

SENATE BILL NO. 283—SENATORS HARDY, HUTCHISON;
CEGAVSKE AND GUSTAVSON

MARCH 15, 2013

Referred to Committee on Legislative Operations and Elections

SUMMARY—Revises provisions relating to the Commission on Ethics. (BDR 23-103)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to ethics in government; prohibiting the Commission on Ethics from taking action on a request for an opinion concerning a public officer or employee who is a candidate for elected office under certain circumstances; revising provisions governing factors which must be considered by the Commission in the disposition of certain requests for opinions; requiring the Commission to consider certain factors before imposing a civil penalty for a violation of the Nevada Ethics in Government Law; providing that a finding of a willful violation of the Nevada Ethics in Government Law requires a finding by the Commission that the person acted in bad faith or with ill will, evil intent or malice, and with knowledge of the prohibition against the act or omission; authorizing the Commission to impose civil penalties and amounts equal to attorney's fees and other costs under certain circumstances; requiring an affirmative vote by two-thirds of the Commission for the finding of a willful violation of the Nevada Ethics in Government Law; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

- 1 The Nevada Ethics in Government Law establishes certain provisions
- 2 governing ethics in government which are applicable to public officers and public
- 3 employees. (Chapter 281A of NRS) The Commission on Ethics has jurisdiction to



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investigate and take appropriate action regarding an alleged violation of the Nevada Ethics in Government Law. (NRS 281A.280)

Sections 2 and 7 of this bill prohibit the Commission from accepting a request for an opinion concerning the applicability of the Nevada Ethics in Government Law, investigating the facts or circumstances relating to such a request, or rendering an opinion concerning a public officer or public employee who is a candidate for public office during the period beginning 120 days before the election and ending on the date of the election.

Section 3 of this bill requires the Commission, when disposing of a request for an opinion by stipulation, agreed settlement or consent order, to treat comparable situations in a comparable manner and ensure that the disposition of a request for an opinion bears a reasonable relationship to the severity of the violation or alleged violation of the Nevada Ethics in Government Law.

Sections 5 and 6 of this bill revise the definitions of the terms “intentionally” and “knowingly,” respectively, to provide that a willful violation of the Nevada Ethics in Government Law requires proof that a person acted or failed to act in bad faith or with ill will, evil intent or malice, and with knowledge of the statutory prohibition against the act or omission. **Section 8** of this bill provides that an act or omission may be found to be a willful violation of the Nevada Ethics in Government Law only by an affirmative vote of two-thirds of the Commission.

Section 4 of this bill requires the Commission to consider a variety of factors when determining the amount of any civil penalty imposed for a willful violation of the Nevada Ethics in Government Law. **Section 8** authorizes the Commission to impose a civil penalty on a person who requests an opinion if the Commission determines that the request was clearly frivolous or vexatious or brought solely for harassment. **Section 8** also authorizes the Commission to assess an amount equal to certain attorney’s fees and costs against a person who requests an opinion if the Commission determines that there is not just and sufficient cause for the Commission to render an opinion in the matter.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 281A of NRS is hereby amended by adding thereto the provisions set forth as sections 2, 3 and 4 of this act.

Sec. 2. 1. *The Commission shall not accept a request for an opinion submitted pursuant to subsection 2 of NRS 281A.440 or render an opinion pursuant to such a request, and the Executive Director shall not investigate the facts and circumstances relating to any such request, concerning a public officer or employee who is a candidate at a special, primary or general election during the period beginning 120 days before the special, primary or general election and ending on the date of:*

(a) The special election;

(b) The primary election, if the candidate is defeated in that election; or

(c) The general election,

↪ as applicable.



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2. *The limitations period set forth in NRS 281A.280 for the commencement of any proceeding is tolled during the period described in subsection 1 for any proceeding concerning a public officer or employee described in that subsection.*

Sec. 3. *In any matter in which the Commission disposes of a request for an opinion by stipulation, agreed settlement or consent order, the Commission shall treat comparable situations in a comparable manner and shall ensure that the disposition of the request for an opinion bears a reasonable relationship to the severity of the violation or alleged violation.*

Sec. 4. *In determining the amount of any civil penalty to be imposed on a public officer or employee pursuant to NRS 281A.480, the Commission shall consider:*

1. *The seriousness of the violation, including, without limitation, the nature, circumstances, extent and gravity of the violation;*

2. *The number and history of previous warnings issued to or violations of the provisions of this chapter by the public officer or employee;*

3. *The cost to the Commission to conduct the investigation and any hearing relating to the violation;*

4. *Any mitigating factors, including, without limitation, any self-reporting, prompt correction of the violation, any attempts to rectify the violation before any complaint is filed and any cooperation by the public officer or employee or former public officer or employee in resolving the complaint;*

5. *Any restitution or reimbursement paid to parties affected by the violation;*

6. *The extent of any financial gain resulting from the violation; and*

7. *Any other matter justice may require.*

Sec. 5. NRS 281A.105 is hereby amended to read as follows:

281A.105 "Intentionally" means voluntarily or deliberately, rather than accidentally or inadvertently. The term ~~does not require~~ *requires* proof of bad faith, ill will, evil intent or malice.

Sec. 6. NRS 281A.115 is hereby amended to read as follows:

281A.115 "Knowingly" imports a knowledge that the facts exist which constitute the act or omission, and ~~does not require~~ *requires* 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.

Sec. 7. NRS 281A.440 is hereby amended to read as follows:

281A.440 *Except as otherwise provided in section 2 of this act:*



1 1. The Commission shall render an opinion interpreting the
2 statutory ethical standards and apply the standards to a given set of
3 facts and circumstances within 45 days after receiving a request, on
4 a form prescribed by the Commission, from a public officer or
5 employee who is seeking guidance on questions which directly
6 relate to the propriety of the requester's own past, present or future
7 conduct as an officer or employee, unless the public officer or
8 employee waives the time limit. The public officer or employee may
9 also request the Commission to hold a public hearing regarding the
10 requested opinion. If a requested opinion relates to the propriety of
11 the requester's own present or future conduct, the opinion of the
12 Commission is:

13 (a) Binding upon the requester as to the requester's future
14 conduct; and

15 (b) Final and subject to judicial review pursuant to NRS
16 233B.130, except that a proceeding regarding this review must be
17 held in closed court without admittance of persons other than those
18 necessary to the proceeding, unless this right to confidential
19 proceedings is waived by the requester.

20 2. The Commission may render an opinion interpreting the
21 statutory ethical standards and apply the standards to a given set of
22 facts and circumstances:

23 (a) Upon request from a specialized or local ethics committee.

24 (b) Except as otherwise provided in this subsection, upon
25 request from a person, if the requester submits:

26 (1) The request on a form prescribed by the Commission;
27 and

28 (2) All related evidence deemed necessary by the Executive
29 Director and the investigatory panel to make a determination of
30 whether there is just and sufficient cause to render an opinion in the
31 matter.

32 (c) Upon the Commission's own motion regarding the propriety
33 of conduct by a public officer or employee. The Commission shall
34 not initiate proceedings pursuant to this paragraph based solely upon
35 an anonymous complaint.

36 ➤ The Commission shall not render an opinion interpreting the
37 statutory ethical standards or apply those standards to a given set of
38 facts and circumstances if the request is submitted by a person who
39 is incarcerated in a correctional facility in this State.

40 3. Upon receipt of a request for an opinion by the Commission
41 or upon the motion of the Commission pursuant to subsection 2, the
42 Executive Director shall investigate the facts and circumstances
43 relating to the request to determine whether there is just and
44 sufficient cause for the Commission to render an opinion in the
45 matter. The Executive Director shall notify the public officer or



1 employee who is the subject of the request and provide the public
2 officer or employee an opportunity to submit to the Executive
3 Director a response to the allegations against the public officer or
4 employee within 30 days after the date on which the public officer
5 or employee received the notice of the request. The purpose of the
6 response is to provide the Executive Director with any information
7 relevant to the request which the public officer or employee believes
8 may assist the Executive Director and the investigatory panel in
9 conducting the investigation. The public officer or employee is not
10 required in the response or in any proceeding before the
11 investigatory panel to assert, claim or raise any objection or defense,
12 in law or fact, to the allegations against the public officer or
13 employee and no objection or defense, in law or fact, is waived,
14 abandoned or barred by the failure to assert, claim or raise it in the
15 response or in any proceeding before the investigatory panel.

16 4. The Executive Director shall complete the investigation and
17 present a recommendation relating to just and sufficient cause to the
18 investigatory panel within 70 days after the receipt of or the motion
19 of the Commission for the request, unless the public officer or
20 employee waives this time limit. If, after the investigation, the
21 Executive Director determines that there is just and sufficient cause
22 for the Commission to render an opinion in the matter, the
23 Executive Director shall state such a recommendation in writing,
24 including, without limitation, the specific evidence that supports the
25 Executive Director's recommendation. If, after the investigation, the
26 Executive Director determines that there is not just and sufficient
27 cause for the Commission to render an opinion in the matter, the
28 Executive Director shall state such a recommendation in writing,
29 including, without limitation, the specific reasons for the Executive
30 Director's recommendation.

31 5. Within 15 days after the Executive Director has provided the
32 Executive Director's recommendation in the matter to the
33 investigatory panel, the investigatory panel shall make a final
34 determination regarding whether there is just and sufficient cause
35 for the Commission to render an opinion in the matter, unless the
36 public officer or employee waives this time limit. The investigatory
37 panel shall not determine that there is just and sufficient cause for
38 the Commission to render an opinion in the matter unless the
39 Executive Director has provided the public officer or employee an
40 opportunity to respond to the allegations against the public officer or
41 employee as required by subsection 3. The investigatory panel shall
42 cause a record of its proceedings in each matter to be kept, and such
43 a record must remain confidential until the investigatory panel
44 determines whether there is just and sufficient cause for the
45 Commission to render an opinion in the matter.



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6. If the investigatory panel determines that there is just and sufficient cause for the Commission to render an opinion in the matter, the Commission shall hold a hearing and render an opinion in the matter within 60 days after the determination of just and sufficient cause by the investigatory panel, unless the public officer or employee waives this time limit.

7. Each request for an opinion that a public officer or employee submits to the Commission pursuant to subsection 1, each opinion rendered by the Commission in response to such a request and any motion, determination, evidence or record of a hearing relating to such a request are confidential unless the public officer or employee who requested the opinion:

(a) Acts in contravention of the opinion, in which case the Commission may disclose the request for the opinion, the contents of the opinion and any motion, evidence or record of a hearing related thereto;

(b) Discloses the request for the opinion, the contents of the opinion, or any motion, evidence or record of a hearing related thereto; or

(c) Requests the Commission to disclose the request for the opinion, the contents of the opinion, or any motion, evidence or record of a hearing related thereto.

8. Except as otherwise provided in this subsection, each document in the possession of the Commission or its staff that is related to a request for an opinion regarding a public officer or employee submitted to or initiated by the Commission pursuant to subsection 2, including, without limitation, the Commission's copy of the request and all materials and information gathered in an investigation of the request, is confidential until the investigatory panel determines whether there is just and sufficient cause to render an opinion in the matter. The public officer or employee who is the subject of a request for an opinion submitted or initiated pursuant to subsection 2 may in writing authorize the Commission to make its files, material and information which are related to the request publicly available.

9. Except as otherwise provided in paragraphs (a) and (b), the proceedings of the investigatory panel are confidential until the investigatory panel determines whether there is just and sufficient cause to render an opinion in the matter. A person who:

(a) Requests an opinion from the Commission pursuant to paragraph (b) of subsection 2 may:

(1) At any time, reveal to a third party the alleged conduct of a public officer or employee underlying the request that the person filed with the Commission or the substance of testimony, if any, that the person gave before the Commission.



(2) After the investigatory panel determines whether there is just and sufficient cause to render an opinion in the matter, reveal to a third party the fact that the person requested an opinion from the Commission.

(b) Gives testimony before the Commission may:

(1) At any time, reveal to a third party the substance of testimony that the person gave before the Commission.

(2) After the investigatory panel determines whether there is just and sufficient cause to render an opinion in the matter, reveal to a third party the fact that the person gave testimony before the Commission.

10. Whenever the Commission holds a hearing pursuant to this section, the Commission shall:

(a) Notify the person about whom the opinion was requested of the place and time of the Commission's hearing on the matter;

(b) Allow the person to be represented by counsel; and

(c) Allow the person to hear the evidence presented to the Commission and to respond and present evidence on the person's own behalf.

➤ The Commission's hearing may be held no sooner than 10 days after the notice is given unless the person agrees to a shorter time.

11. If a person who is not a party to a hearing before the Commission, including, without limitation, a person who has requested an opinion pursuant to paragraph (a) or (b) of subsection 2, wishes to ask a question of a witness at the hearing, the person must submit the question to the Executive Director in writing. The Executive Director may submit the question to the Commission if the Executive Director deems the question relevant and appropriate. This subsection does not require the Commission to ask any question submitted by a person who is not a party to the proceeding.

12. If a person who requests an opinion pursuant to subsection 1 or 2 does not:

(a) Submit all necessary information to the Commission; and

(b) Declare by oath or affirmation that the person will testify truthfully,

➤ the Commission may decline to render an opinion.

13. For good cause shown, the Commission may take testimony from a person by telephone or video conference.

14. For the purposes of NRS 41.032, the members of the Commission and its employees shall be deemed to be exercising or performing a discretionary function or duty when taking an action related to the rendering of an opinion pursuant to this section.

15. A meeting or hearing that the Commission or the investigatory panel holds to receive information or evidence concerning the propriety of the conduct of a public officer or



1 employee pursuant to this section and the deliberations of the
2 Commission and the investigatory panel on such information or
3 evidence are not subject to the provisions of chapter 241 of NRS.

4 **Sec. 8.** NRS 281A.480 is hereby amended to read as follows:

5 281A.480 1. In addition to any other penalties provided by
6 law ~~it~~ *and in accordance with the provisions of section 4 of this*
7 *act*, the Commission may impose on a public officer or employee or
8 former public officer or employee civil penalties:

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

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

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

15 2. In addition to any other penalties provided by law, the
16 Commission may ~~impose~~ *, upon its own motion or upon the*
17 *motion of the person about whom an opinion was requested*
18 *pursuant to NRS 281A.440:*

19 (a) *Impose* a civil penalty not to exceed \$5,000 and assess an
20 amount equal to the amount of attorney's fees and costs actually and
21 reasonably incurred by the person about whom an opinion was
22 requested pursuant to NRS 281A.440 against a person who
23 ~~prevents,~~ :

24 (1) *Files a request for an opinion pursuant to NRS*
25 *281A.440 which the Commission determines was clearly frivolous*
26 *or vexatious or brought solely for harassment; or*

27 (2) *Prevents*, interferes with or attempts to prevent or
28 interfere with the discovery or investigation of a violation of this
29 chapter.

30 (b) *Assess an amount equal to the amount of attorney's fees*
31 *and costs actually and reasonably incurred by the person about*
32 *whom an opinion was requested pursuant to NRS 281A.440*
33 *against a person who requested the opinion if, after the*
34 *investigation required by subsection 4 of NRS 281A.440, an*
35 *investigatory panel of the Commission determines that there is not*
36 *just and sufficient cause for the Commission to render an opinion*
37 *in the matter.*

38 3. If the Commission finds that a violation of a provision of
39 this chapter by a public officer or employee or former public officer
40 or employee has resulted in the realization of a financial benefit by
41 the current or former public officer or employee or another person,
42 the Commission may, in addition to any other penalties provided by
43 law, require the current or former public officer or employee to pay
44 a civil penalty of not more than twice the amount so realized.



4. In addition to any other penalties provided by law, if a proceeding results in an opinion that:

(a) One or more willful violations of this chapter have been committed by a State Legislator removable from office only through expulsion by the State Legislator's own House pursuant to Section 6 of Article 4 of the Nevada Constitution, the Commission shall:

(1) If the State Legislator is a member of the Senate, submit the opinion to the Majority Leader of the Senate or, if the Majority Leader of the Senate is the subject of the opinion or the person who requested the opinion, to the President Pro Tempore of the Senate; or

(2) If the State Legislator is a member of the Assembly, submit the opinion to the Speaker of the Assembly or, if the Speaker of the Assembly is the subject of the opinion or the person who requested the opinion, to the Speaker Pro Tempore of the Assembly.

(b) One or more willful violations of this chapter have been committed by a state officer removable from office only through impeachment pursuant to Article 7 of the Nevada Constitution, the Commission shall submit the opinion to the Speaker of the Assembly and the Majority Leader of the Senate or, if the Speaker of the Assembly or the Majority Leader of the Senate is the person who requested the opinion, to the Speaker Pro Tempore of the Assembly or the President Pro Tempore of the Senate, as appropriate.

(c) One or more willful violations of this chapter have been committed by a public officer other than a public officer described in paragraphs (a) and (b), the willful violations shall be deemed to be malfeasance in office for the purposes of NRS 283.440 and the Commission:

(1) May file a complaint in the appropriate court for removal of the public officer pursuant to NRS 283.440 when the public officer is found in the opinion to have committed fewer than three willful violations of this chapter.

(2) Shall file a complaint in the appropriate court for removal of the public officer pursuant to NRS 283.440 when the public officer is found in the opinion to have committed three or more willful violations of this chapter.

➔ This paragraph grants an exclusive right to the Commission, and no other person may file a complaint against the public officer pursuant to NRS 283.440 based on any violation found in the opinion.

5. An action taken by a public officer or employee or former public officer or employee relating to this chapter *may be found to be a willful violation of a provision of this chapter only by an affirmative vote of two-thirds of the Commission. Without limiting*



1 *the provisions of NRS 281A.105, 281A.115 or 281A.170, an action*
2 *taken by a public officer or employee or former public officer or*
3 *employee* is not a willful violation of a provision of ~~those sections~~
4 *this chapter* if the public officer or employee establishes by
5 sufficient evidence that the public officer or employee satisfied all
6 of the following requirements:

7 (a) The public officer or employee relied in good faith upon the
8 advice of the legal counsel retained by the public body which the
9 public officer represents or by the employer of the public employee
10 or upon the manual published by the Commission pursuant to
11 NRS 281A.290;

12 (b) The public officer or employee was unable, through no fault
13 of the public officer or employee, to obtain an opinion from the
14 Commission before the action was taken; and

15 (c) The public officer or employee took action that was not
16 contrary to a prior published opinion issued by the Commission.

17 6. In addition to any other penalties provided by law, a public
18 employee who commits a willful violation of this chapter is subject
19 to disciplinary proceedings by the employer of the public employee
20 and must be referred for action in accordance to the applicable
21 provisions governing the employment of the public employee.

22 7. The provisions of this chapter do not abrogate or decrease
23 the effect of the provisions of the Nevada Revised Statutes which
24 define crimes or prescribe punishments with respect to the conduct
25 of public officers or employees. If the Commission finds that a
26 public officer or employee has committed a willful violation of this
27 chapter which it believes may also constitute a criminal offense, the
28 Commission shall refer the matter to the Attorney General or the
29 district attorney, as appropriate, for a determination of whether a
30 crime has been committed that warrants prosecution.

31 8. The imposition of a civil penalty pursuant to subsection 1, 2
32 or 3 is a final decision for the purposes of judicial review pursuant
33 to NRS 233B.130.

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

38 **Sec. 9.** This act becomes effective on July 1, 2013.

