, the amount of oversight the Board had over her

employment or her supervisor, the ability of a Board member to exert undue influence over Ancho’s superiors and whether, as a Board member, Ancho would be required to disclose and abstain regularly on matters before the public body as a result of conflicts of interest created by her employment.

Consequently, the Commission determined that, in Ancho’s circumstance, the conflicts created by the oversight and influence the Board had over Ancho’s supervisor and issues relating to budgets and salaries created an appearance of impropriety and caused Ancho to abstain to the point that her constituents would not be well served.

C. Bell’s Conflict

Bell serving two public positions resulting in his being the “boss of himself” and the “boss of his boss” would create multiple substantive conflicts of interest that would constitute a violation of NRS 281A.020(1), which provides:

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 or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.**

Bell provided extensive testimony to the Commission concerning his duties as the Information Technology Director of the Hospital. Bell reports to the Hospital’s Chief Financial Officer. In particular, Bell is responsible for providing direction to the Hospital Board regarding any matters

concerning information technology which affect the Hospital. Bell is also responsible for all technology purchases, repairs and maintenance, including the network of the entire hospital, the technology requirements of hospital instruments and other equipment and electronic medical records. In performing his responsibilities to the Hospital, Bell must obtain Hospital Board approval for any expenditure over \$25,000.

According to NRS 450.180, the Hospital Board has the authority to appoint and employ staff, fix their compensation and remove appointees and employees, including Bell and Bell's supervisor. Therefore, should Bell serve as a Board member, he would certainly have authority over his own position and that of his superiors, including compensation, benefits and working conditions. The Hospital Board sets and approves Bell's salary based on the recommendations of the Hospital's Chief Financial Officer and makes all policy decisions regarding the technology support of the Hospital.

Bell further testified that he had attended nearly every meeting of the Hospital Board during the previous six years and numerous issues regularly impacted the Information Technology Department, the information technology needs of the Hospital and his personal responsibilities and employment. Despite the number of issues affecting his Department, Bell testified that he did not believe abstention would be necessary in most circumstances. However, Bell acknowledged the necessity to disclose the actual or potential conflicts in any matter affecting the Information Technology Department.

Consistent with his testimony, Bell acknowledged that his experience as a public officer on the Humboldt County

Commission confirmed his belief that the conflicts of interest and appearances of impropriety inherent in a dual role as a high level employee and member of the Hospital Board would likely impede his effectiveness as a Board member.

Given the powers and responsibilities of the Information Technology Director of the Hospital and the information technology issues affecting the Hospital, the Commission finds that Bell would have substantive conflicts of interest if he were to serve as a member of the Hospital Board.

The Commission is less concerned with the number of potential conflicts that may be cured through disclosure and abstention and more concerned with the substantive nature of the conflicts and core issues before the Board that may affect his employment status, and, more broadly, issues affecting his department or the Hospital's dependence on information technology requirements.

The Commission is also mindful of the Legislature's guidance that the frequency with which Bell would be required to disclose a conflict or acknowledge an appearance of impropriety, and potentially abstain, deprives the public of its elected spokesperson. Although this position is appointed by the County Commission, the public elected the County Commission members, entrusting them to make prudent appointments as otherwise required by law.

As a result of these substantive and core conflicts, Bell may seek and accept the appointment to the Hospital Board. However, if he accepts the position, he must resign his employment with the Hospital to avoid a violation of NRS 281A.020(1).

III. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Bell was a "public officer," as defined by NRS 281A.160, and a "public employee," as defined by NRS 281A.150.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. As a member of the Humboldt County Commission, Bell may seek and accept an appointment to serve as a member of the Hospital Board.
4. If Bell seeks and accepts an appointment to the Hospital Board, for the circumstances and reasons outlined above he will have to resign his employment with the Hospital to avoid substantive conflicts with the Ethics Law and to properly serve the public trust, as required pursuant to NRS 281A.020(1).

Dated this 13th day of October, 2010.

NEVADA COMMISSION ON ETHICS

By: 

George M. Keele
Chairman, May 13, 2010²

² George M. Keele, Esq. was the Chairman of the Commission during the hearing in this matter.