



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, Governing Body,
Local Government Entity, State of Nevada,

Request for Opinion No. **13-75A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Member of Local Governing Body, Public Officer, requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of the Public Officer's past 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 November 20, 2013. Public Officer appeared at the hearing and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding Public Officer's past disclosure and abstention obligations on a matter before the Governing Body which involved the private interests of a person with whom Public Officer's spouse shared a business relationship.

After 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 Public Officer made an appropriate disclosure of the relationships and interests for purposes of satisfying the provisions and intent of NRS 281A.420(1), but advised Public Officer to make more sufficient disclosures which better explain the full nature and extent of the relationships and interests and their impact on the matter before the Governing Body. The Commission further decided that abstention was not necessary given the remote nature of the interests.² The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.

Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this abstract of the Opinion.

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¹ The following Commissioners participated in this opinion: Chairman Lamboley, Vice-Chairman Gale and Commissioners Carpenter, Cory, Groover, Lau, Shaw, and Weaver.

² Chairman Lamboley and Commissioner Shaw believed abstention was necessary.

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

II. QUESTION PRESENTED

Public Officer is an elected member of Governing Body. Public Officer questions whether the role of Public Officer's spouse as a member of the Board of Directors of a local business enterprise required Public Officer's disclosure and/or abstention pursuant to NRS 281A.420 on past matters that came before the Governing Body involving the private interests of one of the enterprise's employees.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES; COMMISSION DECISION

A. ISSUES

As a member of the Governing Body of a Local Government Entity, the conflicts of interest provisions of the Ethics Law apply to Public Officer's conduct. Specifically, Public Officer must commit himself/herself to avoid actual and perceived conflicts of interest, and Public Officer is required to publicly disclose sufficient information concerning any private relationships and interests which would reasonably affect Public Officer's decision on matters before the Governing Body. Public Officer is also required to abstain from voting or otherwise acting on matters in which such relationships or interests would clearly and materially affect the independence of judgment of a reasonable person in Public Officer's position.

Public Officer and Public Officer's spouse ("Spouse") are members of a local business enterprise ("Enterprise"), a private entity providing various community resources and services. Membership in the Enterprise requires an annual fee. Spouse serves as a volunteer member of the Enterprise's Board of Directors (elected by other Enterprise members), which ensures the financial stability of the organization and hires employees to oversee the operations of the Enterprise. During the time relevant to this RFO, Spouse served as a member of the Board, which had the authority to hire and fire one of the employees at issue in this RFO ("Employee"), but did not otherwise supervise or manage Employee's activities. Public Officer has no personal or other relationship with Employee.

The Governing Body recently considered various agenda items involving a controversial Project affecting the Local Government and regarding which Employee publicly expressed objection in Employee's private, personal capacity. The Enterprise offered no position on the Project.

During the period of time under which the Governing Body considered issues regarding the Project, Public Officer did not seek advice regarding disclosure and abstention obligations from the government-appointed attorney or from any other source, including another qualified attorney or the Governing Body. Instead, Public Officer disclosed Public Officer's membership in the Enterprise, Spouse's interests in the Enterprise and Employee's connections to the Enterprise. Nevertheless, Public Officer voted on the matters believing that the relationships were tenuous and the Enterprise's interests were not represented. Public Officer now questions whether Public Officer's

disclosure was adequate pursuant to NRS 281A.420(1), and whether it was appropriate for Public Officer's to participate and vote on matters involving the Project pursuant to NRS 281A.420(3) and (4).

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. 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 significant 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 another person,
→without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient 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 significant pecuniary interest, or upon the person 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.

3. "Commitment in a private capacity" defined.

NRS 281A.065

"Commitment in a private capacity," with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption or marriage or domestic partnership within the third degree of consanguinity or affinity;

4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subparagraphs 1 to 5, inclusive.

As an elected Governing Body member, Public Officer has public duties that Public Officer must separate from Public Officer's private interests and relationships to preserve the public trust. NRS 281A.020. NRS 281A.065 establishes certain relationships that implicate conflicts of interest. The Commission concludes that no inherent conflict of interest exists between Public Officer and Employee of the Enterprise. Any independent commitment Public Officer may have to Employee is not evident from any facts or testimony presented. Public Officer and Employee are acquaintances who both happen to be members of the Enterprise and occasionally see one another in the community. Public Officer's limited and tenuous personal association with Employee does not create a separate or independent commitment in a private capacity to the interests of Employee.

However, because Public Officer's spouse serves on the Board of Directors for the Enterprise which employs Employee, Public Officer's official duties may be affected by Public Officer's commitment in a private capacity to Spouse's interests in the Enterprise. Public Officer has a commitment in a private capacity with respect to the interests of Spouse. NRS 281A.065(1). Spouse's interests included Spouse's service as a Director of the Enterprise and duty to ensure its mission. As a Director, Spouse had authority to vote on hiring and firing Employee, an important decision relevant to ensuring the continued mission and viability of the Enterprise.

Even though Public Officer understood that Employee's interests in the Project were unrelated to the Enterprise, Public Officer's spouse served as a Director of the Board of the Enterprise which employed Employee, establishing a business and/or employment relationship between Spouse and Employee. Employee had an interest in both the Enterprise and his/her employment status with the Enterprise. Similarly, Spouse had a Director's responsibility to the Enterprise and the authority to vote on hiring and firing of Employee. Therefore, Employee was effectively employed by and/or significantly associated in the same business as Spouse. Accordingly, Public Officer questions whether Spouse's business relationship and interests with Employee create conflicts regarding Public Officer's duties to the Governing Body.

As described above, Spouse's interests related to the Enterprise necessarily include the retention of qualified employees. Determinative in this case, however, is that Employee was not representing the interests of the Enterprise, and the Enterprise did not otherwise express any position on the Project before the Governing Body. Likewise, Employee is employed by the Enterprise's Board (as voted in part by Spouse). If the roles were reversed and Employee had influence regarding the employment of Spouse, Public Officer could be deemed to be voting on a matter affecting, or perceived to be affecting, Spouse's employer, even if the matter before the Governing Body did not involve the interests of the Enterprise. In this case, however, Spouse's relationship with Employee is more removed.

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Nevertheless, the Commission has previously determined that the interests of a person to whom a public officer has a commitment in a private capacity may create a conflict of interest that is broad in scope. In *In re Crowell*, Comm'n Opinion No. 10-64A (2012), the Commission determined that Mayor Crowell had a commitment in a private capacity to the interests of his brother as a blood relative and law associate with whom he shared a substantial and continuing business relationship, and was required to disclose those relationships when the charitable organizations the men represented came before him as a voting member of the Carson City Board of Supervisors. Although Mayor Crowell had no personal interest in or commitment to the charitable organizations, the persons to whom he had a private commitment shared meaningful relationships with those organizations seeking the Board's governance, and disclosure was necessary. Similarly in this matter, although Public Officer has no independent commitment to Employee, Spouse shared a significant business/employment relationship with the Employee. Accordingly, when Employee appeared before the Governing Body, even in a personal capacity unrelated to the Enterprise, Public Officer had a responsibility to disclose the respective relationships and interests.

Public Officer had a potential conflict of interest with respect to any matter before the Governing Body involving the Enterprise, including its employees. Therefore, Public Officer had a duty to fully disclose the nature and extent of Public Officer's relationship with Spouse and Spouse's interests in the Enterprise to put the public on notice of the effect of Public Officer's vote or abstention on the matter and how or whether the vote would affect Public Officer's private commitments. See *In re Woodbury*, Comm'n Opinion No. 99-56, (1999). Public Officer made a disclosure explaining Spouse's position with the Enterprise, Employee's role for the Enterprise, and Employee's private interests in the matter before the Governing Body unrelated to the Enterprise. Public Officer's disclosure satisfies the letter and intent of the law set forth in NRS 281A.420 such that Public Officer did not violate the Ethics Law.

However, given the opportunity to better evaluate the nature of the commitments and relationships, the Commission advises Public Officer that the disclosure could have better explained the structure and operation of the Enterprise's organization, Spouse's duties as a volunteer Board member, Spouse's tenuous relationship with Employee and the Enterprise's lack of interest in the matter before the Governing Body. Had Public Officer offered more detailed information, the public may have better understood how the Enterprise operates, the remote relationship between Spouse and Employee, and the Enterprise's lack of interest in the Project under discussion by the Governing Body. Instead, the lack of specific details prompted more questions about the nature of the relationships and concerns that abstention was required because either Spouse had an interest in the Project via the affiliation with Employee, or Public Officer had an interest in voting on the matter in a manner to benefit Employee because of Employee's relationship with Spouse. None of those concerns were accurate.

In fact, Public Officer testified that Public Officer could have offered more details about the nature of the Enterprise and its operations to ensure that the public understood that it was not a typical private entity with a Board of Directors governing the conduct of its employees and explaining that Spouse's interests in the Enterprise were not issues before the Governing Body. With a more descriptive disclosure, the public may have better understood that Spouse's interests would not be affected in any way by Public Officer's decision to vote, or how Public Officer would vote, on the Project. Having better explained the relationships and interests would have provided valuable insight to the public and Public Officer's fellow colleagues on the Governing Body regarding Public Officer's decision to vote and not abstain.

4. 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 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 significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

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 acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person 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 another person, accruing to the other person, is not greater than that accruing to any other member of any 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 acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

(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, significant pecuniary interest or commitment in a private capacity to the interests of another person 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, significant pecuniary interest or commitment in a private capacity to the interests of another person.

Public Officer's personal relationship with Employee is indirect and casual, and Public Officer's commitment in a private capacity to the interests of Spouse fails to create a clear case in which the independence of judgment of a reasonable person in Public Officer's position would be materially affected by Public Officer's public duties on the Governing Body regarding the Project and Employee's interests in the matter. Spouse's interests as related to Employee are too remote to require abstention. Public Officer's circumstances are similar to those evaluated in *In re Public Officer*, Comm'n Opinion No. 11-65A (2012). In that matter the Commission held that a former relationship with an individual appearing before the governing body who had served as the public officer's former campaign consultant required disclosure but not abstention because the relationship was sufficiently remote to the matter before the governing body.

The same remoteness characterization applies here as well. Spouse's relationship to Employee was remote to the issue before the Governing Body, and Employee appeared before the Governing Body in a private, individual capacity. The tenuous links

between Public Officer and Employee do not require abstention as those links weaken with each step regarding the relationships.

Spouse worked on a volunteer basis with Employee. Although Spouse had a role as a Board member to hire and fire Employee, the authority was not unilateral and Spouse did not directly manage Employee. Spouse's relationship with Employee was limited to their interaction as volunteer Board Member and Employee of the Enterprise. If, instead, Employee served as Spouse's employer, the independence of judgment might be more impaired by the incentive to reward Employee to favor Spouse's employment status.

In this case, there is no objective basis for Public Officer to favor or oppose Employee's position on the Project, particularly as it is unrelated to Public Officer's and Spouse's interests in the Enterprise. The Enterprise did not have a position related to the Project, but rather Employee addressed the issue in a personal capacity. The diminished connections between Spouse's interests and those of the Enterprise to the Project fails to create a clear case in which the independence of judgment of a reasonable person in Public Officer's position would be materially affected by Public Officer's public duties on the Governing Body regarding Employee's interests.

Additionally, the Legislature discourages abstention unless there is a clear conflict. NRS 281A.420(4)(b). The Commission has stated that: (1) abstention deprives the public, and specifically an elected official's constituents, of a voice in matters which come before public officers and employees; (2) public officers and employees should have an opportunity to perform the duties for which they were elected or appointed, except where private commitments would materially affect one's independence of judgment; (3) compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment; and (4) in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or their appointing authority and therefore, the burden is appropriately on the public officer or employee to disclose private commitments and the effect those private commitments can have on the decision-making process and to make a proper determination regarding abstention where a reasonable person's independence of judgment would be materially affected by those private commitments. *In re Woodbury*, Comm'n Opinion No. 99-56 (1999), *see also In re Boggs-McDonald*, Comm'n Opinion No. 01-12 (2001). Without a stronger connection, Public Officer should not deprive the public of Public Officer's representative vote on a matter of public importance.

Public Officer was not required to abstain from participating or acting on matters affecting Employee. Public Officer's private commitment to Spouse's interests related to the Enterprise and Employee are not material or significant enough to affect the independence of judgment of a reasonable person to vote on a project unrelated to those interests.

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. Public Officer's disclosure was sufficient to satisfy the letter and intent of the law set forth in NRS 281A.020 and 281A.420(1). Nevertheless, Public Officer is advised to

disclose more sufficient information in the future to better inform the public of the full nature and extent of Public Officer's commitment in a private capacity to the interests of Public Officer's spouse, which include the type of business entity and operations of the Enterprise, Spouse's role as a volunteer member of the Enterprise's Board and its employment/business relationship with its employees, and the Enterprise's lack of any position on the matter before the Governing Body. A more informative disclosure would have better informed the public of Spouse's remote interests in relation to the Governing Body's consideration of matters affecting the Project.

4. Applying NRS 281A.420(3) and (4) on this record, Public Officer was not required to abstain from participating or acting on matters affecting Employee. Public Officer's participation suggests that Public Officer determined that private commitments and interests related to Employee, in Employee's personal capacity, did not appear material or significant enough to affect Public Officer's independence of judgment as a reasonable person in the situation.

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 31st day of July, 2014 .

NEVADA COMMISSION ON ETHICS

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

By: /s/ John Carpenter
John Carpenter
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ Cheryl Lau
Cheryl Lau
Commissioner

By: /s/ Keith Weaver
Keith Weaver
Commissioner

**Separate expression of
Commissioners Lamboley and
Shaw:**

Based on the developed record, we find and conclude that Public Officer, given ample time between Governing Body meetings, could have made a more complete investigation of the potential for conflict as well as attempted to obtain an ethics opinion, and at the Governing Body meetings, Public Officer should have made a more complete disclosure and abstained from participation.

By: /s/ Paul Lamboley
Paul Lamboley
Chairman

By: /s/ James Shaw
James Shaw
Commissioner