

Agenda Item 5



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Joseph Rodriguez**, Trustee, Washoe
County School District; Lieutenant, State Fire
Marshal Division, State of Nevada,

Ethics Complaint
Case No. 22-051C

Subject. /

OPINION

I. INTRODUCTION AND PROCEDURAL HISTORY

Pursuant to NRS 281A.710(1)(b), an Ethics Complaint was filed with the Nevada Commission on Ethics ("Commission") on May 2, 2022, alleging that Joseph Rodriguez, ("Rodriguez"), Washoe County School District ("WCSD") Trustee and Nevada State Fire Marshal Division Lieutenant, violated provisions of the Ethics in Government Law set forth in Chapter 281A of the Nevada Revised Statutes ("Ethics Law").

On June 13, 2022, the Commission conducted its jurisdictional and evidentiary review of the record, including the Ethics Complaint, supporting evidence and the recommendations of the Executive Director. The Commission accepted jurisdiction of the Complaint and directed the Executive Director to investigate and serve a *Notice of Complaint and Investigation* regarding Rodriguez's alleged violations of NRS 281A.400(2) (using position in government to grant an unwarranted advantage to himself or others), NRS 281A.400(7) (using governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest) and NRS 281A.520 (causing a governmental entity to incur an expense or make an expenditure to support or oppose a candidate).

On or about June 13, 2022, the Commission served Rodriguez via certified mail a *Notice of Complaint and Investigation* advising him of the allegations in the Complaint. On or about July 18, 2022, Rodriguez, by and through his attorney Adam Hosmer-Henner, Esq. with McDonald Carano LLP, submitted a response to the allegations.

On July 21, 2022, the Commission served Rodriguez a *Notice of Additional Issues and Facts*. On September 16, 2022, Rodriguez, through his counsel, submitted a supplemental response to this notice.

On September 19, 2022, the Commission received a waiver of statutory time requirements for the Executive Director to complete his investigation until November 16, 2022 and for the Executive Director to present a recommendation to a review panel until November 30, 2022.

On November 16, 2022, the Commission's Review Panel ("Panel")¹ issued a *Review Panel Determination and Referral Order* finding just and sufficient cause for the Commission to hold a hearing and render an opinion in this matter based on credible evidence that alleged Rodriguez violated NRS 281A.400(2) and (7). The Panel further found no just and sufficient cause for the Commission to render an opinion regarding the allegations pertaining to NRS 281A.520. The Commission referred allegations of violations of NRS 281A.400(2) and (7) to the Commission but dismissed allegations related to Rodriguez's alleged use of WCSD photographs under NRS 281A.400(2) and (7) and NRS 281A.520 for lack of sufficient evidence.

On December 5, 2022, pursuant to NRS 281A.745, Rodriguez waived the statutory time requirements for the adjudicatory through the end of March 2023 and provided a further waiver of the time to render an opinion in this matter through the end of December 2023.

On December 6, 2022, the Commission issued a *Notice of Hearing and Scheduling Order and Notice of Hearings and Meetings to Consider Your Character, Alleged Misconduct, Professional Competence or Health*, setting a hearing for discovery-related or dispositive motions or stipulations and an adjudicatory hearing and/or hearing on adjudicatory motions or stipulations for March 15, 2023. Thereafter, each party filed a motion for summary judgment, which motions were fully briefed and submitted for the Commission's consideration.

On February 23, 2023, Rodriguez submitted an *Adjudicatory Motion*, and on February 27, 2023, the Executive Director submitted a *Motion in Limine*. These motions were fully briefed.

On March 2, 2023, the Commission served a *Notice of Hearing and Scheduling Order* on Rodriguez, notifying Rodriguez of the date, time and location that the Commission would hold public meetings to consider discovery-related or dispositive motions or stipulations and conduct an adjudicatory hearing.

On March 14, 2023, the presiding officer, Vice-Chair Duffrin, held a pre-hearing conference, which was attended by Executive Director Armstrong, represented by Associate Counsel Bassett, and counsel for Rodriguez, Mr. Hosmer-Henner. The Vice-Chair discussed procedural matters with the parties relating to the adjudicatory hearing and received comments from the parties on stipulations of facts and exhibits. The Vice-Chair also ruled orally on Rodriguez's *Adjudicatory Motion* and the Executive Director's *Motion in Limine*. Later that same day, the Vice-Chair issued an *Order Granting Executive Director's Motion in Limine* and an *Order Denying Trustee Rodriguez's Adjudicatory Motion*.

On March 15, 2023, the Commission heard oral argument on the parties' motions for summary judgment. The Commission denied both motions. The Commission then held an adjudicatory hearing to consider whether Rodriguez violated NRS 281A.400(2) or NRS 281A.400(7). At the start of the hearing, the parties orally stipulated to the admission of certain facts and exhibits, and during the hearing, orally stipulated to the admission of one additional exhibit. At the conclusion of the adjudicatory hearing and after fully considering the record, testimony, evidence and arguments of the parties, in accordance with the requirements of the law including, without limitation, the mitigating

¹ Chair Wallin and Commissioners Towler and Sheets served on the Panel and are precluded by NRS 281A.220(4) from participation in further matters after issuance of the Panel Determination.

factors set forth in NRS 281A.775, the Commission deliberated and approved on the record the finding of two willful violations of NRS 281A.400(2) and two willful violations of NRS 281A.400(7). The Commission imposed on Rodriguez a civil penalty in the amount of \$250 per violation, for a total penalty of \$1,000. The Commission also reprimanded Rodriguez and required him to complete ethics training selected by the Executive Director within 60 days of the written decision being issued. The Commission now renders this written opinion setting forth its formal findings of fact and conclusions of law in compliance with NRS 233B.125 and NAC 281A.473.

II. FINDINGS OF FACT

In rendering this opinion, the Commission reviewed and considered all evidence and testimony set forth in the record. The Commission finds the following facts to be established based on the preponderance of evidence standard set forth in NRS 281A.790(9), NRS 281A.765 and NRS 233B.125:

1. Rodriguez has been employed by the State Fire Marshal Division of the Nevada Department of Public Safety since at least 2021, and as such is a public employee as defined in NRS 281A.150.
2. The State Fire Marshal Division is a law enforcement agency.
3. Rodriguez was appointed to serve as a WCSD Trustee beginning in July 2021.
4. Rodriguez successfully campaigned to be elected as a WCSD Trustee in 2022.
5. Rodriguez earns a salary in connection with his position as WCSD Trustee.
6. Rodriguez maintained a campaign website for his election as a WCSD Trustee in 2022 ("Campaign Website"). The Campaign Website was created approximately in Spring 2022.
7. From May 2, 2022 through at least March 15, 2023, the Campaign Website contained a picture of Rodriguez dressed in his State Fire Marshal Division uniform and badge ("Picture One").
8. Picture One was taken approximately in the summer of 2019 during an honor walk where other law enforcement officers appeared in uniform. Rodriguez did not request that the picture be taken and was not considering applying for WCSD Trustee at the time the picture was taken.
9. From May 2, 2022 through at least March 15, 2023, the Campaign Website contained a picture of Rodriguez wearing his State Fire Marshal Division badge and gun in a school classroom ("Picture Two").
10. Picture Two was taken in approximately February 2020. The State Fire Marshal Division promotes fire safety and visits schools throughout the State, and Picture Two was taken during one such school visit. School visits are a routine part of Rodriguez's job and entails him wearing his uniform and badge. Rodriguez believes a parent took the picture, and he was not considering applying for WCSD Trustee at the time the picture was taken.

11. Pictures One and Two appeared on the Campaign Website among twelve other pictures, which included pictures of Rodriguez in other contexts, including with his family and in military uniform.
12. Rodriguez provided many pictures to his campaign team for potential inclusion on his Campaign Website. Rodriguez was aware of which pictures were posted to his Campaign Website.

III. STATEMENT OF THE ISSUE AND RELEVANT STATUTES

A. ISSUES

The issues considered by the Commission are whether Rodriguez's conduct in posting Pictures One and Two on his Campaign Website constitutes a violation of either NRS 281A.400(2) or NRS 281A.400(7).

B. RELEVANT STATUTES

1. Duty to Avoid Conflicts – 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. Use of Government Position to Secure or Grant “Unwarranted” Privileges, Preferences or Advantages – NRS 281A.400(2) Provides:

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 has a commitment in a private capacity. As used in this subsection, “unwarranted” means without justification or adequate reason.

3. Improper Use of Government Resources and Property – NRS 281A.400(7) Provides:

Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer or employee who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal;
and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

→ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

4. Standards for Determining Willful Violation – NRS 281A.775 Provides:

1. The Commission, in determining whether a violation of this chapter is a willful violation and, if so, the penalty to be imposed on a public officer or employee or former public officer or employee pursuant to NRS 281A.785 or 281A.790, or the review panel, in determining whether to approve a deferral agreement regarding an alleged violation, shall consider, without limitation:

(a) The seriousness of the violation or alleged violation, including, without limitation, the nature, circumstances, extent and gravity of the violation or alleged violation;

(b) The number and history of previous warnings, letters of caution or instruction, deferral agreements or violations or alleged violations of the provisions of this chapter relating to the public officer or employee;

(c) The cost to conduct the investigation and any meetings, hearings or other proceedings relating to the violation or alleged violation;

(d) Any mitigating factors, including, without limitation, any self-reporting, prompt correction of the violation or alleged violation, any attempts to rectify the violation or alleged violation before any ethics complaint is filed and any cooperation by the public officer or employee in resolving the ethics complaint;

(e) Any restitution or reimbursement paid to parties affected by the violation or alleged violation;

(f) The extent of any financial gain resulting from the violation or alleged violation; and

(g) Any other matter justice may require.

2. The factors set forth in this section are not exclusive or exhaustive, and the Commission or the review panel, as appropriate, may consider other factors in the disposition of the matter if they bear a reasonable relationship to the determination of the severity of the violation or alleged violation.

3. In applying the factors set forth in this section, the Commission or the review panel, as appropriate, shall treat comparable situations in a comparable manner and shall ensure that the disposition of the matter bears a reasonable relationship to the severity of the violation or alleged violation.

5. Definitions Applicable to Willfulness Determination:

NRS 281A.105 “Intentionally” defined. “Intentionally” means voluntarily or deliberately, rather than accidentally or inadvertently. The term does not require proof of bad faith, ill will, evil intent or malice.

NRS 281A.115 “Knowingly” defined. “Knowingly” imports a knowledge that the facts exist which constitute the act or omission, and does not require knowledge of the prohibition against the act or omission. Knowledge of any particular fact may be inferred from the knowledge of such

other facts as should put an ordinarily prudent person upon inquiry.

NRS 281A.170 “Willful violation” defined. “Willful violation” means a violation where the public officer or employee:

1. Acted intentionally and knowingly; or
2. Was in a situation where this chapter imposed a duty to act and the public officer or employee intentionally and knowingly failed to act in the manner required by this chapter, ↪ unless the Commission determines, after applying the factors set forth in NRS 281A.775, that the public officer’s or employee’s act or failure to act has not resulted in a sanctionable violation of this chapter.

6. Remedies for Violations of the Ethics Law – NRS 281A.785 Provides in Pertinent Part:

1. Except as otherwise provided in this section, in proceedings concerning an ethics complaint, the Commission, based on a finding that a violation of this chapter has been proven, or the review panel, as part of the terms and conditions of a deferral agreement, may, in addition to any other penalty provided by law and in accordance with the provisions of NRS 281A.775:

(a) Require the public officer or employee who is the subject of the ethics complaint to:

(2) Attend and complete training.

(b) Publicly admonish, reprimand or censure the public officer or employee.

2. In carrying out the provisions of subsection 1, the Commission, based on a finding that a violation of this chapter has been proven, or the review panel, as part of the terms and conditions of a deferral agreement, may publicly:

(b) Reprimand a public officer or employee if it is determined that the public officer or employee has willfully violated any provision of this chapter, but there is no evidence that the willful violation involved bad faith, malicious intent or knowing or reckless disregard of the law, or if such a reprimand is imposed as part of the terms and conditions of a deferral agreement. A reprimand is a severe written reproof for the conduct of the public officer or employee.

7. Civil Penalties for Willful Violations – NRS 281A.790 Provides in Pertinent Part:

1. In addition to any other penalties provided by law and in accordance with the provisions of NRS 281A.775, the Commission may impose on a public officer or employee or former public officer or employee civil penalties:

(a) Not to exceed \$5,000 for a first willful violation of this chapter;

(b) Not to exceed \$10,000 for a separate act or event that constitutes a second willful violation of this chapter; and

(c) Not to exceed \$25,000 for a separate act or event that constitutes a third willful violation of this chapter.

9. A finding by the Commission that a public officer or employee has violated any provision of this chapter must be supported by a preponderance of the evidence unless a greater burden is otherwise prescribed by law.

IV. DECISION

The Ethics Law is designed to preserve the public trust and ensure that public officers and employees maintain proper separation between their public duties and private interests. See NRS 281A.020. In furtherance of State policy to protect the public trust, the Code of Ethical Standards was enacted to require proper separation of private interests and commitments from public duties. See NRS 281A.400. As discussed below, the Commission concludes that Rodriguez willfully violated NRS 281A.400(2) and (7).

A. VIOLATION OF NRS 281A.400(2) – USE OF GOVERNMENT POSITION TO SECURE OR GRANT “UNWARRANTED” PRIVILEGES, PREFERENCES OR ADVANTAGES

As relevant here, a violation of NRS 281A.400(2) occurs when a public employee uses his position in government to secure or grant himself an unwarranted advantage. At issue is whether Rodriguez’s use of Pictures One and Two, showing him with his State Fire Marshal Division uniform, badge and gun, violates NRS 281A.400(2).

The Commission has long held that a campaign endorsement showing badge and uniform (i.e., the accouterments of office) would result in an advantage to the person being endorsed. See *In re Kirkland*, Comm’n Op. No. 98-41 (1999).² Consequently, the

² The Commission found no violation of NRS 281A.400(2)’s predecessor statute in this case. However, resolution of the alleged violation turned on whether the use of the accouterments of office was “unwarranted.” The Commission analyzed whether the use was “unlawful,” and because it was not,

Commission has “continue[d] to caution against any attempt, even an incidental one, to bolster a political endorsement by the use of a public office and associated accouterments or any governmental property, equipment or resources.” *In re Public Officer*, Adv. Op. No. 19-124A (2020). This is because “[s]uch uses provide the impression that the public officer is acting in an official capacity implicating NRS 281A.400(2).” *Id.*

Rodriguez contends that he did not violate NRS 281A.400(2) because he used pictures that were taken prior to him considering running for WCSD Trustee and because the pictures were not government property. The Commission does not find these distinctions material.

Rodriguez displayed himself on his Campaign Website with uniform, badge and gun, which “signify the power and prestige of” his law enforcement position, see *In re Antinoro*, Comm’n Op. Nos. Nos. 18-031C/18-052C (2019), and which position is accorded “respect and deference” by the public, see *In re Kirkland*, Comm’n Op. No. 98-41 (1999). In the context of NRS 281A.400(2), the accouterments of office represent a public officer or employee’s position in government; a uniform, badge and gun are powerful, visceral symbols of a peace officer’s position. By posting pictures on his Campaign Website of himself with uniform, gun and badge, Rodriguez invoked and advertised his position in government, thereby creating the impression of prestige and power as well as the impression that he was acting in an official capacity. This provided an unwarranted advantage to Rodriguez in his campaign. It is irrelevant that Rodriguez used pictures from before he considered running for WCSD Trustee; it is the use of the pictures with the accouterments of office, and what they symbolize, as part of his campaign that constitutes the improper use of his position in government.

Accordingly, the Commission determines, based on a preponderance of the evidence, that Rodriguez violated NRS 281A.400(2) twice by posting two pictures of himself in State Fire Marshal Division accouterments on his Campaign Website.

B. VIOLATION OF NRS 281A.400(7) – IMPROPER USE OF GOVERNMENT RESOURCES AND PROPERTY

1. Violation of NRS 281A.400(7)

As relevant here, NRS 281A.400(7) prohibits a public employee from using governmental time, property, equipment or other facility to benefit his own significant personal or pecuniary interest. Rodriguez argues that he did not use governmental resources or property because Pictures One and Two were taken prior to him considering running for WCSD Trustee and were not government property. The Commission disagrees.

concluded that the use was also not “unwarranted.” NRS 281A.400(2)’s predecessor statute was amended after the opinion in *In re Kirkland* was issued to include that “unwarranted” as used in that statute “means without justification or adequate reason.” See Senate Bill 478, 70th Session, § 14.5 (approved June 9, 1999). That definition remains in NRS 281A.400(2) today.

Commission precedent supports rejection of Rodriguez’s argument. In *In re Kuzanek*, Comm’n Op. No 14-61C (2014), undersheriff Tim Kuzanek displayed pictures of himself in full sheriff’s office dress uniform and a picture of his undersheriff badge as part of campaign materials for his candidacy for sheriff. The Commission found use of these pictures violated NRS 281A.400(7). See *id.* (“The use of Washoe County Sheriff Deputy uniform and undersheriff badge act as a visual endorsement, affirmation . . . , and sanction of Kuzanek’s campaign for sheriff, and provide an unfair advantage to Kuzanek at government cost. This is the type of harm to the public that the Ethics Law is designed to prohibit.”). The Commission has therefore previously concluded that displaying a representation of government property as part of a campaign constitutes use of government property under NRS 281A.400(7). There is no basis to treat a picture of government property differently based solely on when it was taken. Rodriguez used government property, implicating NRS 281A.400(7), when he posted Pictures One and Two showing his uniform, gun and badge on his Campaign Website as part of his campaign.

The Commission also notes that “statutory interpretation should not render any part of a statute meaningless, and a statute’s language should not be read to produce absurd or unreasonable results.” *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). Rodriguez’s proposed interpretation of NRS 281A.400(7) would lead to an absurd or unreasonable result as a violation would turn on when a picture was taken: if a candidate uses a picture from before his campaign, there would be no violation, but if the candidate uses a picture taken after the candidate announces his candidacy, there would be a violation. Such an arbitrary distinction cannot be accepted, including because members of the public viewing the picture would have no way of knowing when the picture was taken.

Finally, there can be no doubt that a benefit to Rodriguez’s personal or pecuniary interests is implicated. As the Commission has previously explained, “incumbent Public Officers seeking re-election have significant personal and financial interests in maintaining the elected position.”³ *In re Public Officer*, Adv. Op. No. 19-124A (2020) (citing *In re Antinoro*, Comm’n Op. Nos. 18-031C/18-052C (2019)). Rodriguez had a significant personal and financial interest in seeking election as a WCSD Trustee, including because he earns a salary as a WCSD Trustee.

Based upon the record, the Commission determines by a preponderance of the evidence that Rodriguez’s use of Pictures One and Two on his Campaign Website constituted use of government property and was in furtherance of a significant personal and pecuniary interest.

2. The Limited-Use Exception Does Not Apply

The Commission next considers whether Rodriguez’s use of the pictures was permitted by the limited-use exception established in statute. There is no violation of NRS

³ While Rodriguez was not technically seeking re-election as he was initially appointed as a WCSD Trustee, his interests in maintaining his position are identical to an incumbent’s interests in seeking re-election.

281A.400(7) if all four factors of the limited-use exception are met. As an initial matter, the Commission notes that no evidence was submitted regarding the first factor, i.e., “[t]he public officer or employee who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances.” Consequently, the limited-use exception does not apply.

The limited-use exception also does not apply because Rodriguez cannot establish that the use of the pictures does not create the appearance of impropriety. For over twenty years, the Commission has held that the use of the accouterments of public office for campaigning purposes is inappropriate, in part because it creates the impression of government sanction. See *In re Kirkland*, Comm’n Op. No. 98-41 (1999). The Commission has followed a hard line: “A public officer will create an appearance of impropriety under NRS 281.481(7)(a)(4)⁴ if, in the course of endorsing a person’s candidacy, he uses the physical accouterments of his office or position to bolster the endorsement.” *Id.*; see also *In re Kuzanek*, Comm’n Op. No. 14-61C (2014) (“A public officer and/or employee cannot engage in any activity that involves . . . the use of state or political subdivision badge or uniform to give that person an advantage, and it creates the appearance of impropriety.”); *In re Antinoro*, Comm’n Op. Nos. Nos. 18-031C/18-052C (2019) (“An elected sheriff’s use of his official uniform, badge and ‘other physical accouterments’ of the public office in the course of supporting his own campaign for re-election also creates an appearance of impropriety and violates NRS 281A.400(7).”).

Accordingly, based on a preponderance of the evidence, the limited-use exception does not apply, and the Commission determines that Rodriguez violated NRS 281A.400(7) twice based on Pictures One and Two appearing on his Campaign Website.

C. WILLFULNESS

Pursuant to NRS 281A.170, a violation is willful if it is intentional and knowing, which terms are defined in NRS 281A.105 and NRS 281A.115 respectively. For an act to be intentional, NRS 281A.105 requires that the subject acted “voluntarily and deliberately.” “The term does not require proof of bad faith, ill will, evil intent or malice.” NRS 281A.105. Here, Rodriguez selected pictures for inclusion on his Campaign Website, including Pictures One and Two, and was aware that they were posted. His conduct was therefore neither accidental nor inadvertent, but rather was intentional as defined in NRS 281A.105.

“Knowingly imports a knowledge that the facts exist which constitute the act or omission, and does not require knowledge of the prohibition against the act or omission.” NRS 281A.115. The provisions of NRS Chapter 281A do not require Rodriguez to have actual knowledge that his conduct violated the Ethics Law. See *State v. Rhodig*, 101 Nev. 608, 611, 707 P.2d 549, 551 (1985) (“[T]he law does not require knowledge that such an act or omission is unlawful.”). Here, Rodriguez was aware of the facts constituting the violations, and Commission precedent has consistently established that use of the

⁴ NRS 281.481(7)(a)(4) is the predecessor statute to NRS 281A.400(7)(a)(4).

accouterments of office in connection with a campaign endorsement can lead to violations of NRS 281A.400(2) and (7). Therefore, the Commission finds, based on a preponderance of the evidence, that Rodriguez's conduct was knowing.

D. NRS 281A.775 – MITIGATING FACTORS AND CIVIL PENALTY

The Commission considers all relevant mitigating factors set forth in NRS 281A.775 in determining whether a violation is willful and if so any civil penalty to be imposed. However, each factor may not necessarily be present or be provided equal weight.

1. Seriousness of the violation. The Commission has now issued a series of opinions establishing that public officers and employees cannot use the accouterments of office in campaigns. Use of the accouterments gives an improper impression that the public employee is acting in an official capacity and of government sanction.
2. The number and history of previous violations. Rodriguez has no prior history of Ethics Law violations.
3. The cost to conduct the investigation and hearing. This matter proceeded through an investigation, evidentiary motions, summary judgment motions, and an adjudicatory hearing, leading to additional cost to the Commission.
4. Mitigating factors. Rodriguez did not self-report and did not take down Pictures One and Two from his Campaign Website through the day of the adjudicatory hearing.
5. Restitution and reimbursement. No restitution or reimbursement was warranted in this matter.
6. Extent of financial gain. Rodriguez was elected as WCSO Trustee and earns a salary as a result. Moreover, the Campaign Website solicited and accepted monetary donations to Rodriguez's campaign account.

The nature of the violations and the totality of Rodriguez's conduct is determined to be significant when measured against the public's trust and the public policy of the State of Nevada requiring public officers and employees not use their position in government or government property for their benefit. Based upon the record, the Commission determines that Rodriguez's conduct constitutes two willful violations of NRS 281A.400(2) and two willful violations of NRS 281A.400(7) and imposes a civil penalty of \$250 per willful violation.

V. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Rodriguez was a "public employee" as defined by NRS 281A.150.

2. Pursuant to NRS 281A.280, the Commission has jurisdiction to render an opinion in this matter.
3. Rodriguez, as a public employee, has a duty under the Ethics Law and its interpretive opinions to maintain proper separation between public duties and private interests. See NRS 281A.020.
4. Pursuant to NRS 281A.400(2), Rodriguez, as a public employee, is prohibited from using his position in government to secure an unwarranted advantage for himself.
5. Based upon the preponderance of the evidence, Rodriguez willfully violated NRS 281A.400(2) twice by using two pictures showing him with the accouterments of his State Fire Marshal Division position to secure an unwarranted advantage in his campaign for WCSD Trustee.
6. Pursuant to NRS 281A.400(7), Rodriguez, as a public employee, is prohibited from using government time, resources, property, equipment or other facility to benefit his significant personal or pecuniary interests, unless the limited-use exception applies.
7. Pursuant to the provisions of the Ethics Law and the record and based on the preponderance of the evidence, all requirements of the limited-use exception set forth in NRS 281A.400(7)(a) are not met; therefore, the conduct is not excused by the exception.
8. Based upon the preponderance of the evidence, Rodriguez willfully violated NRS 281A.400(7) twice by using government property, through two pictures showing him with the accouterments of his State Fire Marshal Division position, in furtherance of his significant personal and pecuniary interest in being elected and receiving a salary as a WCSD Trustee.
9. In accordance with the authority of the Commission under NRS 281A.775 and NRS 281A.790, civil penalties are imposed and Rodriguez must pay a civil penalty in the amount of \$1,000. Authorization is provided for the Executive Director and Rodriguez to enter into a payment schedule, with payment being completed within ten (10) months after the date of issuance of this opinion.
10. Pursuant to NRS 281A.785(1)(a)(2), Rodriguez must, within 60 days after the issuance of this opinion, complete ethics training to be selected by the Executive Director.
11. A reprimand is warranted pursuant to NRS 281A.785(1)(b) and (2)(b) because there was no evidence that the willful violations involved bad faith, malicious intent or knowing or reckless disregard of the law. This opinion serves as a public reprimand of Rodriguez's conduct described herein.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.⁵

The following Commissioners participated in this Opinion:⁶

Dated this 17th day of May, 2023.

NEVADA COMMISSION ON ETHICS

By: /s/ Brian Duffrin
Brian Duffrin
Vice-Chair

By: ABSENT
James Oscarson
Commissioner

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner

By: /s/ Teresa Lowry
Teresa Lowry, Esq.
Commissioner

⁵ Findings of Fact and Conclusions of Law are set forth separately in this Opinion as required by NRS 233B.125, NRS 281A.765 and NAC 281A.473; however, they are deemed interchangeable for interpretive purposes. See *State, Dep't of Commerce v. Soeller*, 98 Nev. 579, 586, 656 P.2d 224, 228 (1982) (concluding that when “the conclusion itself gives notice of the facts on which the Commission relied . . . we may imply the necessary factual findings, so long as the record provides substantial evidence to support the Commission’s conclusion”).

⁶ After consultation with Commission Counsel, Commissioner Amanda Yen disclosed that subject Rodriguez is a client of McDonald Carano LLP (“Firm”). Commissioner Yen further disclosed that she is a partner with the Firm and has both a pecuniary interest in her employment and a private commitment to the Firm, as her employer, and its clients under NRS 281A.065. Consequently, the independence of judgment of a reasonable person in Commissioner Yen’s situation could be materially affected in voting upon matters related to this case. To avoid any appearance of impropriety and to comply with Nevada’s Ethics in Government Law set forth in NRS Chapter 281A and Rule 2.11 of the Code of Judicial Conduct, Commissioner Yen disclosed her private interests and abstained from participation in this case.

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada Commission on Ethics and that on this day in Carson City, Nevada, I transmitted a true and correct copy of the **OPINION** in Ethics Complaint Case No. 22-051C via U.S. Certified Mail and electronic mail to the Parties as follows:

Executive Director:

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Executive Director
Elizabeth J. Bassett, Esq.
Associate Counsel
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DATED: May 18, 2023



An employee, Nevada Commission on Ethics

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8 **BEFORE THE NEVADA COMMISSION ON ETHICS**

9 In re Joseph Rodriguez, Trustee,
10 Washoe County School District;
11 Lieutenant, State Fire Marshall Division,
12 State of Nevada,
13
14 Subject.

Ethics Complaint
Case No. 22-051C

**TRUSTEE RODRIGUEZ'S
MOTION FOR RECONSIDERATION**

15 Joseph Rodriguez (“Trustee Rodriguez”) hereby files a Motion for Reconsideration,
16 pursuant to NAC 281A.442, of the Opinion served by the Commission in this matter on May 18,
17 2023.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. INTRODUCTION**

20 In its Opinion, the Commission found that Trustee Rodriguez “willfully violated NRS
21 281A.400(2) twice” and “willfully violated NRS 281A.400(7) twice” by using two pictures of
22 himself with the accoutrements of office on his campaign website. Opinion 13. Without waiving
23 any of the arguments advanced in briefing or at the hearing, which arguments are specifically
24 preserved for judicial review and appeal, Trustee Rodriguez requests limited reconsideration of
25 the Opinion as only one violation of NRS 281A.400(2) and one violation of NRS 281A.400(7)
26 should be deemed to be a willful violation, with the other two violations deemed to be non-willful.

27 **II. LEGAL STANDARD**

28 NAC 281A.442(7) permits a motion for reconsideration to be filed prior to the filing of a
petition for judicial review. While no standards are specifically set forth in this provision, the
standards for reconsideration generally require a moving party to demonstrate any of the
following: (1) the judgment was based upon a manifest error of law or fact; (2) there is newly

1 discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) there is
2 an intervening change in controlling law. See 11 CHARLES ALAN WRIGHT & ARTHUR R.
3 MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d ed. 1995) (discussing FRCP
4 59(e)).

5 **III. ARGUMENT**

6 The Commission concluded that Trustee Rodriguez’s violations were willful based on an
7 analysis of NRS 281A.170, which holds that a violation is willful if it is intentional and knowing.
8 Further, the Commission concluded that Trustee Rodriguez was not required to have knowledge
9 of the prohibition against the act or omission. Opinion 11. Read strictly, this could deem every
10 violation to be a willful one as there are only rare situations where a party would not be aware of
11 their own actions or their own omissions. Consequently, the Legislature charges the Commission
12 to review additional factors in determining whether a violation is willful. NRS 281A.775. The
13 Commission “shall consider, without limitation” the factors listed in NRS 281A.775(1), which
14 include “[a]ny other matter justice may require.” NRS 281A.775(g). For the following four
15 reasons, together with the arguments advanced in prior briefing and at the hearing, Trustee
16 Rodriguez submits that at least two of the violations should be deemed to be non-willful.

17 First, the pictures on the campaign website were posted at the same time and appear on the
18 same page of the website. In effect, there was a single act by Trustee Rodriguez, which was to
19 approve the posting of a number of photographs to the website. Opinion 4 (“Rodriguez provided
20 many pictures to his campaign team for potential inclusion on his Campaign Website. Rodriguez
21 was aware of which pictures were posted to his Campaign Website.”) The Commission has
22 previously taken the position that these circumstances constitute a single violation. *See* Opinion
23 14-70C (“Although several statutes or violations are implicated by the conduct, the Commission
24 has more consistently determined that multiple violations of the Ethics Law arising out of the
25 same course of conduct constitutes a single violation, and the Commission will weigh the
26 significance of the conduct in its determination of willfulness and the amount of any sanction.”)
27 In the *In re: Matson* Opinion, the Commission determined that while the individual “engaged in
28 a series of activities motivated by her bid for re-election and personal retaliation” there should

1 only be “one willful violation.” *Id.* Thus, the Commission should revise its Opinion to find only
2 one willful violation by Trustee Rodriguez or at a maximum, two.

3 Second, even though the Commission did not find the distinctions to be material between
4 photographs taken while running for office and those taken prior to running for office, these
5 distinctions had never before been considered or discussed by the Commission. Opinion 9.
6 Accordingly, the interpretation of NRS 281A.400(2) and NRS 281A.400(7) would be vague and
7 ambiguous, and unconstitutionally so, to a public officer. The prior decisions of the Commission,
8 which do not constitute precedent, discuss the use of government resources in a way that “provide
9 the impression that the public officer is acting in an official capacity.” Opinion 9 (quoting *In re*
10 *Public Officer*, Adv. Op. No. 19-124A (2020). As the photographs were taken prior to running for
11 office, Trustee Rodriguez did not *use* any government resources creating them to benefit his
12 campaign. The Commission’s conclusion that Trustee Rodriguez “used government property . . .
13 when he posted Pictures One and Two showing his uniform, gun and badge on his Campaign
14 Website as part of his campaign” is erroneous as the photographs were not government property.
15 Interpreting NRS 281A.400 in this fashion is void for vagueness as applied to Trustee Rodriguez.

16 Third, the Commission is impermissibly preventing Trustee Rodriguez from exercising his
17 First Amendment rights to accurately depict himself to voters. The Commission’s interpretation
18 of NRS 281A.400 chills the ability of candidates to freely and accurately use their own life
19 experiences to run for office. The Commission is obligated to narrowly interpret its statutes to
20 avoid unnecessarily interfering with the First Amendment. *See Dehne v. Avani*, 219 F. Supp.
21 2d 1096, 1110–11 (D. Nev. 2001). Accordingly, the interpretation of NRS 281A.400 is overbroad
22 because it shuts down more speech than is necessary to protect the public interest.

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IV. CONCLUSION

For all of the above reasons, Trustee Rodriguez requests reconsideration of the Opinion to reduce the number of willful violations and, correspondingly, the number of fines and total amount of fines levied against Trustee Rodriguez. At a minimum, Trustee Rodriguez requests that the number of willful violations be reduced from four to two and the total civil penalty be reduced from \$1,000 to \$500.

Dated: June 2, 2023

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CERTIFICATE OF SERVICE

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I hereby certify that I am an employee of McDonald Carano LLP and that on the June 2, 2023, I caused a true and correct copy of the foregoing **TRUSTEE RODRIGUEZ’S MOTION FOR RECONSIDERATION** to be served on the parties below via email:

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Dated: June 2, 2023

/s/ Pamela Miller
An employee of McDonald Carano LLP

4876-8946-4914, v. 2

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8 *Attorney for Ross E. Armstrong, Esq.*
9 *Executive Director*

10 **STATE OF NEVADA**

11 **BEFORE THE COMMISSION ON ETHICS**

12 In re **Joseph Rodriguez**, Trustee,
13 Washoe County School District;
14 Lieutenant, State Fire Marshall
15 Division, State of Nevada,

Ethics Complaint Case
No. 22-051C

16 Subject /

17 **EXECUTIVE DIRECTOR'S PARTIAL NON-OPPOSITION TO**
18 **SUBJECT'S MOTION FOR RECONSIDERATION**

19 Ross E. Armstrong, Esq., Executive Director of the Nevada Commission on
20 Ethics ("Commission"), through the Commission's Associate Counsel, Elizabeth J.
21 Bassett, Esq., hereby submits this Partial Non-Opposition to Subject Joseph
22 Rodriguez's ("Rodriguez") Motion for Reconsideration ("Motion") of the Commission's
23 Opinion in this matter.

24 **LEGAL ARGUMENT**

25 **I. The Executive Director Does Not Oppose Subject's Request that the**
26 **Commission Reduce the Number of Willful Violations**

27 Subject's Motion argues that the Commission should reconsider its finding that
28 Subject committed four total willful violations in this matter. For the following reasons,
the Executive Director does not oppose Subject's request that the Commission
reconsider its order in this matter and instead find that Rodriguez committed two willful
violations and two nonwillful violations.

1 The format of the adjudicatory hearing in this matter did not allow the parties to
2 sufficiently argue the number of willful violations that should be found against Subject
3 for his violations of NRS 281A.400(2) and (7). At the hearing, the parties argued the
4 following issues together before the Commission deliberated and ruled on the parties'
5 competing motions for summary judgment: the merits of the violations alleged against
6 Subject, how many violations of the Ethics Law should be found and whether the
7 Commission should find those violations to be willful. In this format, the Executive
8 Director argued that to the extent the Commission found Rodriguez violated the Ethics
9 Law, the Commission should find those violations were willful. The Commission
10 ultimately found Rodriguez committed four willful violations of the Ethics Law.

11 Given the number of photographs at issue in this matter, the nature of their use,
12 and the overall totality of the circumstances, the Executive Director agrees with
13 Rodriguez that the additional penalty associated with a finding of three or more willful
14 violations is too severe in this matter. NRS 281A.790(4)(c) requires:

15 In addition to any other penalties provided by law, if a proceeding results
16 in an opinion that: . . . One or more willful violations of this chapter have
17 been committed by a public officer . . . the willful violations shall be
18 deemed to be malfeasance in office for the purposes of NRS 283.440 and
19 the Commission: . . . (2) Shall file a complaint in the appropriate court for
20 removal of the public officer pursuant to NRS 283.440 when the public
21 officer is found in the opinion to have committed three or more willful
22 violations of this chapter.

23 Thus, if the current finding of four willful violations is upheld, the Commission will be
24 required to file a complaint for Rodriguez's removal from public office.

25 In light of the facts in this matter, the Executive Director agrees with Rodriguez
26 that his removal from office is not warranted. In making a determination as to
27 willfulness, the Commission shall consider "any other matter justice may require".
28 NRS 281A.775(1)(g). Additionally, the Commission "may consider other factors in the
disposition of the matter if they bear a reasonable relationship to the determination of
the severity of the violation" NRS 281A.775(2). The arguments of the parties in their
briefings and at the hearing omitted arguments and discussion about the secondary

1 consequences of three or more willful violations. Had the secondary consequences
2 been thoroughly argued, the Executive Director would have requested the
3 Commission find that Rodriguez committed two willful violations and two nonwillful
4 violations because the application of NRS 281A.790(4)(c) is too severe in this matter.
5 Thus, the Executive Director does not oppose Rodriguez's request that the
6 Commission reconsider its holding and instead find that two of his violations were
7 willful and two were nonwillful.

8 The Executive Director takes no position on Rodriguez's request that the
9 Commission also reduce the civil penalty assessed against him as a result of his
10 violations from \$1,000 to \$500.

11 DATED this 15th day of June, 2023.

12 NEVADA COMMISSION ON ETHICS

13 /s/ Elizabeth J. Bassett

14 Elizabeth J. Bassett, Esq.
15 Associate Counsel

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BEFORE THE NEVADA COMMISSION ON ETHICS

In re Joseph Rodriguez, Trustee,
Washoe County School District;
Lieutenant, State Fire Marshall Division,
State of Nevada,

Subject.

Ethics Complaint
Case No. 22-051C

REQUEST FOR SUBMISSION

Trustee Joseph Rodriguez (“Subject”) filed a Motion for Reconsideration of the Opinion served by the Commission in this matter on June 2, 2023. On June 15, 2023, Executive Director Ross E. Armstrong filed a Partial Non-Opposition to Subject’s Motion for Reconsideration. Subject does not intend to file a Reply in Support of the Motion for Reconsideration and requests that the Motion for Reconsideration be submitted for decision.

Dated: June 16, 2023

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I hereby certify that I am an employee of McDonald Carano LLP and that on the June 16, 2023, I caused a true and correct copy of the foregoing **REQUEST FOR SUBMISSION** to be served on the parties below via email:

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Dated: June 16, 2023

/s/ Pamela Miller
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4856-3379-4666, v. 1

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BEFORE THE NEVADA COMMISSION ON ETHICS

7 In re Joseph Rodriguez, Trustee,
8 Washoe County School District;
9 Lieutenant, State Fire Marshall Division,
10 State of Nevada,

Subject.

Ethics Complaint
Case No. 22-051C

**TRUSTEE RODRIGUEZ'S
SUPPLEMENT TO MOTION FOR
RECONSIDERATION**

13 Joseph Rodriguez (“Trustee Rodriguez”) hereby supplements his Motion for
14 Reconsideration, pursuant to NAC 281A.442, of the Opinion served by the Commission in this
15 matter on May 18, 2023.

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

17 Trustee Rodriguez received notice of a meeting, scheduled for August 23, 2023, to
18 consider his Motion for Reconsideration. Trustee Rodriguez understands that in a separate case
19 involving Governor Lombardo, Consolidated Case Nos. 21-062C and 21-082C, the Commission
20 determined that a similar factual predicate involving photographs of the subject in uniform did
21 not constitute a violation of NRS 281A.400(2). Neither minutes nor a formal order from
22 Consolidated Case Nos. 21-062C and 21-082C appears to be available at this time. While
23 postponement of the August 23, 2023 meeting ultimately may be necessary to avoid the creation
24 of inconsistent precedent, in the interests of efficiency, Trustee Rodriguez offers the verbal
25 decision in Consolidated Case Nos. 21-062C and 21-082C as supplemental authority and as a
26 separate basis to reconsider the decision of the Commission in Case No. 22-051C.

27 As there is no substantive basis to deem the conduct of Trustee Rodriguez as violative of
28 NRS 281A.400(2), but the similar conduct of Governor Lombardo *as not* violative of NRS

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281A.400(2), reconsideration is warranted. If the same reasoning is followed, as it should, then the two violations issued by the Commission against Trustee Rodriguez under NRS 281A.400(2) should be reconsidered and vacated. Trustee Rodriguez still seeks reconsideration of the remaining two violations under NRS 281A.400(7) and specifically the unopposed request that one of the remaining violations be reduced to a non-willful violation.

Dated: August 17, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP and that on the August 17, 2023, I caused a true and correct copy of the foregoing **TRUSTEE RODRIGUEZ’S SUPPLEMENT TO MOTION FOR RECONSIDERATION** to be served on the parties below via email:

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Dated: August 16, 2023

/s/ Pamela Miller
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