

Abstract of Opinion No. 92-48

BEFORE THE NEVADA COMMISSION ON ETHICS

This Opinion is in response to a request for an opinion filed with the Nevada Commission on Ethics (Commission) by an owner of a private company concerning a state regulatory board (board), a member of the board, and an investigator for the board. The issues in this matter are whether any of the public officers or employees named in the opinion request violated the Code of Ethical Standards found at NRS 281.411, et seq. by acting to disqualify the opinion requestor's eligibility to accept and perform a government contract, subsequently awarding that contract to a board member, and whether such conduct was performed in willful violation of the Code of Ethical Standards pursuant to the provisions of NRS 281.551(1)-(8) sufficient to support the imposition of a civil penalty.

The Commission has jurisdiction over this matter pursuant to NRS 281.511(2). The opinion request and hearing in this matter were confidential pursuant to NRS 281.511(4) and accordingly, the hearing was not open to the public. The Commission heard testimony from various individuals, including the opinion requestor and certain members and employees of the regulatory board, all of whom were represented by counsel. The Commission also received documentary evidence regarding the subject matter of this opinion.

The Commission thereafter met for deliberations. Based upon the foregoing, the Commission makes these Findings and renders the following Opinion.

I. FINDINGS

1. The regulatory board (board) is authorized by statute to administer law relating to the licensing and discipline of members of the profession (profession) it regulates in Nevada. The board is comprised of seven members, appointed by the governor, six of whom must, at the time of the appointment, hold an unexpired license to operate in the profession, be actively engaged in the profession for a period of not less than five years prior to the appointment, and be a resident of the State of Nevada for at least five years prior to the appointment.
2. The board's specific functions include, upon application and demonstration of the required qualifications, issuance of various classifications of licenses to engage in the profession the board regulates. The board may limit the field and scope of the operations of a licensed professional to those areas in which the licensee is classified and qualified to engage. The board may further limit the field and scope of the operations of a licensed professional by establishing a monetary limit on the professional's license or by taking other action to limit the field and scope of a license as is necessary to protect the health and safety of the general public. Pursuant to statute, such additional limitations of a license may not be imposed by the board without review of the individual qualifications of an applicant. The board is authorized to investigate the qualifications of applicants for the relevant professional licenses and to retain the services of attorneys, investigators, and experienced consultants necessary to allow the board to discharge its duties. The board has an executive officer authorized to oversee the board office and personnel, prepare and maintain board records and quarterly reports, and sign board decisions and orders in both contested and uncontested matters. Administrative regulations governing the profession expressly prohibit the executive officer from personally deciding any contested matter.
3. Contested or uncontested matters are heard by the board upon issuance of at least 20-days notice of hearing by personal service or certified mail to the licensee or other person requesting a hearing. Any person may file with the board a petition for a declaratory order or an advisory opinion regarding application of the statutory provisions regulating the profession.

The executive officer, on behalf of the board, may issue a "cease and desist" order to any person acting as a

licensed professional or to any person who submits a bid on a job situated in the state of Nevada, who has not been issued a license to engage in the profession by the board. The applicable law requires that the order be served personally or by certified mail and is effective upon receipt. If a licensee should bid on a contract outside the scope of its license, the professional is considered unlicensed and out of compliance for that portion of the work performed outside the scope of the license. If a professional fails to comply with a cease and desist order, the board is authorized to seek an injunction restraining the individual from working in violation of the law.

4. The board also has disciplinary authority over contractors. Disciplinary complaints must be submitted to the board in writing and signed by the complainant, describe the nature of the grievance and include any related documentation. If the board determines that an investigation is necessary, its staff is required by board regulations to commence an investigation within 10 days after the date the complaint is filed. If the results of the investigation indicate that a licensee may have violated the statutory provisions or administrative regulations governing the profession, the executive officer may: (a) request the licensee to take appropriate corrective action; (b) request the licensee to meet informally with the board's staff and the complainant; and (c) require the licensee to appear before the board and show cause why disciplinary action should not be taken. Before disciplinary action is taken, the board must provide the licensee with reasonable notice of the contemplated action. If grounds exist to suspend or revoke a license, the board is authorized to place a licensee on probation until existing projects are completed and thereafter suspend or revoke the license or otherwise discipline the licensee.

5. In response to a local government's public solicitation of bids for a project which specified those services to be provided, the opinion requestor submitted a sealed bid on the project to the local government. Although the local government did not specify the classification of license required for the job, the opinion requestor indicated upon his bid proposal the classification of license he held. In his bid, the opinion requestor listed seven other entities with whom he would associate in performing the specifications of the project, if awarded.

6. A member of the board, who in his private capacity owned a business in the profession regulated by the board, and who held several classifications of licenses (including the same as that held by the opinion requestor), also submitted a sealed bid on the project on behalf of his company.

7. The local government publicly opened the sealed bids and announced the award of the contract to the opinion requestor's company based on its submission of the lowest bid. Another company, which held the same classification of license as the opinion requestor submitted the second-lowest bid, while the board member submitted the third-lowest bid.

8. Two days after the contract was awarded to the opinion requestor, the board member telephoned an investigator employed by the board to "look into" whether the opinion requestor was qualified to bid on the project because he believed that the work required by the project would exceed the scope of the requestor's license classification. The investigator was still being trained for his position with the board when he received the board member's telephone call. While the investigator could not recall whether the board member had informed him that he had also submitted a bid proposal, the board member testified that he had in fact told the investigator that he had made a bid on the project.

9. Immediately thereafter, without consulting any other board staff, the investigator met with a local government employee to obtain a list of bidders on the project. In reviewing that list, the investigator confirmed that the first two bidders were the opinion requestor and the company that had submitted the second-lowest bid, both of whom held the same license classification, and that the third-lowest bidder was the business owned by the regulatory board member, which held licenses of three distinct classifications. The investigator informed the local government employee that the regulatory board was investigating the first two bids and that a complaint had been filed. The local government employee informed the investigator that the second-lowest bidder was currently performing a separate but similar project for the local government.

10. Thereafter, the investigator consulted with a director of the regulatory board and another board employee. The three concluded that the opinion requestor could not accept or perform the work required for the project because such work would be outside the scope of the opinion requestor's license. On the same day, without first receiving a written complaint or a petition for a declaratory order; or advisory opinion; corrective action; or arranging a meeting with the licensee; or taking the matter before the regulatory board for consideration of issuing a cease and desist order; or conducting a hearing, all of which are provided for in the board's regulations, the investigator issued a letter to the opinion requestor advising him that he was not authorized to bid upon or perform the contract. The investigator notified the opinion requestor that should he again bid or contract to perform work beyond the scope of his license, he would be cited to appear before the board and show cause why disciplinary action should not be taken against his license pursuant to the board's statutory authority. A copy of the investigator's letter was mailed to the appropriate government contracting department and to the second-lowest bidder on the project at issue. Upon receipt of a copy of the letter directed to the opinion requestor's company, the local government employee telephoned the opinion requestor's company and notified it that the regulatory board had determined it would be outside the scope of its license to perform the project.

11. Approximately two weeks following dissemination of the investigator's letters, the regulatory board met to review a petition for an advisory opinion from the opinion requestor on whether a license-holder of that classification which he owned could bid on the project. At that meeting, the board concluded that a while other classifications of licensees would be permitted to bid on the project, the classification of license held by the opinion requestor could not. Immediately after the meeting, the investigator sent a letter to the local government contracting department stating the types of license classifications that would be acceptable for the project. While the opinion requestor did not retain any such suitable license, the board member did.

12. The local government subsequently disqualified and rejected the bid submitted by his company, as well as the bid proposed by the second-lowest bidder, and awarded the project to the board member's company at a substantial increase in the total bid cost.

II. OPINION

Based upon the foregoing findings of fact, the Commission concludes that in their capacities as regulatory board members, such individuals are public officers as defined in NRS 281.4365, and that the investigator was a public employee as provided by NRS 281.436.

The specific questions presented in this matter are:

1. Whether the investigator, the board member awarded the contract, or any other member(s) of the board, used their positions in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household or any business entity in which they had a significant pecuniary interest or for any other person in violation of NRS 281.481(2);
2. Whether the board member ultimately awarded the local government contract used his position in government to benefit his personal or financial interests through the influence of a subordinate, namely the investigator, in violation of NRS 281.481(9); and/or
3. Whether the investigator, the board member ultimately awarded the contract, or any other member(s) of the board willfully violated the provisions of the Code of Ethical Standards such that civil penalties should be imposed pursuant to NRS 281.551(1)-(8).

The standards found in NRS 281.481(2) and (9) are relevant to these issues and provide in pertinent part the

following:

A code of ethical standards is hereby established to govern the conduct of public officers and employees:

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person.

.....

9. A public officer or employee shall not attempt to benefit his personal or financial interest through the influence of a subordinate.

The public policy purposes of the Code of Ethical Standards, and its application to individuals who hold roles as both public servants and private citizens, have been declared by the legislature in the following manner:

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 to avoid conflicts between his private interests and those of the general public whom he serves.

2. The legislature finds that:

(a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.

(b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

It is in this context that the Commission reviews the facts and circumstances of this matter.

A. Regarding the Regulatory Board Member Ultimately Awarded the Public Contract

The regulatory board member contacted the investigator for the board and directed him to investigate the award of the government contract to a licensee of the classification held by the opinion requestor. The board member advised the investigator that he, the board member, had likewise bid on the project and that the project was awarded to a licensee whom he believed, based on his own review of applicable board regulations, did not meet the appropriate license classification for the project. The board member did not report these circumstances to the board nor its executive director for review, decision and appropriate action.

As a competing bidder, the board member had a direct and substantial pecuniary interest in requesting a board employee to investigate the award of the contract and used his position as a member of the board to direct its staff to initiate an investigation into the propriety of the award. Pursuant to applicable administrative regulations concerning the profession, and the board's stated policy as contained in its own publication, the procedure to initiate an investigation is by submitting a signed, written complaint to the board for initial review. Upon determination by the board that a complaint is merited, the board would direct its staff to initiate an investigation into the matter. The board member and another member of the board stated that a board member would, on occasion, initiate informal inquiries through the director of investigations. Although no board member, including the board member made the subject of this case, had ever before initiated such an investigation in which he or she had a private pecuniary interest. In this circumstance, on the same day that the oral telephone request for investigation was made by the board member, the opinion requestor was prohibited by board staff from performing the public contract. Further, an immediate investigation was conducted by the board's investigator, who met directly with representatives of the

local government without affording the opinion requestor any notice or opportunity to respond to the complaint. The request for investigation by the board member was outside of any regulatory or statutory method or procedure established by the board to review complaints, investigate disciplinary violations, settle disputed matters or enjoin nonconforming licensee behavior. Therefore, the board member violated NRS 281.481(2) by using his position in government to secure an unwarranted privilege, preference, exemption and advantage for himself and his own private business, in which he had a significant pecuniary interest. In addition, the board member's informal request for an investigation into the appropriateness of the local government's award to the opinion requestor's company to a board investigator, a subordinate, in light of the board member's interest in the undertaking as a private competitive bidder on that project and his failure to follow mandatory complaint procedures, violated NRS 281.481(9), prohibiting a public officer from attempting to benefit his personal or financial interest through the influence of a subordinate.

Despite significant concern over the board member's course of conduct in this matter, there is insufficient evidence to find that the violation on the part of the board member under the provisions of NRS 281.551(1) were willful, and therefore the Commission imposes no penalty against him for his violation of the Code.

B. Regarding the Regulatory Board Investigator

The regulatory board investigator initiated an investigation as a result of a telephone call to him by the board member ultimately awarded the contract. The investigator was advised by the board member that the board member had a private business interest in a contract awarded by the government to a licensee of a certain classification. The investigator commenced the requested investigation without consulting other staff or persons who were training him in his new position and acted outside the regulatory procedures which require written complaints or review by the board. Although a new employee, the investigator had sufficient understanding of the circumstances surrounding the request from the board member to be aware that the matter involved the private pecuniary interests of a board member. Such conduct is in contravention of the provisions of NRS 281.481(2) which prohibits a public employee from using his position in government to secure advantages for himself or any other person.

The Commission notes that the investigator was less than forthcoming during his testimony with respect to the board member's identity as the caller who, on July 28, 1992, contacted him about the bid on the government project, as discussed above. Despite this, the Commission, in reviewing the record, does not find sufficient evidence of willful behavior on the investigator's part to warrant imposition of a civil penalty under NRS 281.551(1).

C. Regarding the Remaining Members of the Regulatory Board

The Commission finds no evidence of a violation of the Code of Ethical Standards by any of the remaining members of the regulatory board.

III. CONCLUSION

The regulatory board member ultimately awarded the public contract violated the Code of Ethical Standards at NRS 281.481(2) and (9).

The investigator for the regulatory board is in violation of the Code of Ethical Standards at NRS 281.481(2).

The Commission finds there is insufficient evidence of violation of the Code of Ethical Standards by the remaining member of the regulatory board.

IV. COMMENT

It is specifically noted that the foregoing Opinion applies only to the specific circumstances described therein, and

may not apply to other circumstances. The provisions of NRS 281.481 and 281.551 quoted and discussed above must be applied on a case-by-case basis, the results of which will vary depending on the specific facts and circumstances involved.

DATED: July 26, 1994.

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R. C. WILSON II, Chairman

We concur:

By: /s/ WILLIAM R. MORSE, Vice Chairman

By: /s/ HELEN CHISOLM, Commission Member

Dissenting in part; concurring in part, Commissioners JONI WINES and JUD ALLEN:

We agree with the majority of the Commission in all respects save and except that we disagree that there is insufficient evidence to support a finding of willful violation of the Code of Ethical Standards and imposition of a civil penalty against the regulatory board member ultimately awarded the contract pursuant to the provisions of NRS 281.551(1). That statute provides that " in addition to any other penalty provided by law, the commission may impose on a public officer or former public officer civil penalties not to exceed \$5, 000 for a willful violation of this chapter." NRS 281.551(1).

In this case, the board member, having a long-time private interest in the profession and being a member of the board for several years, had, or reasonably should have had, the requisite knowledge of a conflict of interest existing between his private pecuniary interest in calling the investigator to request that he look into the award of the government contract to a designated licensee, and his role in initiating such an investigation in his capacity as a board member. The board member acknowledged that although he had made similar telephone calls during his tenure as a board member, he had never previously made such calls where his private interests had been implicated. The board member used his public office to further primarily his own pecuniary and personal interests in being awarded a public contract from the local government. Based on substantial evidence in the record, we would find that the regulatory board member willfully violated NRS 281.481(2) and (9) and impose a penalty for such violation in the amount of \$5,000.

By: /s/ JONI WINES, Commission Member

By: /s/ JUD ALLEN, Commission Member