



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

**In the Matter of the Request for
Advisory Opinion by RICHARD MENDES,
General Manager, Clark County Water
Reclamation District, Clark County,
Nevada**

Advisory Opinion No. 10-19A

Public Employee.

OPINION

Public officer, Richard Mendes (Mendes), requested this 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. Mendes appeared in person and provided sworn testimony. At the conclusion of the hearing, Mendes waived his right to keep the Commission's opinion confidential.

Mendes seeks an advisory opinion from the Commission on the propriety of his future conduct as it relates to the Ethics in Government Law (Ethics Law) set forth in chapter 281A of the Nevada Revised Statutes (NRS). Mendes serves as the General Manager of the Clark County Water Reclamation District (CCWRD). Mendes

questions whether his position causes him to be considered a public officer within the meaning of NRS 281A, thereby requiring him to comply with the Ethics Law provisions applicable to public officers. Specifically, Mendes seeks advice regarding whether he was required to file a financial disclosure statement with the Ethics Commission pursuant to NRS 281A.600.

After fully considering Mendes' request and analyzing the facts, circumstances and testimony presented, the Commission deliberated and orally advised Mendes of its decision in the matter. The Commission now renders this written Opinion.

The facts described in this opinion were provided by Mendes. Facts and circumstances that differ from those presented to and considered by the Commission in this Advisory Opinion may result in a different opinion.

¹ The following Commissioners participated in this opinion: Chairman Keele and Commissioners Beyer, Gale, Groover, Lambole, Marvel, Moran and Shaw.

I. FINDINGS OF FACT

1. In his public capacity, Mendes serves as the General Manager of the CCWRD, a general improvement district organized under Chapter 318 of NRS. The CCWRD is a political subdivision of Clark County, Nevada.
2. Mendes was appointed as the General Manager by the Board of Trustees of the CCWRD (Board), which is comprised of the Clark County Board of Commissioners, serving ex officio.
3. Prior to Mendes' appointment, the Board and Clark County entered into an interlocal agreement to streamline the supervisory functions of the Board and the reporting requirements of its management staff.
4. The interlocal agreement delegated to the Clark County Manager all of the Board's supervisory rights, powers and duties over the General Manager and the policies and procedures of the CCWRD. The Clark County Manager is required to carry out these rights, powers and duties in the same fashion as they are exercised over the heads of departments within Clark County.
5. General improvement districts, such as the CCWRD, are established pursuant to Chapter 318 of NRS. NRS Chapter 318 was enacted in 1959. Prior to the enactment of the statute, the CCWRD was created in 1954 by court decree. The agency has changed names and survived many mergers to be known today as the CCWRD. These mergers organized the CCWRD under NRS 318.

II. DISCUSSION

To provide its advice, the Commission must determine whether Mendes is a public officer for purposes of the Ethics Law as defined in NRS 281A, as amended by Senate Bill 160 of the 2009 Nevada Legislative Session.

In March 2010, Mendes attended a training presentation governing the Ethics Law presented by the Commission's Executive Director in Clark County which triggered his concern that he may be considered a public officer required to file a financial disclosure statement with the Commission. Mendes considers himself as only a public employee because he reports to the Clark County Manager. As a public employee, Mendes has filed the county-required financial disclosure form, but has not filed the State's financial disclosure forms required of public officers by NRS 281A.600.

The Ethics Law, specifically NRS 281A.160, defines "public officer" as follows:

1. "Public officer" means a person **elected or appointed to a position** which:

(a) **Is established by the Constitution of the State of Nevada, a statute of this State or a charter or ordinance of any county, city or other political subdivision; and**

(b) **Involves the exercise of a public power, trust or duty.** As used in this section, "the exercise of a public power, trust or duty" means:

(1) Actions taken in an official capacity which involve a substantial and material exercise of administrative discretion in the formulation of public policy;

(2) The expenditure of public money; **and**

(3) The administration of laws and rules of the State or any county, city or other political subdivision.

2. "Public officer" **does not include:**

(a) Any justice, judge or other officer of the court system;

(b) Any member of a board, commission or other body whose function is advisory;

(c) Any member of a special district whose official duties do not include the formulation of a budget for the district or the authorization of the expenditure of the district's money; or

(d) A county health officer appointed pursuant to NRS 439.290.

3. "Public office" does not include an office held by:

(a) Any justice, judge or other officer of the court system;

(b) Any member of a board, commission or other body whose function is advisory;

(c) Any member of a special district whose official duties do not include the formulation of a budget for the district or the authorization of the expenditure of the district's money; or

(d) A county health officer appointed pursuant to NRS 439.290.

(Emphasis added).

Before the 2009 amendments to NRS 281A.160, the definition of "public officer" specifically excluded from its meaning a member of a board of trustees for a general improvement district and did not include positions established by charters or ordinances of political subdivisions. A general improvement district is considered a political subdivision of a county or city, as applicable. In this case, the CCWRD is a

political subdivision of Clark County. The new definition established in 2009 clearly encompasses positions which are established by charter or ordinance of political subdivisions such as CCWRD. The Commission's inquiry focuses on whether the required conjunctive elements of NRS 281A.160(1)(a) and (b) are satisfied.

A. Is the General Manager Position a Public Position Created by State Constitution or Statute or County, City or Political Subdivision Charter or Ordinance?

1. State Statutes

NRS Chapter 318 contains no provisions which create the position of General Manager of the CCWRD. Further, the Commission has not discovered any statute, ordinance or charter provision which specifically created this position for the CCWRD, either before or after the enactment of NRS Chapter 318. Rather, authority to create such a position by the CCWRD Board/County Commission is all that appears in the law.

The management responsibilities of any general improvement district, including the CCWRD, are outlined in NRS Chapter 318 but the statute does not otherwise establish a specific position to carry out those responsibilities. Rather, NRS Chapter 318 authorizes the Board of Trustees of a district to hire employees. The following sections of NRS Chapter 318 pertain to the management and employees of a general improvement district:

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NRS 318.175 Management of district's business; acquisition and operation of projects. The board shall have the power:

1. To manage, control and supervise all the business and affairs of the district.
2. To acquire, improve, equip, operate and maintain any district project.

NRS 318.180 Employees: Power to hire and retain. The board shall have the power to hire and retain agents, employees, servants, engineers and attorneys, and any other persons necessary or desirable to effect the purposes of this chapter.

NRS 318.185 Employees: Duties and compensation. The board shall have the power to prescribe the duties of officers, agents, employees and servants, and fix their compensation.

2. Interlocal Agreement and County Ordinances

By and through an interlocal agreement between the CCWRD and Clark County, the CCWRD Board delegated its statutory management responsibilities to the Clark County Manager.

The following clause of the interlocal agreement relates specifically to supervision of the CCWRD's General Manager:

3. Supervisory Responsibility: Except as otherwise expressly provided herein, and effective November 4, 2002, the District Board of Trustees hereby delegates all those supervisory rights, powers and duties over the District's General Manager as provided in Chapter 318 of the

Nevada Revised Statutes, and any written policies or procedures, to the Clark County Manager, who shall exercise such rights, powers, and duties, to the extent reasonably possible, in the same fashion as those rights, powers and duties are exercised over Clark County Department Heads.

A County Manager position is authorized to be established by any Board of County Commissioners pursuant to NRS 244.125, with additional duties and provisions relating to county managers further outlined in NRS 245.135. Such duties and provisions involve the exercise of public power, trust and duty.

Chapter 2.44 of the Clark County Code of Ordinances specifically creates the position of Clark County Manager and outlines its duties, powers and responsibilities. The Clark County Manager serves as the chief administrative officer of Clark County and each of its agencies, districts and departments, including those under the control of the County Commissioners, ex officio. CCC 2.44.020. The County Commission serves as the CCWRD Board of Trustees, ex officio, and the interlocal agreement between the CCWRD and Clark County specifically authorizes the Clark County Manager to serve in the capacity as the chief administrative officer for the CCWRD.

Significantly, the Clark County Code does not contain an ordinance that specifically establishes the position of General Manager for the CCWRD. In fact, the interlocal agreement specifies that the CCWRD, for all matters relating to the budgets, human resources, purchasing, benefits, personnel issues and other various services, shall be treated in the same fashion and according to

the same procedures as any County department.

Certain County department heads are specifically established by County Ordinance, while others are not. Those department heads which are established by ordinance are filled through appointment by the County Commission or the County Manager and ratified by the County Commission.

The Clark County Code does not contain any similar provision for the CCWRD or General Manager of the CCWRD. Title 24 of the Code establishes various procedural duties of the General Manager, but includes no language specifically establishing or creating the position.

The Nevada Supreme Court has regularly upheld the maxim of statutory construction, *expressio unius est exclusio alterius*, which means that the expression of one thing is the exclusion of another. *Dessert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1060, 944 P.2d 835 (1997). Thus, the creation of the General Manager position of the CCWRD cannot be inferred from duty language under this “expression/exclusion” rule since other Department positions are expressly created.

Provisions of NRS 281A.160(1)(a) and (b) defining “public officer” are conjunctive and require that all elements must be satisfied to be considered a public officer. Based on the extensive research conducted by the Commission and attested to by Mendes, it does not appear that the CCWRD General Manager position is created or established by the Nevada Constitution, a state statute, or an ordinance or charter of any county or political subdivision which the statute requires under NRS 281A.160. Because of this fact alone, the Commission concludes that Mendes is not a public officer pursuant

to the definition of “public officer” under NRS 281A.160.

While this conclusion would normally end the discussion, should such an ordinance or charter provision be found to exist or if the Clark County Code is amended to create such a position satisfying the requirements of NRS 281A.160(1)(a), the Commission finds it appropriate to further observe that under the facts of this case the remaining provisions of NRS 281A.160(1)(b) that require the public position to be one that exercises a public power, trust or duty would be satisfied such that the General Manager of the CCWRD would be considered a public officer.

B. Position Involves Exercise of Public Power, Trust or Duty

NRS 281A.160(1)(b) provides, in relevant part:

1. “Public officer” means a person elected or appointed to a position which:

(b) Involves the exercise of a public power, trust or duty. As used in this section, “the exercise of a public power, trust or duty” means:

(1) Actions taken in an official capacity which involve a substantial and material exercise of administrative discretion in the formulation of public policy;

(2) The expenditure of public money; **and**

(3) The administration of laws and rules of the State or any county, city or other political subdivision.

The job description of the General Manager of the CCWRD and testimony provided by Mendes includes sufficient duties and

responsibilities that involve administrative discretion in formulating public policy, authority to expend public money and administration of laws and rules.

1) GM’s Official Actions Involve Substantial and Material Exercise of Administrative Discretion in Formulation of Public Policy

The job description states that the General Manager is responsible for, among other things: 1) working with elected and appointed officials to develop policy for citizens of the service areas; 2) working with the Board, water districts, advisory bodies and citizen groups to formulate policy related to CCWRD activities; ensuring that all federal, state and local laws are met relating to CCWRD objectives; and 3) making policy exceptions for effective operations.

2) GM has Authority Over Expenditure of Public Money?

The information provided in the job description and the internal Clark County Water Reclamation District Purchasing Procedure states that the General Manager has signature authority over purchase requisitions, check requests, commercial card purchases and petty cash expenditures up to \$25,000. Additionally, the General Manager is responsible for preparing and administering the District’s budgets, including record keeping and reporting to various funding agencies. While these job duties are expressed, the interlocal agreement gives ultimate approval for certain purchases and expenditures over \$25,000 to the Clark County Manager and Board.

3) GM has Authority Over Administration of Laws and Rules of Political Subdivision?

The job description identifies several duties involving the administration of laws and rules of the political subdivision, CCWRD. One such duty states that the General Manager “[e]nsures that all federal, state and local laws and regulations are met regarding plan operations, potable water quality and wastewater effluent discharge and sludge disposal.” Likewise, the General Manager is responsible for implementing changes to the laws and ordinances and lobbying the legislature as required.

III. CONCLUSIONS OF LAW

1. Mendes is not a public officer within the meaning established in NRS 281A.160. The position of General Manager of the CCWRD is not established by the Constitution of the State of Nevada, a statute of this State or a charter or ordinance of any county, city or other political subdivision as required by NRS 281A.160(1)(a). Therefore, the first element under the definition of a “public officer” has not been satisfied. The statute is conjunctive and requires satisfaction of each of the elements for a person to be considered a public officer.
2. Because he is not a public officer, Mendes is not required to file a financial disclosure statement pursuant to NRS 281A.600.

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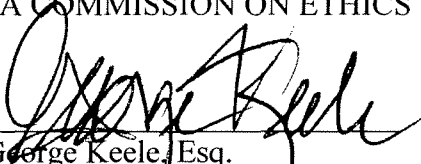
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3. If it can be subsequently shown that the General Manager position was or will be created by any statute, ordinance or charter, the remaining attributes of the General Manager position would satisfy the requirements of the statute for status as a public officer under NRS 281A.160.

Dated this 13th day of October, 2010.

NEVADA COMMISSION ON ETHICS

By: 
George Keele, Esq.
Chairman, May 13, 2010²

² Commissioner Keele was the Chairman of the Commission during the hearing in this matter.