



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**, Trustee, Board of
Trustees, General Improvement District,
State of Nevada,

Request for Opinion No. 12-13A

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 past, present and 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 March 21, 2012. Public Officer appeared at the hearing and provided sworn testimony.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and orally advised Public Officer of its decision that the Ethics Law does not prohibit him from simultaneously serving on the boards of a general improvement district and nonprofit entity which contracts with the district and also serving as a contract employee of the nonprofit entity.

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

¹ The following Commissioners participated in this opinion: Chairman Erik Beyer and Commissioners John Carpenter, Timothy Cory, Esq., Gregory Gale, C.P.A., Magdalena Groover, Paul H. Lambole, Esq., James Shaw and Keith Weaver, Esq.

II. QUESTION PRESENTED

Public Officer is an elected member of the General Improvement District Board of Trustees ("District") which governs certain facilities ("Facilities"). Public Officer questions whether any conflicts exist under NRS 281A between his public duties as a Trustee of the District and his private interests serving as an employee and member of the board of directors of a nonprofit entity which has a contract for use of the facilities.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

As a public officer governing the Facilities, the Ethics Law prohibits Public Officer from: 1) seeking or accepting economic opportunities which tend to influence the faithful discharge of his public duties (NRS 281A.400(1)); 2) using his position in government to secure unwarranted benefits for himself (NRS 281A.400(2)); or 3) contracting with governmental entities unless certain criteria are met (NRS 281A.400(10) and 281A.430). Furthermore, Public Officer is required to properly disclose his private interests in matters under consideration by the Board and abstain from voting under certain circumstances (NRS 281A.420).

Public Officer's private interests serving as a board member and employee of a nonprofit entity

("Nonprofit Entity") which contracts for use of the Facilities triggers these provisions.

B. RELEVANT STATUTES

1) Public Policy

NRS 281A.020(1), 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.

The Ethics Law promotes the appropriate separation between public duties and private interests. As an elected Trustee of the District Board, Public Officer is a public officer and has specific public responsibilities that he must separate from his private interests to preserve the public trust. The Commission concludes that there is no inherent conflict of interest in Public Officer serving simultaneously as District Trustee, Assistant Treasurer of Nonprofit Entity's Board of Directors, and a contract employee of Nonprofit Entity.

However, he does hold a public position which governs the Facilities. Because he serves as an employee and member of the board of directors of Nonprofit Entity which contracts for use of the Facilities, his

private interests may be affected by his public duties. If an issue comes before the District Board for consideration that involves the interests of Nonprofit Entity, Public Officer must appropriately disclose his private interests in Nonprofit Entity and undertake the statutorily required abstention analysis as described herein.

2) Seek/Accept Engagement Improperly Influencing Public Duties.

NRS 281A.400(1), provides:

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

Public Officer accepted the position as employee and Treasurer of Nonprofit Entity before he was elected as a Trustee of the District Board. Accordingly, as a public officer, he did not seek or accept the private positions which implicate his public duties.

Nevertheless, because his private interests serving Nonprofit Entity may be affected by his public duties governing the Facilities, Public Officer must be careful not to seek or accept gifts, services, favors or other opportunities derived from his

private interests in Nonprofit Entity which may improperly influence his public duties. Based on Public Officer's testimony, the District Board does not vote on matters involving Nonprofit Entity and all contracts or agreements for use of the Facilities are negotiated solely with the Facilities' Director.

Furthermore, Public Officer was not involved in negotiating Nonprofit Entity's contract with the Facilities' Director and Nonprofit Entity did not receive any special advantages because he was a Trustee. Other interested persons and entities seeking use of the Facilities have the same opportunity to negotiate agreements for use with the Facilities' Director. In fact, Nonprofit Entity's rate for facility use has remained the same since before Public Officer's service on the District Board. Accordingly, Public Officer would not be accepting opportunities through his public duties to benefit his private interests in Nonprofit Entity.

If an issue comes before the Board for consideration that involves the interests of Nonprofit Entity, Public Officer must appropriately disclose his private interests in Nonprofit Entity and undertake an abstention analysis as described below.

3) Use of Government Position to Secure Unwarranted Preferences.

NRS 281A.400(2), provides:

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 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.

No evidence exists to suggest that Public Officer has used his position as Trustee in any manner to benefit Nonprofit Entity as an employee or its Treasurer. In fact, Public Officer testified that the District Board has never voted on any issue involving Nonprofit Entity. Public Officer also testified that he does not interact with the Facilities Director in his capacity as a Trustee, and Nonprofit Entity has not been given any special advantages for facility use.

4) Seeking Employment or Contract Through Use of Official Position

NRS 281A.400(10) provides:

10. A public officer or employee shall not seek other employment or contracts through the use of the

public officer's or employee's official position.

Although Public Officer has a contract with Nonprofit Entity as an employee while simultaneously serving as a Trustee, no evidence has been presented that he has used his public position to acquire or influence that contract.

5) Contracts in which public officer or employee has interest prohibited; exceptions

NRS 281A.430(1) and (4) provide, 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.

4. A public officer or employee, other than a public officer or employee described in subsection 2 or 3, 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.

NRS 281A.430(1) prohibits a public officer from entering into a contract with a governmental entity and any business entity in which the public officer has a pecuniary interest. Public Officer has a pecuniary interest as an employee of Nonprofit Entity, but volunteers to serve as a member of its board of directors. Because Nonprofit Entity entered into a contract to use the Facilities, Public Officer entered into a contract between a governmental agency (Facilities) and a business entity in which he has a significant pecuniary interest (Nonprofit Entity).

Although the contract is not subject to open competitive bidding it is nonetheless controlled by an open process in which any interested person or entity is authorized to contract with the Facilities Director, and Public Officer was not otherwise involved in developing the plans for or the specifications of the contract or deciding whether Nonprofit Entity would be awarded the contract. This open and available contracting process satisfies the intent of NRS 281A.430(4)(a). See *In re Blackburn*, RFO No. 09-90A (2009) (county firefighter owned mortuary business and was permitted to contract with county to provide services under County's open rotation agreements available to all mortuaries without violating NRS 281A.430 - although the contract process was not subject to open competitive bidding, it was nonetheless an open process

satisfying the intent of NRS 281A.430(4)(a) and all other criteria for the exception in NRS 281A.430(4) were satisfied).

6) Statutes Outside NRS 281A

The Commission does not interpret the provisions of NRS governing public employees outside of NRS 281A, including, without limitation, the applicability, if any, of NRS 281.230, NRS 332.800 or NRS 245.075. Conduct which is permissible under the Ethics Law may otherwise be prohibited under other provisions of Nevada Law. Accordingly, Public Officer is advised to consult other resources to ensure his relationships with the District and Nonprofit Entity are permissible and/or not restricted.

7) Disclosure/Abstention

NRS 281A.420(1), (3) and (4) in relevant part, provide:

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 interests 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 person to whom the public officer or employee has a commitment in a private capacity. Such 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 to the chair and other members of the body.

* * *

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 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 person, 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.

Public Officer has a commitment in a private capacity to Nonprofit Entity, a nonprofit organization for which he serves as a fiduciary in his role as its Treasurer. See *In the Matter of Cornwall*, RFO No. 91-6 (1991); and *In re Matter of Wishart*, RFO No. 92-11 (1992) (one who sits on the Board of Directors of a corporation, whether nonprofit or for-profit, has a fiduciary obligation to the corporation, which is a commitment to the interests of another); see also *In re Public Officers*, RFO Nos. 11-84, 12-04 and 12-15 (public officers who serve as members of the boards of directors of nonprofit entities have commitments in a private capacity to the interests of the entities and fellow board members). Public Officer also has a pecuniary interest in Nonprofit Entity as a paid employee. Accordingly, Public Officer has an obligation to disclose his pecuniary interests and the interests of Nonprofit Entity in all matters before the District Board which affect those interests.

Although Public Officer testified that the District Board does not consider or vote upon any issue directly involving Nonprofit Entity, it is likely that the District Board votes on many issues that indirectly affect the interests of Nonprofit Entity and its use of the Facilities (and thereby also affect his pecuniary interests as an employee). Public Officer is advised to disclose the nature and extent of these private interests and the potential effect of his action upon those interests in accordance with NRS 281A.420(1) each time the

District Board considers such matters

To the extent the District Board considers matters which affect Nonprofit Entity, Public Officer is reminded of the provisions of NRS 281A.420(3) and (4) which encourage public officers to vote unless a clear conflict of interest exists. The law creates a presumption in favor of voting despite a conflict of interest where the public officer's private interests will not result in benefit or detriment any more or less than any other member of the group affected by the matter, such as other persons or which contract with the District Board for use of the Facilities.

In this instance, the Commission presumes that a reasonable person in Public Officer's position would be able to exercise independent judgment in such matters unless the outcome of the issue would affect his Nonprofit Entity differently than any other persons or entities contracting for use of the Facilities. If there is no greater or lesser effect on his interests, Public Officer should undertake that analysis on the record to determine whether such independent judgment would be materially affected.

IV. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officer was a public officer as defined by NRS 281A.160.

2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. No conflict of interest arises between Public Officer's duties as District Trustee and his private interests in Nonprofit Entity as prohibited by NRS 281A.020(1), and he may serve simultaneously as District Trustee, Treasurer of Nonprofit Entity's Board of Directors, and employee of Nonprofit Entity.
4. Public Officer did not violate NRS 281A.400(1) because he did not seek or accept any services, favors or other economic opportunities through his public duties as District Trustee to benefit his private interests in Nonprofit Entity.
5. Public Officer did not violate NRS 281A.400(2) because he did not use his position as Trustee in any manner to benefit Nonprofit Entity as an employee or its Treasurer.
6. Public Officer did not violate NRS 281A.400(10) because he did not use his position as Trustee to seek a contract for Nonprofit Entity's use of the Facilities.
7. Public Officer's contractual agreement between Nonprofit Entity and the Facilities satisfies the exception to the contract prohibitions set forth in NRS 281A.430(4) because it was controlled by an open process in which any person or entity was authorized to contract with the Facilities and Public Officer was not otherwise involved in developing the plans for or the specifications of the contract or deciding whether Nonprofit Entity would be awarded the contract.
8. When matters involving Nonprofit Entity come before the District Board, Public Officer must disclose his relationships with Nonprofit Entity and determine whether to abstain as required by NRS 281A.420.

Dated this 15th day of August, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman