

Michael K. Morton, Esq.

## MEMO

**To:** Nevada Commission on Ethics  
**From:** Michael K. Morton, Esq.  
**Date:** November 17, 2021  
**Re:** Executive Director Candidate Presentation

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At the request of the Nevada Commission on Ethics and its staff, this memorandum contains:

- I. Jurisdictional Determination on Case No. 21-023C (Porta)
- II. Justification for PIO/Training Officer position for the Nevada Commission on Ethics
- III. Justification for passing AB65 (2021) during the 82<sup>nd</sup> Session of the Nevada Legislature

### **I. Jurisdictional Determination on Case No. 21-023C (Porta)**

The Nevada Commission on Ethics (Commission) received this Ethics Complaint (Complaint) on October 30, 2021, regarding the alleged conduct of Subject Don Porta. Pursuant to subsection 2 of NAC 281A.405, the Executive Director of the Commission is tasked with making a determination regarding whether to recommend that the Commission accept jurisdiction in the matter and whether the evidence submitted with the complaint is sufficient to warrant an investigation in the matter.

For the foregoing reasons, it is my recommendation that, pursuant to subsection 3 of NRS 281A.715, the Commission dismiss the matter, as the Commission does have jurisdiction in this matter, but the evidence submitted with the Complaint is not sufficient to warrant an investigation into this matter. Further, pursuant to NRS 281A.780, it is my recommendation that the Commission issue a letter of caution to Mr. Porta based on prior precedent set by the Commission in an earlier case.

While the Commission has jurisdiction over this matter because Porta is either a public officer as defined in NRS 281A.160 or a public employee as defined in NRS 281A.150, it is unclear as to whether Porta is an officer or whether he is an employee, based on the facts presented in the Complaint. As Administrator, if Porta was appointed to such position by the City Manager, Porta would not be a public officer because his duties are delegated to him by a

higher authority, according to [Attorney General Opinion 96-33](#) (found on page 112-114 in hyperlink). Whether a public officer or public employee, the Commission has jurisdiction over this matter pursuant to NRS 281A.280 because the allegations contained in the Complaint relate to Porta's conduct as Administrative Officer of Public Entity and have associated implications under the Ethics Law.

The Complaint alleges that Porta, Administrative Officer of Public Entity, had stayed overnight in a city-owned building several nights a week between July and August 2021. The Requester alleges that the alleged conduct is a violation of: 1) subsection 2 of NRS 281A.400 – which prohibits the use of a position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee; and 2) subsection 7 of NRS 281A.400 – prohibiting the use of governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee.

The only specific facts and circumstances that Requester provides to support the allegations is that another employee complained to a city council member about the alleged conduct, and that a proxy card system is used to secure city-owned buildings. Pursuant to subsection 2 of NRS 281A.710, the person who files an ethics complaint must submit sufficient evidence to support the allegations in order for the Commission to make a determination of whether it has jurisdiction in the matter. Requester has failed to submit any evidence with the Complaint. Further, other than herself, Requester only provides the name of one other witness, with no contact information for the witness, and only provides that the other witness has interviewed Porta regarding the allegations. Because the complaint does not meet the evidentiary requirements set forth in statute, I recommend that, pursuant to subsection 3 of NRS 281A.715, the Commission dismiss the matter.

However, based on the general allegations of staying in a government-owned property overnight for personal use, I believe that the Complaint warrants a letter of caution, issued by the Commission to Porta pursuant to NRS 281A.780. A letter of caution in this matter is supported by past Commission action on a set of similar facts. In January 2018, the Commission approved a stipulation agreement with a public employee employed by Boulder City, Nevada in [Ethics Complaint Case No.17-37C](#). In that case, it was substantiated that the Subject used a city-owned facility for personal purposes, including on several occasions to stay overnight. The evidence in that case was more than sufficient for an order to investigate, and subsequently to enter into a stipulation agreement with the Subject, which included a civil penalty of \$1,000. While there is almost no evidence provided in this Complaint against Porta, the allegations made seem to follow a similar fact pattern as in the 2018 case; therefore, a letter of caution to Porta would serve both Porta and the Commission well in reminding and educating Porta as to the position of public trust that he holds.

## **II. Justification for PIO/Training Officer position for the Nevada Commission on Ethics**

The State of Nevada is comprised of 17 counties, 19 incorporated cities and municipalities, and countless other political subdivisions, such as library districts, water conversation districts, river authorities, and agricultural districts. Each of these entities is governed by a public body, each made up of elected or appointed individuals, and employ thousands of Nevadans across the State. When you consider state government, there are nearly 100 executive branch agencies, a plethora of gubernatorial-appointed boards and commissions, all who also employ plenty of our friends, neighbors, and colleagues. If you were to count the employees that work for the state or a political subdivision in Nevada, you would arrive at a number upwards 72,000 people. Whether a public officer that constitutes one of these elected or appointed boards or commissions, an appointed head of a state agency, or one of the many people employed by one of those bodies, each one is subject to the requirements, conditions, and limitations of chapter 281A of NRS – the Nevada Ethics in Government Law.

Subsection 1 of NRS 281A.280 establishes the jurisdiction of the Nevada Commission on Ethics. That jurisdiction includes conduct of each public officer and public employee as it relates to the Nevada Ethics in Government Law, including those former public officers and employees within 2 years of their separation of government service. Pursuant to NRS 281A.240(1)(f), the Executive Director of the Commission is required to, at the request of a public officer or public employer, to conduct trainings on the Nevada Ethics in Government Law, regulations adopted by the Commission, and opinions of the Commission. According to the Commission’s website, when fully staffed, the Commission – made up of eight part-time appointees who essentially donate their time and expertise to the State of Nevada – employs six people.

Six.

Six full-time employees and 8 part-time appointees are statutorily obligated to ensure that approximately 75,000 people are holding their positions of public trust appropriately. Specifically, the Executive Director is required to ensure that these public servants, through their public employers, are apprised of and educated on the Nevada Ethics in Government Law. The Executive Director is tasked with this statewide education, while also collaborating with Commission Counsel, pursuant to Commission regulation, on making jurisdictional determination recommendations to the Commission, administering the Commission’s budget, and liaising with Executive Branch leadership and the Nevada Legislature. Additionally, the Executive Director serves as the Commission’s public information officer (PIO), a critical function for ensuring the public’s trust in government – something that the Commission itself is obligated with upholding statewide.

A PIO/Training Officer would aid the Commission, the Executive Director, Commission Counsel, and other professional employees of the Commission in meeting and exceeding its statutory duties set forth in chapter 281A of NRS. Breaking down the proposed position’s duties into its two named parts – PIO and Training Officer – the position would be a benefit to the Commission and the residents of the State of Nevada.

In multiple opinions, both the Attorney General and the Nevada judiciary, the Commission has been deemed a quasi-judicial agency. Outside of the courthouse dramas we all see on TV, it is not the place of the prosecutor or judge to make statements to the press on the courthouse steps regarding a given case. As a best practice, offices of prosecuting attorneys and courts alike have public information officers or media liaisons to create a clean break between those who have the solemn obligation of adjudicating cases. Likewise, that best practice must also apply to the Commission. As one of the people making recommendations on jurisdictions, investigations, and stipulated agreements, the Commission would be well-served by a communications professional to correspond responsibly with the public and the media within the bounds of the confidentiality of the Nevada Ethics in Government Law regarding the work of the Commission and matters before it.

Regarding the responsibilities that this proposed position would complete as a Training Officer, I believe that the educational responsibilities placed upon the Executive Director is paramount to the mission and guiding principles of the Commission. In order to enhance the public's trust and confidence in its government, it is incumbent to provide each public officer and public employee with the tools and knowledge necessary to avoid all conflicts while executing his or her job duties for the benefit of Nevada's residents. A Training Officer would complement the Executive Director in traveling the state physically and virtually to reach each public employer, whether that is one as large as the Department of Corrections or as niche as Elko Television District or the Douglas County Mosquito Abatement District.

The salary and benefits of this position are such a noble way to expend public money – to ensure that all public money, in the form of payment to public officers and employees – is always being used for the sole benefit of the people of Nevada. The Nevada Legislature would best serve the public by creating this new position within the Commission.

### **III. Justification for passing AB65 (2021) during the 82<sup>nd</sup> Session of the Nevada Legislature**

Assembly Bill No. 65 (AB65) of the 81<sup>st</sup> Session of the Nevada Legislature (2021) contains a much-needed substantive revision of the Nevada Ethics in Government Law that has been attempted in some form in more than one recent legislative session. The provisions in AB65 were finally passed by the Legislature earlier this year, but the measure was vetoed by the Governor.

As the Governor noted in his veto letter that he agreed with most of the substantive provisions of AB65, I'd like to focus on the sole reason on why the bill was vetoed, and why the Legislature should pass AB65 during the 82<sup>nd</sup> Session of the Nevada Legislature, notwithstanding the Governor's veto.

A substantial portion of AB65 creates the Nevada Legislative Ethics Law, by bifurcating the portions of the current Nevada Ethics in Government Law that apply to legislative officers and legislative employees. Any advocacy for the passage of AB65 or the provisions of AB65 in a

different piece of legislation should focus on the constitutional principle known as the separation of powers, and the Legislature should consider such constitutional principle when considering approval of AB65 notwithstanding the Governor's veto.

The Nevada Constitution establishes three separate, co-equal branches of government. The Constitution currently establishes the Commission on Judicial Discipline to enforce the ethical standards of the Judicial Branch, while similarly granting authority to each house of the Nevada Legislature to enforce the ethical standards for members of the Assembly and Senate when the conduct at issue is related to core legislative functions. While the Constitution does not contemplate the enforcement of ethical standards for the Executive Branch, chapter 281A of NRS was enacted for such enforcement and education in the Executive Branch.

Judicial precedent has established that, for the purposes of the Nevada Ethics in Government Law, the Commission has jurisdiction over state legislators and legislative employees when alleged misconduct *does not* involve core legislative functions. This is different than the jurisdictional standards set forth for members of the judiciary, who are completely removed from the definition of "public officer" in NRS 281A.160. Similarly, members of the Legislature should be completely removed from the relevant definitions and jurisdiction granted to the Commission. This supports the constitutional principle of the separation of powers through which three coequal branches of government were created and are contemplated to police themselves. Furthermore, returning to this clear demarcation that used to exist when the Legislative Branch had its own ethics committees would relieve the Commission and its staff of having to determine the difference between core legislative functions and other legislative functions based on judicial precedent, likely keeping ethics complaints against state legislators out of the court system.