



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, Chair, Appeals Board,
State of Nevada,

Request for Opinion No. 12-40A

Public Officer. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Public Officer, Appeals Board ("Board") Chairman, requested this 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 August 15, 2012. Public Officer appeared in person represented by the Board's Attorney, and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding whether he must disclose and abstain from participation in a Board hearing concerning an appeal brought by Petitioners.

After fully considering the request for advisory opinion and analyzing the facts and circumstances of the request presented, the Commission deliberated and orally advised Public Officer of its decision in the matter to decline and defer rendering the advisory opinion, without prejudice, based on the request presented at this time.² This Opinion addresses an issue of first impression.

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

² Commissioners Cory and Gale disagreed with the majority decision not to proceed with a hearing and advisory opinion.

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

Public Officer serves as the Chair of the Board and questions whether the Ethics Law requires him to disclose and abstain from participating in a contested matter before the Board in which one of the interested parties has requested Public Officer's disqualification on the basis of bias.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer, the Chair of the Board, has been accused of having bias against Petitioners appearing before the Board appealing the decision of a local agency. Petitioners have appeared before the Board on several occasions making arguments in opposition to the local agency's determination. The appeals to the Board have resulted in litigation regarding which Public Officer participated as an agent of the Board. Public Officer has participated in each of the Board meetings regarding Petitioners' appeals. Although litigation is pending, certain matters continue to proceed at the Board level.

Petitioners have filed a motion with the Board requesting that Public Officer abstain from participating or voting as a result of his alleged bias against Petitioners. Petitioners have alleged that Public Officer has a personal bias against them and has influenced fellow Board members as the Chair to make determinations against Petitioners' interests. Petitioners cite to principles of judicial recusal based on bias. The local agency, as an interested party before the Board, has opposed Petitioners' motion and Public Officer disputes that he has any bias or has demonstrated any bias.

The threshold question in this case is whether the Commission should render an advisory opinion under NRS 281A.440(1) pursuant to a request based on allegations in a contested motion made and pending before another agency. The Board has initial general jurisdiction over the motion, and the request for advisory opinion invokes the Commission's jurisdiction to initiate a proceeding in which the requester is the sole participant.

In the context of this request, the agency having initial jurisdiction over the contested motion (the Board) has not considered the motion, identified issues in that motion that may arise under NRS Chapter 281A or referred those issues for consideration by the Commission under its primary jurisdiction with a provision that all interested parties participate before the Commission on those issues. Consequently, the maker of the motion (Petitioners) and other interested persons (local agency) will not be participants in the Commission proceedings, nor have they nor will they be

invited to do so under Commission procedural rules which require confidentiality for a first-party request for opinion. Thus, principles of fundamental fairness and administrative due process are also at issue. Further, in the context of this type of request, it is reasonable to anticipate that customary confidentiality of an advisory opinion will be voluntarily waived for the purpose of giving the advisory opinion some preemptive effect in other forums, such as the Board, the courts or public opinion.

In this case, if Commission jurisdiction were exercised based on the First-Party Request for Opinion, the issues would be confined to those arising under NRS Chapter 281A, most probably the provisions of NRS 281A.420(1) (disclosure) and NRS 281A.420(3) (abstention). The request itself, however, fails to identify provisions of NRS Chapter 281A and only cites the allegations in the contested motion which are facially outside the primary jurisdiction of the Commission. For that reason, the Commission has declined to exercise its jurisdiction to render an opinion at this time, and without prejudice, has deferred doing so until either a proper First-Party Request for Opinion is made under NRS 281A.440(1)³ or the agency (Board) having initial jurisdiction over the contested motion itself refers issues raised by the contested motion that fall within NRS Chapter 281A to the Commission with instruction that all interested parties may participate in the development of the record and presentation of arguments on those issues before the Commission.

The latter option is a remedial suggestion that seeks to respect and preserve the jurisdiction of the Board and the Commission, promote principles of fundamental fairness and due process, and prevent forum shopping and preemptive effect to the benefit of one party and the detriment of the other party in a contested proceeding before another agency.

B. RELEVANT STATUTES

1. NRS 281A.440 provides, in relevant parts:

1. The Commission shall render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances as soon as practicable or within 45 days after receiving a request, whichever is sooner, on a form prescribed by the Commission, from a public officer or employee who is seeking guidance on questions which directly relate to the propriety of his own past, present or future conduct as an officer or employee. He may also request the Commission to hold a public hearing regarding the requested opinion. If a requested opinion relates to the propriety of his own present or future conduct, the opinion of the Commission is:

- (a) Binding upon the requester as to his future conduct; and
- (b) Final and subject to judicial review pursuant to NRS 233B.130, except that a proceeding regarding this review must be held in closed court

³ The Commission contemplates that a proper First-Party Request for Opinion would include questions related to the applicability of provisions of NRS Chapter 281A and would not include matters involving contested matters pending before another agency.

without admittance of persons other than those necessary to the proceeding, unless this right to confidential proceedings is waived by the requester.

2. The Commission may render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances:

(a) Upon request from a specialized or local ethics committee.

(b) Except as otherwise provided in this subsection, upon request from a person, if the requester submits:

(1) The request on a form prescribed by the Commission; and

(2) All related evidence deemed necessary by the Executive Director and the panel to make determination of whether there is just and sufficient cause to render an opinion in the matter.

(c) Upon the Commission's own motion regarding the propriety of conduct by a public officer or employee. The Commission shall not initiate proceedings pursuant to this paragraph based solely upon an anonymous complaint.

7. Each request for an opinion that a public officer or employee submits to the Commission pursuant to subsection 1, each opinion rendered by the Commission in response to such a request and any motion, determination, evidence or record of a hearing relating to such a request are confidential unless the public officer or employee who requested the opinion:

(a) Acts in contravention of the opinion, in which case the Commission may disclose the request for the opinion, the contents of the opinion and any motion, evidence or record of a hearing related thereto;

(b) Discloses the request for the opinion, the contents of the opinion, or any motion, evidence or record of a hearing related thereto; or

(c) Requests the Commission to disclose the request for the opinion, the contents of the opinion, or any motion, evidence or record of a hearing related thereto.

12. If a person who requests an opinion pursuant to subsection 1 or 2 does not:

(a) Submit all necessary information to the Commission; and

(b) Declare by oath or affirmation that the person will testify truthfully, the Commission may decline to render an opinion.

It is axiomatic the Commission has primary, if not exclusive, jurisdiction to implement and interpret the provisions of NRS Chapter 281A. Accordingly, the Commission has authority to render advisory opinions requested under NRS 281A.440(1).

While NRS 281A.440(1) uses the mandatory term "shall" and NRS 281A.400(2) (third-party requests for opinion) uses the permissive term "may", NRS 281A.400(12) makes clear that the Commission has the authority to decline to render an opinion in appropriate cases. This is one such case where, as here, the requester makes no reference to any potential issues that arise under applicable provisions of NRS Chapter 281A. The written request is expressly based on allegations of the

contested motion pending before the Board, which allegations contain no reference to provisions of NRS Chapter 281A and contain only general allegations of bias. While certain provisions of NRS Chapter 281A may at their core be subsets or manifestations of the concept of bias, the Commission has never considered whether bias itself is a violation of any provision of NRS Chapter 281A.

As mentioned above the potential issues not raised might be those under NRS 281A.420(1) and (3) regarding disclosure and abstention. Other issues are not excluded.

2. NRS 281A.020 provides, in part:

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.

It is occasionally argued that NRS 281A.020 does not constitute an independent basis upon which any violation could be found because it contains merely aspirational, precatory policy language and is not within the Code of Ethical Standards that the Commission is charged with enforcing. In particular, it is noted that the Code of Ethical Standards setting forth specific rules of ethical conduct begins with NRS 281A.400, whereas NRS 281A.020 was set forth under the statutory heading: "General Provisions." It is important to observe that in matters of statutory construction, section titles and statutory headings are not determinative.

In past cases, the Commission has noted the statute contains language which can be read as imposing a mandatory obligation and not merely as a statement of policy. The Commission has based its ruling on this issue on the facts and circumstances of the case. The Commission has never precluded deciding whether NRS 281A.020 might be used as a predicate for finding violations of this or other provisions of NRS Chapter 281A.

3. NRS 281A.420(1) and (8) provide:

1. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest,

- without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest...such a disclosure must be made at the time the matter is considered. If the officer or employee is a

member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body.

8. "Commitment in a private capacity to the interests of others" means a commitment to a person:

- (a) Who is a member of his household;
- (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
- (c) Who employs him or a member of his household;
- (d) With whom he has a substantial and continuing business relationship; or
- (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

In Public Officer's request, as it pertains to matters before the Board, there is no reference to specific conduct or circumstances raising ethical issues under NRS 281A.420(1). The fact of a contested motion requesting Public Officer's recusal from participation in any hearing on Petitioners' appeals does not by itself create an issue under NRS 281A.420.

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

3. [I]n addition to the requirements of the code of ethical standards, 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 his situation would be materially affected by:

- (a) His acceptance of a gift or loan;
- (b) His pecuniary interest; or
- (c) His 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 would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

Here again, Public Officer's request, as it pertains to matters before the Board concerning Petitioners' appeals, makes no reference to specific conduct or circumstances raising ethical issues under NRS 281A.420(3).

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. The Commission has primary jurisdiction to render an advisory opinion concerning ethics questions and issues arising under NRS Chapter 281A, and to render opinions thereon upon requests made pursuant to NRS 281A.440(1).
3. The Commission has discretion to determine whether to exercise its jurisdiction to render an opinion under NRS 281A.440(1) as matter of sound public policy, considerations of administrative due process requirements and prevention of forum shopping.
4. Public Officer's request, as it pertains to matters before the Board, makes no reference to specific conduct raising ethical issues defined in NRS Chapter 281A.
5. The fact there is a contested motion requesting Public Officer's recusal from participation in any Board consideration and hearing on Petitioners' appeals does not of itself create or raise an issue under NRS Chapter 281A.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

V. DECISION: DEFER AND DECLINE EXERCISE OF JURISDICTION

The Commission finds and concludes that the request for opinion submitted by Public Officer pursuant to NRS 281A.440(1) concerning Petitioners' appeals pending before the Board fails to make reference to any conduct, circumstances or issues arising under NRS Chapter 281A over which the Commission has primary jurisdiction. Moreover, the Commission finds and concludes that the request invokes the Commission's jurisdiction to initiate proceedings in which the requester is the sole participant before the Commission in the context of a contested motion pending before another agency. The request raises significant issues of fundamental fairness, administrative due process, forum shopping and preemptive effect or use in other forums.

Accordingly, the Commission finds and concludes it is appropriate to decline to exercise its jurisdiction to render an advisory opinion at this time, and without prejudice has deferred doing so until either a proper First-Party Request for Opinion is made under NRS 281A.440(1) raising issues specific to provisions of NRS Chapter 281A, or the Board, the agency having initial jurisdiction over the contested motion, itself identifies and refers issues raised by the contested motion that fall within NRS Chapter 281A to the Commission with a provision that all interested parties may

participate in the development of the record and presentation of arguments on those issues before the Commission.

The latter alternative remedial suggestion above seeks to respect and preserve the jurisdiction of the Board and the Commission, promote principles of fundamental fairness and due process, and prevent forum shopping and preemptive effect or use to the benefit of one party and the detriment of the other party in a contested proceeding before another agency.

The Commission advises Public Officer that, before he acts on any matter related to the issues discussed herein, he seek the advice of the Board's Attorney, and that he reviews the Ethics Law and the Commission's interpretation of the provisions of the Ethics Law, including its opinion *In re Woodbury*, Nevada Comm'n on Ethics Opinion No. 99-56 (1999).

The Commission's guidance in this Opinion is limited to the Ethics in Government Law (NRS Chapter 281A) and does not extend to other ethical considerations such as Board's own ethical code, if one exists, or the judicial canons, applicable to judges.

The Following Commissioners Participated in this Opinion:

Dated this 4th day of October, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman

By: /s/ Gregory Gale
Gregory Gale
Commissioner

By: /s/ Paul Lamboley
Paul Lamboley
Vice-Chairman

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ John Carpenter
John Carpenter
Commissioner

By: /s/ James Shaw
James Shaw
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Keith Weaver
Keith Weaver
Commissioner