



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party Request  
for Opinion Concerning the Conduct of  
**Ken Fujii**, Principal, Eureka County High  
School, Eureka County School District,  
State of Nevada,

**Request for Opinion No. 12-42C**

\_\_\_\_\_  
Subject. /

### OPINION

#### I. STATEMENT OF THE CASE

Pursuant to NRS 281A.440(2)(b), a Third-Party Request for Opinion ("RFO") was filed with the Nevada Commission on Ethics ("Commission"), alleging that Ken Fujii ("Fujii") violated the Ethics in Government Law ("Ethics Law") as set forth in Chapter 281A of the Nevada Revised Statutes ("NRS") by using his position as the Principal of the Eureka County High School to "hire himself" or influence his subordinate, the Athletic Director, to hire him as the coach of the High School Girls Varsity Basketball Team. The Commission reviewed the RFO, provided Fujii with notice of the allegations, the Commission's intent to investigate and an opportunity to respond, conducted an investigation of the allegations and convened an Investigatory Panel to determine whether the RFO and related evidence established just and sufficient cause for the Commission to conduct a hearing and render an opinion regarding whether Fujii violated the Ethics Law. The Panel concluded that the Commission must first determine whether Fujii was a "public employee" under the jurisdiction of the Commission before holding a hearing on the merits of the allegations. This Opinion addresses the Commission's determination regarding jurisdiction.

#### II. PRODEDURAL HISTORY

##### A. Third-Party Request for Opinion

The allegations set forth in the RFO suggested that Fujii used his position as the Principal to secure the role as the coach over another qualified individual in violation of the public trust (NRS 281A.020). The allegations further alleged that Fujii sought and accepted economic opportunities that improperly influenced his public duties (NRS 281A.400(1)); improperly used his position to gain unwarranted benefits (NRS 281A.400(2)); participated as an agent of government in negotiating his

coaching contract (NRS 281A.400(3)); used his position to influence subordinates (NRS 281A.400(9)); and improperly contracted with a governmental entity (NRS 281A.400(10) and 281A.430).

Pursuant to NAC 281A.400<sup>1</sup> and based on the information and evidence provided by the Requester, the Executive Director and Commission Counsel evaluated the RFO and concluded that the Commission had jurisdiction over Fujii as a public employee to investigate the allegations and present them to an Investigatory Panel. The Executive Director and Commission Counsel determined that a reasonable person would believe that the various contracts and district policies provided by the Requester was competent proof to support a reasonable belief that Fujii had a position of authority to improperly claim the coaching position. Based on this assessment, the Commission provided Fujii with notice of the allegations and intent to investigate and an opportunity to respond to the RFO.

## **B. Fujii's Response to Allegations**

As provided in NRS 281A.440, and prior to any representation by counsel, Fujii filed a written response to the RFO denying the factual assertions offered by the Requester. The response also clarified Fujii's contractual relationship with the School District and his role as the Principal in determining coaching positions. In particular, Fujii stated that he served as an independent contractor for the School District and he did not supervise the Athletic Director. Further, Fujii asserted facts contrary to those provided by the Requester regarding his role in applying for and determining any coaching positions.

Fujii's response did not dispute that the Ethics Commission had jurisdiction over him as a "public employee." Rather, in response to the contractual clarifications concerning the nature of Fujii's employment status, Commission Staff raised the jurisdictional question independently during the investigation.

## **C. Investigation**

Pursuant to NRS 281A.440(3) and (4), the Executive Director conducted a thorough investigation of the RFO and presented a recommendation regarding just and sufficient cause to a two-member Investigatory Panel of the Commission.<sup>2</sup> The Commission's investigation clarified the nature of Fujii's contractual relationship with the School District as well as the factual assertions of the Requester and Fujii.

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<sup>1</sup> NAC 281A.400 defines "evidence which supports the allegation" to include a very low threshold similar to the level of evidence required of the Commission's panel to determine that there is just and sufficient cause to forward a matter to the Commission for full review. Specifically, the definition defines, in part, the level of evidence to include "any reliable and competent form of proof provided by witnesses, public and private records, audio or visual recordings, documents, exhibits, concrete objects and other such forms of proof that support a reasonable belief in the allegation made in the ethics complaint."

<sup>2</sup> Commissioners John Carpenter and Paul Lamboley served on the Investigatory Panel. Pursuant to NRS 281A.220(4), they did not thereafter participate in any proceedings of the Commission relating to the matter.

Given Fujii's independent contractor status with the School District, the Commission's Executive Director recommended that the Panel consider the legal question regarding whether Fujii was a "public employee" subject to the jurisdiction of the Commission, as defined by NRS 281A.150. Presuming the Panel was to determine that Fujii was a public employee, the Executive Director further recommended that the Panel find insufficient evidence to support a finding of just and sufficient cause for the Commission to hold a hearing and render an opinion.

#### **D. Panel Review/Determination**

The Panel concluded that it would be more appropriate for the Commission, and not the Panel, to consider and determine Fujii's legal status as a public employee within the Commission's jurisdiction. Presuming the Commission was to determine that Fujii was a public employee, however, the Panel declined to follow the Executive Director's recommendation, instead finding sufficient credible evidence for the Commission to hold a hearing and render an opinion concerning the substantive allegations.<sup>3</sup>

#### **E. Commission Hearings – Notices to Subject**

In response to the Panel's determination, the Commission bifurcated the hearing process. The Commission scheduled and noticed an initial hearing for the limited purpose of determining jurisdiction based on Fujii's questionable status as a public employee. The Commission also scheduled and noticed a contingent hearing to consider the merits of the substantive allegations if the Commission was to conclude that Fujii was a public employee. The Commission noticed its initial jurisdictional hearing for October 17, 2012.

#### **F. Motion to Dismiss**

Having received notice of the Panel's determination and initial hearing, as well as the jurisdictional issue raised concerning Fujii's questionable status as a public employee under the Commission's jurisdiction, Fujii retained the legal services of the School District's legal counsel, Mike Pavlakis, Esq., of the Allison, MacKenzie, Pavlakis, Wright & Fagan, Ltd. law firm in Carson City, Nevada. Based on the nature of its contractual relationship with Fujii, the School District represented Fujii for the limited purpose of determining whether Fujii was a public employee. In response to this legal issue, Mr. Pavlakis filed a Motion to Dismiss with the Commission arguing that Fujii was not a public employee within the jurisdiction of the Commission and the RFO should be dismissed.

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<sup>3</sup> An Investigatory Panel determines there is just and sufficient cause for the Commission to hold a hearing and render an opinion in the matter if the allegations are supported by a "minimal level of any reliable and competent form of proof provided by witnesses, records, documents, exhibits, concrete objects, and other such similar means, that supports a reasonable belief by a panel that the Commission should hear the matter and render an opinion." NAC 281A.435(3).

## **G. Commission Jurisdictional Hearing – Motion to Dismiss**

The jurisdictional issue/Motion to Dismiss came before a quorum of the Commission for a public hearing on October 17, 2012.<sup>4</sup> Fujii attended the hearing and provided sworn testimony. He was represented during the Commission proceedings by attorney Mike Pavlakis, Esq., for the purposes of the jurisdictional questions and attorney Rick Hsu, Esq., of the Maupin, Cox & Legoy law firm in Reno, Nevada for all other purposes.

At the conclusion of the hearing, and after fully considering the facts and circumstances disclosed by the evidence, including witness testimony and documents, the Commission deliberated on the record and orally announced its decision that Fujii was not a public employee and the Commission lacked jurisdiction to hold a hearing or render an opinion regarding the allegations set forth in the RFO.<sup>5</sup> Accordingly, the Commission dismissed the RFO in its entirety. The Commission now renders this written Opinion setting forth its findings of fact and conclusions of law.

### **III. FINDINGS OF FACT<sup>6</sup>**

1. In his public capacity, Fujii serves as the Principal of the Eureka County High School (“High School”) through an independent contract with the Eureka County School District (“School District”) in Eureka, Nevada. Fujii also serves as the coach of the High School Girls Varsity Basketball Team.
2. Fujii and his wife own SUEKEN, Inc., a private company that contracts with the School District to provide Fujii’s services as the Principal to the High School.
3. The School District and SUEKEN established this contractual relationship to ensure Fujii’s status as an independent contractor and not an employee of the School District to protect his public employee retirement system (“PERS”) benefits. Fujii retired after 36 years of service as a public school teacher and administrator in Nevada and receives his full PERS benefits. Fujii’s PERS benefits would be interrupted if he was to become a public employee and he would decline to serve as an administrator if he could not do so as an independent contractor.
4. The Eureka County School District is a unique, if not the sole, school district in the State that retains certain high-level administrative professionals and educational personnel via independent contracts. Due to its rural location and small

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<sup>4</sup> The quorum consisted of Chairman Erik Beyer and Commissioners Timothy Cory, Gregory Gale, James Shaw and Keith Weaver.

<sup>5</sup> Commissioner Weaver voted against this determination, finding instead that a public position such as that of a school principal is a position of public trust compensated through public funds that is subject to the jurisdiction of the Ethics Law and a principal should not be entitled to contract away the obligations of the Ethics Law on behalf of the State of Nevada, despite the otherwise acceptable objectives of independent contracts as quality recruiting, cost savings and pension-protecting measures.

<sup>6</sup> The Commission does not make any findings of fact relevant to the substantive allegations in this RFO. The findings of fact are only those that relate to Fujii’s status as a public employee.

population, Eureka County has tremendous difficulty attracting and retaining qualified personnel for certain high-level positions within the District, such as the Superintendent and various administrators (principals).

5. The School District retains retired public school administrators and educators to fill these positions via independent contracts to acquire qualified personnel and achieve significant cost savings by not providing employee health, leave or retirement benefits to independent contractors. The retired public employees benefit from independent contracts by not becoming public employees and not having their PERS benefits disturbed.
6. Fujii's contract specifically and unambiguously states that he is not an employee of the School District for any purpose.
7. Fujii's contract further specifies the circumstances by which Fujii's contract may be terminated. Under the terms of his contract, Fujii does not report to any person or perform duties under the direction or control of any person. The School District's Superintendent does not evaluate Fujii's work performance. Fujii has no set business hours or specific tasks and he is otherwise entitled to contract with other entities to provide his services.
8. As an independent contractor, Fujii waives any rights to due process and indemnification that are otherwise afforded to employees of school districts as provided in NRS Chapter 391. Fujii's rights are expressly and solely provided in the terms of his contract.
9. Fujii receives no employee benefits such as health insurance, retirement contributions, sick leave, vacation pay or expense reimbursement. He pays his own business and travel expenses, including office supplies and materials.
10. As an independent contractor, the School District pays Fujii a specified compensation for which Fujii is responsible for the payment of his own taxes and withholdings.

#### **IV. COMMISSION DECISION**

##### **A. ISSUES**

The Commission is generally presented with an issue of first impression regarding whether a private citizen who enters into an independent contractual relationship with a governmental entity is a "public employee" as defined by NRS 281A.150. The Commission declines to decide this broad issue, instead resolving this matter on the narrower basis of the specific facts and circumstances presented in this case. The Commission determines that Fujii is not a public employee as defined by NRS 281A.150 based on the nature of his contractual relationship with the School District. Because Fujii is not a public employee, the Commission does not have

jurisdiction to consider the substantive allegations rendered against him in the RFO. Accordingly, the Commission hereby dismisses the RFO in its entirety.

## **B. DECISION**

The School District has intentionally retained Fujii's services as the High School Principal by independent contract to avoid the legal and economic conditions and consequences of public employment. Although the original intention was to save costs for the school district, retain a qualified administrator and protect Fujii's PERS benefits, the unintended result has raised a question regarding Fujii's status as a public employee subject to the Ethics Law.

NRS 281A.150 states that a "[p]ublic employee' means any person who performs public duties under the direction and control of a public officer for compensation paid by the State or any county, city or other political subdivision." The Commission therefore considers whether Fujii, based on his independent contract with the School District, could be deemed to be performing public duties under the direction and control of a public officer. It is undisputed that the salary provided in his contract is paid through county funds (taxes), regardless of whether he receives them directly from the School District or as an employee under the umbrella of his private corporation, SUEKEN. However, the express terms of his contract state that Fujii does not report to any person and the conditions of his employment are specified in and limited by the terms of his contract.

Fujii's contract specifies the circumstances by which Fujii's contract may be terminated, he has no set business hours or specific tasks and he is otherwise entitled to contract with other entities to provide his services. Furthermore, as an independent contractor, Fujii waives any rights to due process and indemnification that are otherwise afforded to employees of school districts as provided in NRS Chapter 391. Fujii's rights are expressly and solely provided in the terms of his contract. Waiving such significant rights and protections otherwise due to public employees signifies the intention that Fujii be deemed independent in all aspects, subject only to the terms and conditions of the contract.

Fujii receives no employee benefits such as health insurance, retirement contributions, sick leave, vacation pay or expense reimbursement and he pays his own business and travel expenses, including office supplies and materials. As an independent contractor, the School District pays Fujii a specified compensation for which Fujii is responsible for the payment of his own taxes and withholdings. Based on the nature of his contract, Fujii does not perform his public duties as the Principal under the direction or control of any person. Rather, his duties are controlled by the terms of his contract and he undertakes those responsibilities independent of any supervision or direction.

Given the very specific terms of Fujii's contract and the School District's unique and specified reasons for retaining Fujii's services as an independent contractor, Fujii cannot be deemed to be a public employee as that term is defined under the Ethics Law. Pursuant to NRS 281A.280, the Commission's jurisdiction to investigate alleged violations of the Ethics Law and render opinions is limited to the alleged conduct of public officers or employees. Accordingly, since Fujii is not deemed to be a public employee, the Commission lacks jurisdiction to hold a hearing or render an opinion on the allegations set forth in the RFO and those allegations are therefore dismissed.

## V. CONCLUSIONS OF LAW

1. Fujii serves as an independent contractor for the Eureka County School District and based on the specific terms of his contract, he is not a public employee as defined by NRS 281A.150 or a public officer as defined by NRS 281A.160.
2. The Commission does not have jurisdiction to hold a hearing or render an opinion pursuant to NRS 281A.280 and 281A.440 against a person who is not a public officer or employee.
3. Because Fujii is not a public officer or public employee under the jurisdiction of the Commission, the Commission dismisses the RFO in its entirety.

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.

The Following Commissioners Participated in this Opinion:

Dated this 24<sup>th</sup> day of January, 2013.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer  
Erik Beyer  
Chairman

By: /s/ James Shaw  
James Shaw  
Commissioner

By: /s/ Timothy Cory  
Timothy Cory  
Commissioner

By: /s/ Keith Weaver  
Keith Weaver  
Commissioner<sup>7</sup>

By: /s/ Gregory Gale  
Gregory Gale  
Commissioner

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<sup>7</sup> See Footnote 5.