



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the
Conduct of **Public Officer**, Member,
Nevada State Commission,
State of Nevada,

Request for Opinion No. 11-84A

Public Officer. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Public Officer requested a confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his 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 quorum¹ of the Commission heard this matter on September 13, 2011. Public Officer appeared at the hearing and provided sworn testimony.

At the conclusion of the hearing, and after full consideration of the facts, circumstances and testimony

presented, the Commission deliberated and orally advised Public Officer of its decision that under the Ethics Law he must disclose his pecuniary interest and private commitment to the interest of others, but that neither private interest required him to abstain from voting on certain regulations.²

Public Officer elected to retain confidentiality with respect to this proceeding. Therefore, the Commission publishes this Abstract in lieu of the full opinion.

II. QUESTION PRESENTED

The Nevada State Commission ("State Commission") approved temporary regulations and will now be considering the adoption of permanent regulations. Public

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

² Commissioner Weaver disagrees with the determination on abstention.

Officer, newly appointed to the State Commission, questions whether his long-term and previously substantial affiliation with a nonprofit organization ("Nonprofit Association") which supports the regulations and which has brought litigation to maintain the current regulation without amendment, requires him to disclose or abstain with respect to the regulations.

III. DISCUSSION OF RELEVANT STATUTES AND ISSUES

A. ISSUES

Public Officer is a member of a State Commission. In a private capacity, he has been and remains actively involved in the governance of Nonprofit Association at both the national and local levels. Nonprofit Association is a nonprofit organization with a substantial interest in establishing and maintaining a certain activity in Nevada, and has used membership dues to partially fund its litigation in support of the temporary regulations which were adopted by the State Commission before Public Officer's appointment.

The State Commission will now consider adopting permanent regulations to govern the activity in Nevada. In light of his present and past affiliations with Nonprofit Association, the Commission must consider whether Public Officer has a pecuniary interest in the permanent regulations. Likewise, we consider whether his involvement in the organization is a commitment in a private capacity to the interest of

others that would require him to disclose. Finally, we consider whether either interest would require his abstention with respect to the regulations.

B. RELEVANT STATUTES

1) Public Policy

NRS 281A.020 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.

Public Officer currently serves as an appointed member of the State Commission and must commit himself to avoid conflicts between his private interests and those of the public he serves. The Commission trusts that Public Officer will follow the statutory guidelines governing decisions of the State Commission, but counsels him that any conflict between his public duties as Commissioner and his commitments to his private interests must be considered in light of the applicable provisions set forth in NRS 281A and as interpreted by applicable Commission precedent in similar circumstances.

2) Disclosure

NRS 281A.420(1) provides:

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 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.

The facts before the Commission establish that Public Officer must disclose his relationship with Nonprofit Association prior to taking action on any regulations involving the activity which Nonprofit Association actively supports. His long-term and extensive association with Nonprofit Association, together with Nonprofit Association's substantial interest in the approval of permanent regulations, demand full and complete disclosure of his past and present involvement with the organization.

We find that Public Officer has a pecuniary interest in the regulations supported by Nonprofit Association under NRS 281A.420(1)(b). Public Officer's pecuniary interest arises from Nonprofit Association's expenditure of membership dues and other funds raised by the local chapters to support Nonprofit Association's litigation efforts intended to ensure that the State Commission's decision to approve temporary regulations remain in place. Although Public Officer resigned his leadership positions in Nonprofit Association, he does remain a dues-paying member, and has contributed a substantial amount – about \$10,000 – of personal funds to Nonprofit Association's local chapters over the years. Although he

did not participate in Nonprofit Association's decision to join the Nevada litigation, he was a member of the Association's Government Affairs Committee at the time the decision was made and also was a member of Nonprofit Association's Board by virtue of his position as President of the Nevada Chapter. Based on this evidence, we do not conclude that Public Officer's pecuniary interest is substantial, but it is one that nonetheless triggers the disclosure provisions.

We further conclude that Public Officer has a private commitment to the interest of Nonprofit Association under NRS 281A.420(1)(c) which would reasonably affect his vote on the permanent regulations. Public Officer held governance positions in Nonprofit Association at the time of his appointment to the State Commission – he was the current President of the Nevada Chapter, Board member of the national organization, and also served on the national Government Affairs Committee – and resigned from them only days before the effective date of his appointment. His decreased involvement in Nonprofit Association occurred at virtually the same time he joined the State Commission, and followed many years of personal commitment to Nonprofit Association always in a leadership capacity. *Compare In re McCoy*, RFO No. 09-58A (2012) (dues-paying membership and service as a Board member six years prior is not a commitment to the interest of others).

3) Abstention

NRS 281A.420(3) and (4) provide:

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.

The closer question is whether either or both of Public Officer's personal interests require him to abstain from acting on the regulations. The Ethics Law disfavors abstention, and requires a public officer to abstain only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by a conflict between his public and private interests.

Based on the testimonial and documentary evidence presented to

the Commission, we conclude that this is not a clear case where a reasonable person in Public Officer's situation would be materially affected.³ Neither Public Officer's pecuniary interest nor his private commitment to Nonprofit Association's interest, or both interests combined, are substantial enough to mandate abstention. Also, the benefits that would accrue to Public Officer or the Nonprofit Association as a result of the regulations is not greater than that accruing to any other member of the general business, profession, occupation or group that is affected by the matter. Further, we note that at the hearing of this matter, Public Officer testified that he recognizes and intends to comply with his statutory duties governing the State Commission, and that in participating in the regulations he will not have a predisposition or be biased in the decision-making, but will make up his mind based on the record developed before the State Commission.

Despite the conclusion that NRS 281A.420(3) and (4) do not mandate Public Officer's abstention on the regulation, we take this opportunity to caution him that our decision is based on and limited to the testimonial and documentary evidence he submitted. Public Officer must remain mindful that once the full record is developed before the State Commission, circumstances could evolve that would require his abstention. We cannot emphasize enough Public Officer's obligation to disclose in public, fully and completely, his

³ Commissioner Weaver disagrees with this determination.

present continuing membership in Nonprofit Association, his long-term past involvement in Nonprofit Association leadership, his financial and in-kind voluntary contributions to Nonprofit Association, and that Nonprofit Association membership dues fund, in part, its litigation efforts respecting the regulations. This disclosure is required each time the State Commission considers the regulations, and must precede any action Public Officer takes with respect to those regulations, including any decision he makes to abstain from the vote.

We commend Public Officer for recognizing his ethical obligations and for seeking the advice of this Commission. While this RFO is specific to the regulations, it is clear that Nonprofit Association's interests are broader than this issue, as is Public Officer's role on the State Commission. Hence, we remind Public Officer of his obligations as a public officer under NRS 281A.020 to maintain the public trust and to avoid conflicts of interest. If Public Officer has specific questions about a future set of circumstances, he is always welcome to bring such circumstances to this Commission for further review and opinion.

IV. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Public Officer 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. Under NRS 281A.420(1)(b), Public Officer has a pecuniary interest in the regulations.
4. Under NRS 281A.440(1)(c), Public Officer has a commitment in a private capacity to the interests of Nonprofit Association, and Public Officer's action on the regulations reasonably would be affected by this commitment.
5. The facts presented do not establish a clear case under NRS 281A.420(4) that the independence of judgment of a reasonable person in Public Officer's situation would be materially affected by his past and present affiliations with Nonprofit Association. The Ethics Law therefore does not require Public Officer to abstain from voting or otherwise acting on the regulations.

Dated this 15th day of August, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman