



STATE OF NEVADA
BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of **Chris Johnson**, Mayor,
City of Elko, State of Nevada,

Request for Opinion No. 12-68A

Public Officer. /

OPINION

I. STATEMENT OF THE CASE

Elko Mayor Chris Johnson ("Johnson") requested this 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 February 20, 2013. Johnson appeared via video conference in Las Vegas and provided sworn testimony.

Johnson sought an opinion from the Commission regarding whether he is prohibited from providing private business services to a municipal corporation within the City regarding which he is responsible as the Mayor for nominating and voting to appoint one of the members of the governing body of the municipal corporation.

After fully considering Johnson's request and analyzing the facts, circumstances and testimony presented by Johnson, the Commission deliberated and orally advised Johnson of its decision that by continuing to provide plumbing and heating repair and maintenance services to the Elko Convention Center through his private business, Johnson will not be in violation of NRS 281A.400(1), (2) or (10). Further, Johnson would not be in violation of NRS 281A.430(1) and (4) by continuing

¹ The following Commissioners participated in this opinion: Chairman Paul Lamboley, Vice-Chairman Gregory Gale and Commissioners Timothy Cory, Magdalena Groover, Cheryl Lau, James Shaw and Keith Weaver. Commissioner John Carpenter disclosed a close personal relationship with Mr. Johnson and abstained from participating and voting on this matter.

to provide those services. Additionally, Johnson is not required to disclose or abstain from voting on matters regarding his business relationship with Chester Plumbing during the appointment of a member of the Board of Supervisors to the Elko Convention and Visitors Authority Board. The Commission now renders this final written Opinion stating its findings of fact and conclusions of law.

After the hearing in this matter, Johnson waived confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this Opinion.

The facts in this matter were obtained from documentary and testimonial evidence provided by Johnson. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact set forth below accept as true those facts Johnson presented. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTION PRESENTED

Johnson questions whether he may provide private business services to a municipal corporation of the State which provides facilities and services in and for the County/City of Elko, and regarding which he is responsible as the Mayor for nominating and voting to appoint one of the members of the Elko Board of Supervisors to the governing body of the municipal corporation.

III. FINDINGS OF FACT

1. Johnson serves as the Mayor of the City of Elko ("City"). Johnson's duties as Mayor generally include serving as ex officio President of City's Board of Supervisors meetings and as Chief Executive Officer of the City. The Board of Supervisors ("Board") is comprised of the Mayor and four (4) members. The Board formulates, adopts and enforces the ordinances, resolutions and orders necessary for the government and management of City affairs.
2. Prior to election as Mayor, Johnson served two (2) terms as a Board Member.
3. In his private capacity Johnson owns and serves as the president of a plumbing and heating business, Charles H. Chester Plumbing and Heating, Inc. ("Chester Plumbing") in Elko, Nevada.
4. Chester Plumbing has provided plumbing and heating products and services for the Elko Convention Center ("ECC") for decades.
5. The ECC is a facility owned and operated by the Elko Convention and Visitors Authority ("ECVA").

6. The ECVA is a municipal corporation of the State of Nevada which is governed by a five (5) member Board of Governors appointed or elected as follows:
 - a. One member appointed by the City Board of Supervisors. This member must be a current member of the Board of Supervisors;
 - b. One member appointed by the Board of County Commissioners. This member must be a current member of the Board of County Commissioners;
 - c. Two members elected at large who must reside within the City of Elko and within the boundaries of the ECVA; and
 - d. One member elected at large who must reside outside the City of Elko and within the boundaries of the ECVA.
7. Any member of the Board may nominate a prospective member to serve on the ECVA Board of Governors. However, it has been customary for the Mayor of the City to make the nomination from among the Board's members. As Mayor, Johnson made the most recent Board nomination/recommendation which was approved by the Board. When he served as a member of the Board, Johnson always voted to approve the Mayor's nominee.
8. Chester Plumbing has no formal contract with the ECVA to provide plumbing and heating services for the ECC. Rather, Chester Plumbing provides services for the ECC on an "as needed" basis. ECVA personnel contact Chester Plumbing directly to request service. A purchase order is created and upon completion of the services an invoice for payment is issued.
9. The ECVA does not issue requests for proposals for routine maintenance and repairs of plumbing and heating systems at the ECC, such as those performed on a time and materials, as-needed, basis by Chester Plumbing.
10. Pursuant to the ECVA's Current Purchasing Act Policy, all contracts must be advertised for which there is an estimated cost exceeding \$25,000. If the estimated cost is \$25,000 or less the ECVA has discretion to advertise. For estimated costs of performance of more than \$10,000 but less than \$25,000, the ECVA must request at least two competitive bids. Records of those bids must be kept and there are requirements for advertising and publishing those requests and bids.
11. The ECC does not maintain an exclusive agreement for service with Chester Plumbing. However, the ECC prefers Chester Plumbing because its technician has worked on the ECC for many years and is familiar with the building and plumbing systems. If Chester Plumbing is unable to satisfy the ECC's demands, ECVA personnel are free to contact a competitor at any time.
12. Although the Board appoints a member to the ECVA, the Board has no authority over the ECVA Board's activities.

13. ECVA tax and assessment revenues are formalized in its enacting legislation. However, the ECVA has sought additional funding from the City for various projects.
14. In 2010 Chester Plumbing's receipts for services provided to the ECC totaled \$5,870, or approximately 0.2% of its gross receipts. In 2011 the receipts for services provided to the ECC was \$16,255, or 0.5% of its gross receipts; and 2012 yielded \$2,891, or 0.08% of the total volume of business.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

As a public officer, Johnson must carefully separate his private interests in his plumbing business from his public duties as the Mayor and member of the Board of Supervisors. Johnson is concerned about his ability to conduct private business with the ECVA, a municipal corporation of the State providing convention and tourism resources in and for the County/City of Elko. The ECVA's governing body is comprised of various representative members of the County/City government and the public. One of the five members of the ECVA governing body is a member of the Board of Supervisors, appointed by the Board. Johnson has a significant role in nominating which member of the Board will serve on ECVA's governing body. Although the Board has no active role in governing the matters of the ECVA, it presumably has some influence in the ECVA's matters by virtue of its representative voice on the ECVA's governing body.

Johnson questions whether his influence and role as the Mayor in nominating and appointing a member of ECVA's governing body creates a conflict with his ability to provide private plumbing services to the ECVA, an activity he has undertaken for years. Furthermore, Johnson questions his legal authority to engage in private business with the ECVA, a (quasi-) governmental entity, while serving as the Mayor, and if so, whether he has disclosure and abstention obligations.

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.

2) Seek/Accept Engagement Improperly Influencing Public Duties.

NRS 281A.400(1), provides:

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.

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.

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.

5) Disclosure

NRS 281A.420(1), in relevant part, 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 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...

6) Abstention

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

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 other's.

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 other.

(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.

7) Prohibited contracts

NRS 281A.430, in relevant part, provides:

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.

→ If a public officer who is authorized to bid on or enter into a contract with a governmental agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose the public officer's interest in the contract and shall not vote on or advocate the approval of the contract.

C. COMMISSION OPINION

The Commission finds and concludes that Mayor Johnson's plumbing business, Chester Plumbing, may continue to provide plumbing services to the ECC on an as-needed basis. Specifically, pursuant to NRS 281A.400(1), Mayor Johnson would not be deemed to be seeking or accepting an economic opportunity that would tend to improperly influence a reasonable person in his situation to depart from the faithful discharge of his public duties as the Mayor of the City of Elko. Likewise, Mayor Johnson has not used and would not be using his official position as the Mayor to create unwarranted benefits or privileges to Chester Plumbing pursuant to NRS 281A.400(2).

Mayor Johnson testified that while he values the business relationship that he (as the owner of Chester Plumbing) has with the ECVA to provide plumbing services to the ECC, it is a very small portion of Chester Plumbing's annual billing/revenues. Essentially, the money he collects from the ECC is immaterial to his overall business in terms of revenue. Such monetary effect would not improperly influence his official duties as the Mayor or cause him to use his official position in any way to secure unwarranted benefits.

Furthermore, Mayor Johnson's only official duty which could affect the activities of the ECVA is the nomination and/or vote to appoint a member of the Board to serve

as a governing member of the ECVA. The evidence reflects that the ECVA has enacting, governing and funding legislation separate and apart from that of the City or Board. Such a nomination and appointment, without other evidence to the contrary, does not impact the ECVA's determination about which plumbing contractor to utilize for the ECC.

With regard to the contracting provisions set forth in NRS 281A.400(10) and 281A.430, the Commission is mindful of the distinction between formal contractual relationships and as-needed, service-provider agreements. The Commission can appreciate Mr. Johnson's perspective as a business person that a purchase/work order followed by an invoice for services, as-needed, does not constitute a contractual relationship. However, from a legal perspective a contract can quite simply refer to an offer and acceptance in exchange for consideration; in this case, a request for plumbing services (offer) and agreement to provide the plumbing services (acceptance) in exchange for payment (consideration). The work/purchase order commits Chester Plumbing to satisfactorily perform/provide the plumbing services and the ECC to provide compensation for the services. The Commission interprets such a legal arrangement as a "contract" for the purposes of its application to NRS 281A.400(10) and 281A.430.

Regardless of any legal contractual relationship, no evidence supports any view that Mayor Johnson used his official position as the Mayor to secure any contracts or agreements with the ECC to provide plumbing services. Accordingly, Mayor Johnson did not violate NRS 281A.400(10) and is advised not to utilize his official position in any future arrangements to provide plumbing services to the ECC. His nomination of a member of the Board to serve as a member of the ECVA, a statutory requirement, does not constitute the use of his position to secure private contracts.

NRS 281A.430 requires a separate evaluation from NRS 281A.400(10). Specifically, 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. However, the Legislature has provided an exception to this prohibition where the rules of open competitive bidding are followed, generally, and the public officer is a limited source of supply and has not been involved in the contractual terms and/or processes on behalf of the governmental entity. The Commission has interpreted this exception to extend to otherwise open and transparent contracting processes where the contract is not the type that qualifies for a formal open, competitive bidding process.

In this case, the provision of as-needed plumbing services to the ECC is not the type of contractual arrangement which is subject to open competitive bidding. However, the as-needed services are nonetheless controlled by an open, competitive process in which any interested person or entity is authorized to market and provide its plumbing services to the ECVA/ECC. Furthermore, Mayor Johnson did not develop and/or specify the terms or requirements of the plumbing services requested by the ECC or decide whether Chester Plumbing would be contacted to provide the

services. This open, transparent “contracting” process satisfies the intent of NRS 281A.430(4)(a). See *In re Public Officer*, Comm’n Opinion No. 12-13 (2012) (Member of governing body of Governmental Entity had a pecuniary interest as an employee of Nonprofit Entity and a commitment in a private capacity to Nonprofit Entity as a volunteer member of its Board of Directors. Because Nonprofit Entity’s Board entered into a contract to use facilities owned and governed by Governmental Entity, Public Officer was deemed to have entered into a contract between Governmental Entity and a business entity in which he has a significant pecuniary interest - Nonprofit Entity. However, Commission found that contract effectively satisfied the exception set forth in NRS 281A.430(4) because of its open process wherein the facilities were available to any person or entity that applied for use); and *In re Blackburn*, Comm’n Opinion 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).

Furthermore, the Commission has also expressed its intent to interpret the contracting provisions to permit public officers to provide as-needed services to governmental entities, so long as there is no effort to improperly use public positions or relationships to secure such arrangements or otherwise violate the provisions of NRS Chapter 281A. The Commission initiated significant efforts during the last two legislative sessions to clarify the meaning and application of NRS 281A.430 to authorize contractual circumstances where the processes are open and transparent and do not implicate the public officer’s official positions. While these measures have not ultimately been passed by the Legislature, the Commission continues to support its interpretation of the law by acknowledging that the Legislature encourages and envisions citizen representation in our public offices, i.e., citizen legislators, to ensure public service has the benefit of representatives with real business and other private-sector experience.

The Legislature did not intend to exclude from public service, and particularly from public office, those people who are involved in private business. Accordingly, the Commission achieves a balance between acknowledging and encouraging such representation and limiting or cautioning against certain business arrangements that have significant interplay with governmental activities. In this case, Mayor Johnson’s plumbing services to the ECC are a step removed from his role as the Mayor. The Board does not maintain authority over the activities and funding of the ECVA/ECC. While the Board does nominate one of its members to serve as a member of the ECVA, it is a statutory obligation and not an obligation that the Mayor has or intends to use to advance his personal business endeavors with the ECVA.

The obvious resolution to any potential conflict between the Mayor’s private business and his nomination power with the ECVA would be disclosure and possible

abstention pursuant to NRS 281A.420(1) and (3). However, on the facts provided, the connection is so tenuous and remote that his nomination and/or vote to approve the nomination of a member of the Board to serve as a member of the ECVA does not, alone, trigger a disclosure and abstention obligation. The matter of nominating a member to serve on the ECVA is not a matter under consideration by the Board involving Chester Plumbing's services provided to the ECC. However, if the ECVA came before the Board on a specific matter, particularly one that might influence funding and/or the ECC, Mayor Johnson would be advised to properly disclose his business relationship with Chester Plumbing and the ECC. Given that the history of services has amounted to less than one half of one percent of his overall revenues, such services and pecuniary interests are deemed immaterial and not sufficient to require abstention under such circumstances.

As a final consideration, Johnson appears to be concerned with the application of NRS 281.230 governing contracts with governmental entities. However, the contracting provisions of NRS 281.230 governing contracts for public officers, in general, is distinct from the provisions of the Ethics Law set forth in NRS Chapter 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. Conduct which is permissible under the Ethics Law may otherwise be prohibited under other provisions of Nevada Law. Nevertheless, the Commission strives to achieve consistency with outside provisions of law and intends its interpretations of NRS 281A to be cohesive with other provisions of law affecting contracts by public officers with governmental entities. Mayor Johnson is advised to consult other resources to ensure his business relationships with the ECC are permissible or not otherwise restricted.

V. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Johnson 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. Mayor Johnson would not be deemed to violate NRS 281A.400(1) or (2) by continuing to provide plumbing and heating repair and maintenance services to the ECC. Mayor Johnson would not be accepting an economic opportunity which would tend to improperly influence him or a reasonable person in his position to depart from faithful and impartial discharge of his public duties or otherwise be using his official position as Mayor to secure unwarranted privileges for his business, Chester Plumbing.
4. No evidence has been presented that Mayor Johnson used or would use his position as Mayor to seek contracts for plumbing and heating service and maintenance at the ECC in violation of NRS 281A.400(10).

5. Consistent with previous opinions regarding performance of “as-needed,” routine services, Mayor Johnson, through his business, Chester Plumbing, would not violate NRS 281A.430(1) and (4) by providing “as-needed” plumbing and heating services for the ECVA at the ECC. Such services are provided according to an open, transparent competitive market process.
6. Pursuant to NRS 281A.420(1) Mayor Johnson is not required to disclose Chester Plumbing’s provision of services to the ECC during the nomination and voting process for appointment of a member of the Board to serve on the ECVA. However, should any specific issues involving the ECVA or ECC come before the Board for consideration, Johnson is advised to disclose sufficient information concerning the nature of his business relationships with the ECVA/ECC to inform the public of the effect of his participation or abstention.
7. Pursuant to NRS 281A.420(3), Mayor Johnson is not required to abstain from nominating or voting on the appointment of a member of the Board of Supervisors to the ECVA Board. Furthermore, the extent of Johnson’s business relationship with and pecuniary interests in the ECVA/ECC is nominal as compared to his overall business revenues such that abstention would not be required if the ECVA/ECC came before the Board for consideration of any specific matter.

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 1st day of July, 2013.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul Lamboley
Paul Lamboley
Chairman

By: /s/ Cheryl Lau
Cheryl Lau
Commissioner

By: /s/ Gregory Gale
Gregory Gale
Vice-Chairman

By: /s/ James Shaw
James Shaw
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Keith Weaver
Keith Weaver
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner