



STATE OF NEVADA
COMMISSION ON ETHICS

BEFORE THE NEVADA COMMISSION ON ETHICS

**IN THE MATTER OF THE
REQUEST FOR ADVISORY OPINION OF
PUBLIC EMPLOYEE, DIVISION,
State Department**

**Abstract of Confidential
Advisory Opinion No. 06-51**

OPINION

This matter came before a quorum¹ of the Nevada Commission on Ethics (“Commission”) for a hearing on October 11, 2006 on a request for advisory opinion pursuant to NRS 281.511.1.

The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511.5. Public Employee appeared in person, was sworn and provided testimony. Director for the State Department appeared as a witness and provided sworn testimony.

Public Employee sought an opinion from the Commission as to whether his work through his private company creates a conflict of interest between his private interests and his public duties with the State Department.

¹ The quorum consisted of then Chairman Jenkins and Commissioners Capurro, Cashman, Flangas, Hsu, Hutchison and Keele.

After fully considering the request for advisory opinion and analyzing all of the facts and circumstances and testimony presented, the Commission deliberated and orally advised Public Employee of its decision in the matter.

FINDINGS OF FACT

1. Public Employee has been employed with a Division of a State Department (Division 1) for approximately 26 years.
2. Public Employee has been a licensed professional in his field since 1995.
3. Public Employee is the head of a branch office of DIVISION 1. The head is responsible for the management and operation of the branch office of DIVISION 1.
4. For approximately nine years, Public Employee has owned and operated a part-time business called XYZ and XYZ Consulting Services, LLC. (XYZ).
5. Services provided through XYZ require interaction with another division within the same State Department (DIVISION 2), a sister agency of DIVISION 1. Both divisions deal with the same item but for different purposes. DIVISION 1 and DIVISION 2 are both part of the same State Department (State Department).
6. Neither Public Employee, nor his supervisor has DIVISION 2 employees under his direction. Public Employee does not have access to non-public information that he might use to benefit a private client. Further, Public Employee does not have influence within DIVISION 2.
7. In his public employment, Public Employee does not interact with DIVISION 2 and neither does anyone else in DIVISION 1, with the exception of a supervisor who sits on a commission. The commission has authority over enforcement of DIVISION 2's law and regulations and conducts hearings through panels. The commission seeks to avoid conflicts

when appointing members to hearing panels; therefore, Public Employee's supervisor would not be assigned to a panel that would involve a client of Public Employee.

8. It is unlikely that any of Public Employee's clients would ever come before DIVISION 1.

9. Services provided by XYZ include preparation of reports, management plans, and applications. These services are performed primarily for clients that own a specific type of entity and hold permits. The permits are issued by Public Employee's supervisor and are for a specific purpose. XYZ has dealt with entities that hold permits, but Public Employee is not involved in the work involved in processing those permits, in either his public or private capacities. All of Public Employee's clients at XYZ had obtained permits prior to becoming Public Employee's clients.

10. Public Employee does not advertise XYZ and its services. Public Employee has obtained every XYZ project by referral from friends. Public Employee spends weekends and takes occasional leave from his public employment to work on XYZ projects. He works approximately three to four days every three months for XYZ. One member of Public Employee's family performs the field work for XYZ and another does the data entry.

11. Public Employee disclosed his part-time business to his supervisor and the director of State Department. Additionally, Public Employee discloses his state employment to private clients.

12. The director for State Department brought Public Employee's dual employment issue before a local ethics committee to determine whether a conflict existed. The committee found no conflict. Further, the director discussed the dual employment issue with State Department's Deputy Attorney General who also did not perceive a conflict but recommended Public Employee seek an advisory opinion from this Commission.

13. Should any finding of fact be better construed as a conclusion of law, it may be so deemed.

CONCLUSIONS OF LAW

1. Public Employee is a public employee as defined by NRS 281.436.
2. The Commission has jurisdiction to render an advisory opinion in this matter pursuant to NRS 281.511.1 and NRS 281.521.
3. Public Employee's dual employment does not violate the provisions of NRS 281.481.
4. Public Employee's dual employment does not violate NRS 281.491.

DISCUSSION

Pursuant to NRS 281.511.1, the Commission is authorized to render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances upon request from a public officer or public employee who is seeking guidance on questions which directly relate to the propriety of his own past, present or future conduct as a public officer or employee. Further, if the requested opinion relates to the propriety of his own present or future conduct, the Commission's opinion is binding upon the requester as to his future conduct, final and subject to judicial review.

The Nevada Legislature has declared it to be the public policy of this state that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves." (See NRS 281.421). Further, the Nevada Legislature has declared that, "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 role of persons who are both public servants and private citizens." The

Commission is therefore directed to hold public officers accountable when they fail to place the public interest and public trust ahead of their private interests.

The Code of Ethical Conduct provides:

NRS 281.481 General requirements; exceptions. A code of ethical standards is hereby established to govern the conduct of public officers and employees:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.

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 business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281A.420.

(b) "Unwarranted" means without justification or adequate reason.

3. A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and any private business in which he has a significant pecuniary interest.

4. A public officer or employee shall not accept any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of his duties as a public officer or employee.

5. If a public officer or employee acquires, through his public duties or relationships, any information which by law or practice is not at the time available to people generally, he shall not use the information to further the pecuniary interests of himself or any other person or business entity.

6. A public officer or employee shall not suppress any governmental report or other document because it might tend to affect unfavorably his pecuniary interests.

7. A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

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

(1) The public officer 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 his 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.

...

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

10. A public officer or employee shall not seek other employment or contracts through the use of his official position.

NRS 281.491 provides:

NRS 281.491 Additional standards: Representation and counseling of private person before public agency; disclosure required. In addition to the requirements of the code of ethical standards:

1. A member of the executive branch or public employee of the executive branch shall not accept compensation from any private person to represent or counsel him on any issue pending before the agency in which that officer or employee serves, if the agency makes decisions...As used in this subsection, "issue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

2. A member of the legislative branch, or a member of the executive branch or public employee whose public service requires less than half of his time, may represent or counsel a private person before an agency in which he does not serve. Any other member of the executive branch or public employee shall not represent a client for compensation before any state agency of the Executive or Legislative Branch of government.

3. Not later than January 10² of each year, any Legislator or other public officer who has, within the preceding year, represented or counseled a private person for compensation before a state agency of the Executive Branch shall disclose for each such representation or counseling during the previous calendar year:

- (a) The name of the client;
- (b) The nature of the representation; and
- (c) The name of the state agency.

The disclosure must be made in writing and filed with the Commission, on a form prescribed by the Commission.

² Since the hearing on this matter, NRS 281.491 has been re-codified as NRS 281A.410 and the deadline for filing a disclosure of agency representation/counseling has changed to January 15 of each year.

CONCLUSION

WHEREFORE, based upon a preponderance of the evidence in this matter, the Commission renders the following conclusion.

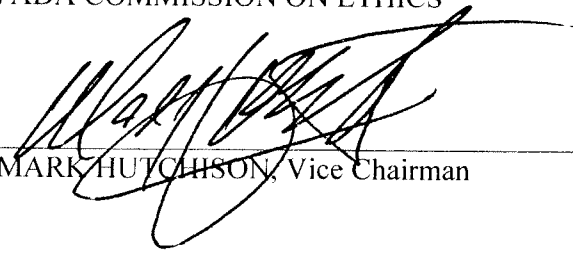
Based on the evidence and testimony presented, the Commission finds that Public Employee's private business conducted while he is a public employee with DIVISION 1 does not violate the provisions of NRS 281.481 or NRS 281.491. However, since this opinion is based on the facts presented at the time of this hearing and based on Public Employee's current activities, any change in Public Employee's business plan may produce a different set of circumstances and Public Employee is cautioned to be mindful of circumstances that could potentially lead him to violate ethics laws.

NOTE: this matter is a first-party advisory opinion request. For purposes of a first-party advisory opinion requested pursuant to NRS 281.511.1 and NRS 281.521, all facts in the matter are provided by the public employee requesting the advisory opinion, and the commission makes no independent investigation as to the truth of those facts. The record herein, therefore, consists solely of facts provided on the record by the public employee, and this opinion is based solely upon those facts. Facts and circumstances that differ from those provided by the public employee and used by the commission in this advisory opinion may result in an opinion contrary to this opinion.

DATED: February 5, 2008.

NEVADA COMMISSION ON ETHICS

By: _____


MARK HUTCHISON, Vice Chairman