



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for
Advisory Opinion by **THOMAS CUNNINGHAM**,
Public Employee,
Department of Cultural Affairs,
State of Nevada,

Advisory Opinion No. 10-52A

Public Employee.

OPINION

Public employee, Thomas Cunningham (Cunningham), 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 July 8, 2010. Cunningham appeared telephonically and provided sworn testimony.

Cunningham sought 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). Cunningham serves as an Exhibits Preparator II for the Lost City Museum in Overton, Nevada. Privately, Cunningham is an artist engaging in various types of photography. Specifically, Cunningham questioned whether he would

violate NRS 281A.400(1), NRS 281A.400(2), or NRS 281A.400(10) by displaying his private photographs for sale in an exhibit at the Museum under unique circumstances.

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

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

¹ The following Commissioners participated in this opinion: Acting Chairman Keele and Commissioners Gale, Groover, Lamboley, Marvel and Shaw.

I. FINDINGS OF FACT

1. Cunningham is employed as an Exhibits Preparator II at the Lost City Museum operated by the State of Nevada Department of Cultural Affairs in Overton, Nevada. In his private capacity, Cunningham is a photographer.

2. As an Exhibits Preparator II, Cunningham designs, builds and prepares display cases, furniture and other mounts or materials to display Museum artifacts.

3. The Museum operates a monthly program in which local artists display their work for sale. Each month, the Museum enters into a contract with a different local artist and shares the proceeds of any sales made during the exhibit with the artist.

4. Due to high demand and interest, the Museum has had as long as a two-year waiting list of artists seeking to display their work at the Museum through this program. In recent months, the Museum has experienced several vacancies despite increased efforts to solicit and secure contracts.

5. The Museum's 2010 exhibit for August remained vacant for more than one year. In response to the vacancy and lack of interest by any other artist, the Museum Director asked Cunningham to display his photography according to the same contract terms and conditions available to all other artists. Before offering the August opening to Cunningham, the Museum Director contacted all artists on the Museum's regular list to determine whether any had an interest in displaying work during August, but no artists were interested. As of the date of the hearing on this matter, no other artist had asked to fill the August 2010 vacancy.

6. According to Cunningham and his supervisors, exhibiting Cunningham's photography would not likely have a big impact on his reputation as an artist, as it is in a small local museum known more for archaeology than for Cunningham's type of photography.

7. Cunningham's participation in the photography exhibit will not interfere with his work responsibilities for the Museum. He will prepare his exhibits on his personal time.

8. Cunningham has no authority or input regarding which artists are selected to display their work at the Museum. Further, while Cunningham is on duty in his public capacity at the Museum, he does not prepare, build or assist in the displays by the private artists. However, he has volunteered to assist artists or the Museum with maintenance or administrative tasks related to private exhibits.

9. Cunningham has no future plans to display his art in the Museum unless he is again asked to fill a vacancy by the Museum.

I. DISCUSSION

By showing his private art through his public employer, at the request of his employer under limited, unique circumstances, and accepting the economic opportunity in his private capacity, Cunningham would not be improperly influenced in the faithful performance of his public duty or deemed to be securing an unwarranted privilege. Further, Cunningham has not improperly sought or entered into a contract in violation of the Ethics Law.

**A. Seeking/Accepting
Engagement/Economic Opportunity
Influencing Public Duties**

NRS 281A.400(1) provides, in relevant part:

A public . . . employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in the public . . . employee's position to depart from the faithful and impartial discharge of the public . . . employee's public duties.

The Commission finds no facts to suggest that Cunningham would be improperly influenced in the duties of his public position by showing his work and accepting the opportunity to earn money through the sale of his art in a private capacity.

Cunningham testified that he did not assist private artists with their displays beyond general maintenance or administrative tasks that he believed were encompassed in his duties as an Exhibits Preparator. He indicated the employees of the Museum contributed to any tasks needed to be accomplished when their work responsibilities were completed. Cunningham does not expect to use any more or less of his public time with his own exhibit than he does for any other private exhibit. He will prepare his exhibit on his personal time. Accordingly, Cunningham's ability to present his exhibit will not improperly influence him to depart from his public duties.

**B. Securing Unwarranted
Privilege/Advantage**

NRS 281A.400(2) provides, in relevant part:

A public . . . employee shall not use the public . . . employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public . . . employee

Cunningham does not seek any preference or advantage at all, let alone an unwarranted preference or advantage. The opportunity to display art was available to all artists. In fact, the Museum solicited several artists to fill the vacancy and, when it was unsuccessful for more than one year, the Museum's supervisor approached Cunningham to fill the vacancy.

C. Seeking Other Contracts

NRS 281A.400(10) provides, in relevant part:

A public . . . employee shall not seek other employment or contracts through the use of the public . . . employee's official position.

As indicated, Cunningham must not use his position as a public employee to seek a contract with the Museum. However, as discussed above, Cunningham did not seek any contract with the Museum. Rather, the Museum requested that Cunningham show his work and Cunningham agreed to fill the August vacancy after no other artists requested or accepted the opportunity.

D. Entering Into Contract with Governmental Entity

NRS 281A.430(1) provides, in relevant part:

1. Except as otherwise provided in this section and NRS 281A.530 and 332.800, a public officer or employee shall not bid on or enter into a contract between a governmental agency and any business entity in which the public officer or employee has a significant pecuniary interest.

However, NRS 281A.430(4) provides an exception as follows:

4. A public officer or employee . . . may bid on or enter into a contract with a governmental agency if:

(a) The contracting process is controlled by the rules of open competitive bidding or the rules of open competitive bidding are not employed as a result of the applicability of NRS 332.112 or 332.148;

(b) The sources of supply are limited;

(c) The public officer or employee has not taken part in developing the contract plans or specifications; and

(d) The public officer or employee will not be personally involved in opening, considering or accepting offers.

While a public employee may not enter into a contract with a governmental entity regarding a matter in which the public employee has a significant pecuniary interest, the Ethics Law specifically exempts certain contracts where the contracting process is open and competitive, the sources

of supply are limited and the public employee has not assisted in developing the contract specifications or been involved in considering or accepting the offers. This exception contemplates contracts which are governed by a competitive bidding process. However, the Commission has applied it in circumstances in which the contract may not literally be awarded under competitive bids, but is nonetheless an open process.

In Cunningham's circumstances, the opportunity to display work at the Museum is open to all artists on a first-come, first-serve basis, subject to a waiting list. The Museum uses various forms of advertising including word-of-mouth and press releases. While the Museum's contracting process does not utilize bidding or awards to the highest bidder, it is nonetheless an open process such that the intent of the exception set forth in NRS 281A.430(4)(a) is satisfied.

The exception further requires that the sources of supply be limited. In Cunningham's circumstance, the sources are not only limited, but they are nonexistent. No interest in the August exhibit opportunity was found despite the Museum's efforts to solicit artists.

Finally, the exception requires that Cunningham neither assisted in developing the contract specifications nor was involved in opening, considering or accepting offers. Cunningham testified that the program and contract terms were developed before he was employed by the Museum and he has no input or authority regarding which artists are awarded contracts pursuant to the program. Those decisions are made by the Museum Director.

E. NRS 281 - Entering Into Contract with Governmental Entity

Outside the scope and jurisdiction of the Ethics Law is a substantially similar prohibition against public officers and employees entering into contracts with governmental entities. Specifically, NRS 281.230 contains a similar prohibition as the Ethics Law but imposes a criminal rather than an administrative sanction.

NRS 281.230 provides, in relevant part:

1. Except as otherwise provided in this section and NRS 218A.970, 281A.530 and 332.800, the following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other significant transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way directly interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada;

(b) Deputies and employees of state, county, municipal, district and township officers; and

(c) Officers and employees of quasi-municipal corporations. . . .

4. A public officer or employee . . . may bid on or enter into a contract with a governmental agency if the contracting process is controlled by rules of open competitive bidding, the sources of supply are limited, the public officer or employee has not taken part in developing the contract

plans or specifications and the public officer or employee will not be personally involved in opening, considering or accepting offers. . . .

5. A person who violates any of the provisions of this section shall be punished as provided in NRS 197.230 and:

(a) Where the commission, personal profit or compensation is \$250 or more, for a category D felony as provided in NRS 193.130.

(b) Where the commission, personal profit or compensation is less than \$250, for a misdemeanor.

The Commission interprets the two similar provisions in NRS 281 and 281A to be intended to encompass those situations in which a public employee improperly uses his public position to benefit himself in his private capacity.

While the Commission cannot and does not interpret NRS 281, it does not intend to infer that an activity permissible under the Ethics Law would otherwise be permissible under other law. Therefore, the Commission's interpretation of NRS 281A.430 is intended to be consistent with NRS 281.230.

II. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Cunningham was a "public employee," as defined by NRS 281A.150.

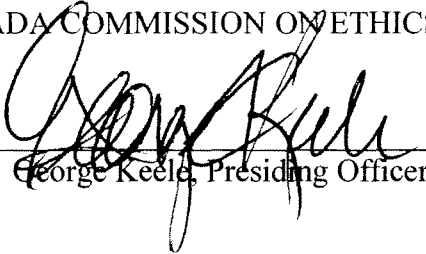
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.

3. Cunningham's intentions to display his photography at the Museum, in

partnership with the Museum and at the Museum's request, to fill a vacancy in the exhibit schedule not pursued or accepted by any other artist, would not violate NRS 281A.400(1), (2) or (10) or 281A.430.

Dated this 13th day of October, 2010.

NEVADA COMMISSION ON ETHICS

By: 
George Keele, Presiding Officer