



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Requests for Advisory Opinions Concerning the Conduct of **DWIGHT D. JONES**, Superintendent of Schools, Clark County School District, State of Nevada,

**Consolidated
Requests for Opinion Nos.
10-117A and 11-03A**

Public Employee. /

OPINION

Public employee Dwight D. Jones requested two confidential advisory opinions from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in NRS 281A. The Commission consolidated the requests for decision. Jones appeared before a quorum¹ of the Commission on February 11, 2011, and provided sworn testimony. At the conclusion of the hearing, and after full consideration of the facts, circumstances and testimony presented by Jones, the Commission orally advised Jones of

its decision that he has not violated the Ethics Law by accepting funds for relocation expenses; however, the Commission questions the School Board's practice of accepting private funds for this purpose. In addition, the Commission determined that as the Clark County School Superintendent he is not a public officer under the current Ethics Law and is therefore not required to file a Financial Disclosure Statement. However, because the position "involves the exercise of a public power, trust or duty," the Commission will seek to amend NRS 281A.160 to include county school superintendents as public officers without regard to whether the position is created by law.

The Commission subsequently issued a letter to Jones setting forth its decision. Jones waived

¹ The following Commissioners participated in this opinion: Chairman John T. Moran, III, Esq., and Commissioners Erik Beyer, Gregory J. Gale, CPA, Magdalena M. Groover, George M. Keele, Esq., Paul H. Lamboley, Esq., and John W. Marvel.

confidentiality with respect to this proceeding. Therefore, the Commission now publishes the letter as its written Opinion.²

I. QUESTIONS PRESENTED

A. Whether NRS 281A.400(1), (2) or (4) prohibit you from accepting privately donated funds for relocation expenses as established by the School District Board of Trustees.

B. Whether, as Clark County School Superintendent, you are a public officer as defined in NRS 281A.160 and therefore required to file an annual Financial Disclosure Statement under NRS 281A.610.

II. DISCUSSION

You asked the Commission whether accepting privately donated funds for relocation expenses in a manner established by the Board of Trustees of the Clark County School District ("School Board") would be a violation of NRS 281A.400(1), (2) or (4). (RFO No. 10-117A)

You also asked the Commission whether you are a "public officer," as that term is defined in NRS 281A.160, serving as the Superintendent of the Clark County School District. (RFO 11-03A) If you are deemed a public officer, you are required to file an annual Financial Disclosure Statement ("FDS") pursuant to NRS 281A.610.

²Section II, Discussion, in relevant form and substance, reproduces the Commission's letter to the requester.

A. Accepting Relocation/Housing Funds (RFO 10-117A)

The Commission noted that the School Board appointed you the Clark County School District Superintendent of Schools on December 15, 2010. Your employment contract with the Board includes a provision requiring the School District to reimburse you up to \$5,000 for temporary housing and/or relocation expenses per month, for not more than 6 to 8 months, contingent upon certain circumstances related to your move from Colorado to Nevada.

The Board arranged for such housing/relocation expenses to be paid through the Las Vegas Public Education Foundation, a nonprofit organization that raises funds and accepts private donations for public education needs. The Foundation set up a "Superintendent's Transitional Housing Fund" on its website and solicited private donations for the Fund. Any money received through this Fund was to be delivered directly to the School District, which would distribute the funds to you as reimbursement for your expenses. The Foundation posted the names of the donors on its website for purposes of transparency in this arrangement.

The Commission reviewed the statutes that govern the acceptance of gifts, securing of economic opportunities and acceptance of private funds for public service set forth in NRS 281A.400(1), (2) and (4), respectively. The Commission determined that the applicable

provisions of NRS 281A did not prohibit you from accepting the relocation reimbursement in the manner established by the Board and as provided in your employment contract.

NRS 281A.400(1) prohibits a public officer or employee from seeking or accepting any economic opportunity that would tend to improperly influence a reasonable person in the official's position to depart from the faithful discharge of his duties. The Commission determined that the right to reimbursement for housing/relocation expenses was part of the contractual agreement between you and the School Board and therefore you would not be accepting an economic opportunity that would otherwise improperly influence a reasonable Superintendent to depart from the faithful discharge of his duties.

NRS 281A.400(2) prohibits a public officer or employee from using his position to secure unwarranted privileges. The Commission found that during the contract negotiations you were not a public officer or employee using your position to secure any unwarranted privileges. Moreover, the Commission found that the School Board determined that the temporary reimbursement of housing expenses was warranted to attract a Superintendent with your qualifications to Las Vegas.

Finally, NRS 281A.400(4) prohibits a public officer or employee from accepting any compensation, including expenses, from a private source for the performance of his duties. The Commission held that

the School Board arranged for the Foundation to solicit the private donations prior to your employment as the Superintendent and no evidence suggested that you had any role in seeking those donations.

The Foundation does not pay you directly for the reimbursement of expenses. Rather, the Foundation delivers its funds to the School Board, which in turn disburses them to you in its discretion and based on receipts you provide. Once the funds are transferred to the School District, they become public funds. Therefore, the Commission held that the funds were not considered compensation from a private source.

The Commission's determination is supported by prior Commission opinions regarding private source funds and the method by which such funds are distributed to public employees. In these decisions, the Commission concluded that funds paid directly from a private source violate NRS 281A.400. *See In Re Looney and Crowley*, RFO 92-17 and *In Re Incline Village General Improvement District*, RFO 93-34. However, funds provided through a public entity, as in the present circumstance, are public funds. *Id.* Therefore, you would not violate the provisions of NRS 281A.400(4) by accepting these funds in the manner outlined herein. *Id;* *see also In Re Massimino and Weaver*, RFO 94-42.

Although the Commission determined that these funds do not create an ethical concern for the public employee who accepts them in accordance with the pass-through situation described herein, the

Commission nonetheless found that the artifice of the Board or any public entity using foundations or other similar organizations to provide public officers and employees with economic opportunities is poor policy and contrary to the intent of the Ethics Law. These individuals are encouraged to maintain the public trust in every instance.

The intent of NRS 281A.400(4) suggests that the government normally compensates employees for government work so that third parties are not in a position to reward, compensate, control or influence a governmental employee's decision or service. See *Looney*. The Commission found no violation based on prior Commission precedent and nature of the funding in this instance, but questions the wisdom of the underlying nature of such an arrangement.

B. Public Officer Status – (RFO 11-03A)

The Commission determined that the position of Superintendent of Schools of Clark County 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 to qualify as a public officer. Therefore, you are not a public officer and you are not required to file a FDS pursuant to the provisions of NRS 281A.610.

The Commission reviewed the statutes which govern the appointment of superintendents of school districts set forth in chapter

391 of NRS. The Commission determined that NRS 391.100 authorizes, as opposed to requires, a board of trustees of a school district to employ a superintendent. The Nevada Legislature has stated that the position may be created by the board of trustees of a school district. The permissive language suggests that the position need not be created at all. Accordingly, a superintendent is not a position "established" by statute because of the permissive language in the statute. Furthermore, the Commission determined that no Clark County ordinance otherwise established the position.

The Commission supported its decision in this matter with a review of *UCCSN v. D.R. Partners*, 117 Nev. 195, 202-03; 18 P.3d 1042, 1047(2001), which held that a statute which authorizes a position to be created and administered by another entity does not "establish" the position in statute. In the case, a Nevada statute authorized the Board of Regents of the University and Community College System of Nevada to prescribe the duties of the officers of the System, including the presidents of the various colleges within the System. The Court stated that "the position of community college president was created not by any statute, but administratively by the Board, and the Board can as easily abolish the position or substitute another for it."

Consequently, the community college president was not a public officer within the meaning of a statute defining "public officer" for purposes of the laws applicable to

public employees and officers, generally. The definition of "public officer" in NRS 281A.160 was derived from the definition described in that statute.

While the Commission declared that the Superintendent of Schools of Clark County is not a public officer based on the limited factors set forth in this decision, the Commission held that the function and duties of the Superintendent otherwise satisfy the remaining elements of the definition of "public officer" set forth in NRS 281A.160 – exercising a public power, trust and duty.

The Commission's decision in this matter became effective on February 11, 2011.

Dated this 4th day of April, 2012.

NEVADA COMMISSION ON ETHICS

By: 
Erik Beyer
Chairman³

³ At the time this written opinion was issued, the presiding officer in this matter, then-Chair Moran, no longer served on the Commission. Therefore, current Chair Beyer signed this opinion on behalf of the participating Commissioners.

NRS 281A.400 General requirements; exceptions.

A code of ethical standards is hereby established to govern the conduct of public officers and employees:

1. A public officer or 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 officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

2. A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281A.420.

(b) "Unwarranted" means without justification or adequate reason.

* * *

4. A public officer or employee shall not accept any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of the public officer's or employee's duties as a public officer or employee.

NRS 281A.160 "Public officer" defined.

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.