

OPEN SESSION
MINUTES OF THE MEETING OF THE
NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION
Friday, August 21, 2009
State Capitol, Room 1525
Lincoln, Nebraska

Call to Order – Chairman McCollister called the meeting to order at 9:02 a.m. and announced the location in the meeting room of a copy of the Public Meetings Law.

Roll Call –

Andre Barry - Present
Kevin Brostrom - Present
John Gale - Present
Paul Hosford - Present
Steve McCollister - Present
Richard Nelson – Present
Kim Quandt - Present
Gary Rosacker - Excused
Judy Schweikart - Present

Introduction of new Commissioner Kevin Brostrom - Chairman McCollister thanked the Commission for the opportunity to serve and invited the new Commissioner Kevin Brostrom to speak. Mr. Brostrom stated that he is from Grand Island and practices law at the firm of Lauritsen, Brownell, Brostrom and Stehlik. His wife Bev teaches 2nd grade and they have a daughter, Kara who is at UNL this year. Mr. Brostrom stated that he was on the Grand Island Board of Education for 10 years and has also served on a couple of other committees as treasurer. He stated he is looking forward to the challenge of the Commission.

Introduction of new General Counsel Neil Danberg - Chairman McCollister asked Executive Director Daley to introduce and welcome the new General Counsel Neil Danberg. General Counsel Danberg stated that he was a 1970 graduate from the UNL Law School and served 7 years in the Marine Corps as an attorney. He has been in private practice for 32 years. Mr. Danberg also stated that he and his wife have been married 36 years and have 3 children. General Counsel Danberg stated that he is looking forward to serving the Commission, the State of Nebraska and its citizens.

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Approval of the Open Session Minutes of the June 19, 2009 Meeting - Chairman McCollister referred the Commissioners to their copies of the Open Session Minutes of the previous meeting.

Motion by Nelson, second by Gale, that the Open Session Minutes of the June 19, 2009 meeting be approved as presented - Roll Call Vote: Commissioners Barry, Gale, Hosford, McCollister, Nelson and Quandt voted yes. Commissioners Brostrom and Schweikart abstained. Motion carried (6-0-2).

Report on Late Filing Fees, including requests for relief – Tom Cavanaugh for County Clerk - Executive Director Daley indicated that this was a matter of three campaign statements that were filed late and assessed late filing fees at the rate of \$25 for each day the statements remained not filed. The total amount due is \$1,650. The Executive Director explained that typically for a review of a request for relief there are two methods by which he evaluates the process. The statutory method is where certain criteria must be met. Two of these criteria are objective. Late filers must show less than \$5,000 in receipts and expenditures. And the second is the late filer must not have been required to have paid late filing fees for two years prior to the date the late filing was due. The second method is Good Cause Shown which is a substantial reason which affords a legal excuse. A request was received from the Cavanaugh Committee and it was noted the committee had paid late filing fees for a report due on April 14, 2008. Therefore the committee did not meet the 2 year criteria for relief and the request was denied.

The Executive Director announced that Tom Cavanaugh was present to address the Commission. Mr. Cavanaugh indicated to the Commission a handout of information he had provided. He offered his sincere apology and stated that he has been in office for 23 years and had a good history of filing until last year. Leaving all responsibility to his treasurer, Mr. Cavanaugh stated that he was unaware of the treasurer's mistakes and oversights.

Discussion followed.

Motion by Barry, second by Quandt, to grant relief from the late filing fees imposed for the 1st General campaign statement and the Post General campaign statement that would result in a waiver of \$900 of the \$1,650 fees and that it would leave in place \$750 in late filing fees – Roll Call Vote: Commissioners Barry, Brostrom, Gale, Hosford, McCollister, Nelson and Quandt voted yes. Commissioner Schweikart abstained. Motion carried (7-0-1).

Consideration of Proposed Advisory Opinion #198 on an executive branch employee supervising a family member. Requested by Sue Larson, Human Resources Administrator, Nebraska Department of Roads – Executive Director Daley reported that this request is pursuant to a law that was so new it hadn't even taken effect. This is the new nepotism law, and to put it in historical

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perspective for better understanding. Until about 10 years ago the law in the Accountability Act on nepotism was actually 'a public official and public employee may hire, may recommend the hiring of, and may supervise the hiring of an immediate family member.' This was a statute that expressly authorized what would be considered nepotism. The Executive Director continued that the Legislature thought it still a reasonable standard for local government, particularly in areas where there was a limited labor pool. So if you couldn't hire a relative you couldn't hire anyone at all. But it came to the conclusion that this was not a good standard for state government. And so the law was changed to 'you may not hire, or recommend the hiring of or supervise an immediate family member.' The area that created concern became the definition of 'immediate family member.' The definition of which was very, very, narrow as it included 'a spouse, the children in the household and someone to be claimed as a dependent for federal income tax purposes.' It did not apply to parents, brothers, sisters and adult children and folks of that nature. In addition it had a way of creating a trap for certain categories of state employees. For instance a person who held a supervisory position, but who had nothing to do with the hiring process, would suddenly find themselves supervising an immediate family member. They had no say about this arrangement and so by doing nothing, they felt as though they were in violation of the statute. It was this first effort of creating a state nepotism statute that was not very good. And after several situations occurred there was a decision that the nepotism statute needed to be clarified. This is the first interpretation of that statute pursuant to LB 322 which falls under the jurisdiction of the Commission. This is a request by Sue Larson who is with the Nebraska Department of Roads. How LB 322 would apply facts to this situation.

The Executive Director explained that the facts are that the Department of Roads has an employee in Arapahoe, where he has been a maintenance worker for a number of years. The worker was later made a Crew Chief, which the department does not consider a supervisory position. The position makes him the 'first among equals', where one of the crew members would be his son-in-law. At the time the individual was hired he was not a son-in-law, he subsequently became a son-in-law. The Department of Roads would like to fill a position known as a Highway Maintenance Supervisor, for the Arapahoe yard. The Crew Chief is one of three applicants for the position based upon experience and qualifications. The Department of Roads thought that he would be the best qualified for the position, however this would put the Crew Chief in the position of supervising his son-in-law. Executive Director Daley further pointed out that the department has a policy where certain employees have to be able report to work within 30 minutes. This is for the purpose of dealing with emergencies such as snow emergencies and floods that require immediate attention by highway maintenance workers. It was also noted that the son-in-law lives 5 miles from the Arapahoe yard, and that the next nearest yard is 27 ½ miles away from the son-in-law's residence. The concern is if the son-in-law were assigned to the distant yard, that this would compromise his ability to provide service within the required 30 minutes. The Department of Roads wants to know how LB 322 would apply to this situation.

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Executive Director Daley indicated that in Section 2 of LB 322 it states 'an official or employee of the executive branch of state government shall not act as a supervisor to his or her immediate family member.' Then you look at the Provision that says 'A supervisor is someone that has authority in the interest of the state to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employees or responsibility to direct them or adjust their grievances or effectively recommend any of these actions.' So for the purposes of the Opinion it would accept the representation that the Department of Roads Highway Maintenance Supervisor is a supervisor who supervises highway maintenance people. The new definition which appears in LB 322, the term 'family member' is defined as 'an individual who is the spouse, child, parent, brother, sister, grandchild or grandparent by blood, marriage or adoption of the official or employee in the executive branch of state government.'

Executive Director Daley pointed out that issue number 1) is whether under the definition, is a son-in-law a family member? A broad view of this particular definition is yes. The Legislature wanted to expand the reach of the statute to extend to other family members who might be offended if they were not included in a nepotism statute. Assuming that a son-in-law is a family member as defined, and that the Crew Chief if promoted to the position of Highway Maintenance Supervisor, he would be supervising a family member. He would then be required to notify the agency department head within 7 days of the situation as set forth in the statute. The 'trap' as mentioned earlier, where a supervisor who had nothing to do with the hiring of a family member under LB 322 is now rectified in this situation as they would now be required to notify the agency head within 7 days after discovery. The Opinion takes the position if the maintenance worker takes the supervisory position they would be required to notify their department head. This is required unless the supervisory position takes place because of nepotism. In which case this would be a violation. The Legislative Bill seems to contemplate that the agency director shall take certain action, whether to eliminate the unlawful supervision of the family member, by way of a transfer of the individual so the violation would not exist. Or, to permit the situation to continue under Good Cause Shown, the statute does not define Good Cause.

Issue number 2) What is Good Cause Shown under the statute? It describes 'a basis by which a person may be granted exception to a rule, a statute or a court order.' The Nebraska Courts variously describe Good Cause as 'a good and sufficient reason', 'a substantial reason which affords a legal excuse', or 'a legally sufficient reason'. In the context of LB 322 the Opinion takes the position that an agency head should determine if there is a good and sufficient reason to justify the prohibition against the supervision of a family member in a particular situation. The Executive Director noted that during the Legislative Hearing for LB 322, Carlos Castillo the Director of Administrative Services stated that 'this exception was in response to limited labor pools in remote areas of the state.' The proposed Opinion notes that Arapahoe and Furnas County have a population of approximately 5,000 and does appear to be an area of a limited labor pool.

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Issue number 3) The statute does not specify who must make the showing of Good Cause. Therefore, the Opinion takes the position that anyone can make the showing of Good Cause. It may be the person who promotes the person to the supervisory position, or it maybe someone in the Human Resources Department. The statute also seems to make sure of a good public record of the activity of the agency. As it requires the agency head file a copy of the written showing of Good Cause to the Commission. The proposed Opinion takes the position that the agency head should also file with the Commission a copy of the employee's letter advising the agency head that he or she is supervising a family member and also a copy of the agency heads decision. The Executive Director pointed out that as a matter for public record, copies of the employee notification of the agency head, the Good Cause letter and the agency head decision should be made available in a packet at the Commission.

Discussion followed.

Motion by Barry, second by Schweikart, to adopt proposed Advisory Opinion #198 'as is' with respect to the definition of family member – Roll Call Vote: Commissioners Barry, Brostrom, Gale, Hosford, McCollister, Nelson, Quandt and Schweikart voted yes. Motion carried (8-0-0).

Discussion followed.

Motion by Barry, second by Nelson, in the paragraph that begins 'we note' that during the Committee hearing to remove the last three sentences and in place of these sentences to insert 'a limited labor pool for the supervisory position in question may constitute good cause under the statute there may also be other factors which constitute good cause in a given case' – Roll Call Vote: Commissioners Barry, Brostrom, Gale, Hosford, McCollister, Nelson and Quandt voted yes. Commissioner Schweikart voted no. Motion carried (7-1-0).

The Executive Director noted on two other issues, the 30 minute situation on page 1, and on the proposal on editing the exact language of the provision on good cause on page 3.

Motion by Barry, second by Brostrom, to adopt the Advisory Opinion #198 as modified by the prior two resolutions and by the changes that Mr. Daley recommended – Roll Call Vote: Commissioners Barry, Brostrom, Gale, Hosford, McCollister, Nelson, Quandt and Schweikart voted yes. Motion carried (8-0-0).

Break 10:34 – 10:42 a.m.

Executive Director's Report (includes personnel activity, budget status, budget process and litigation status) – Executive Director Daley reported that

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Commissioner Schweikart represented the Commission on July 28th at a meeting on Legislative Resolution #163.

Executive Director Daley stated that regarding the budget. That it has been barely 6 weeks into the budget year and there wasn't much to report.

It was pointed out that the Commission has \$337,000 in the CFLA cash funds. This is the pot of funds that is made available to campaign funds to qualified candidates for public office.

Executive Director Daley reported that approximate sum of \$88,000 was carried over from the last fiscal year to the current fiscal year.

The Executive Director reported that in the area of litigation, the Nolan case is on appeal before the District Court of Lancaster County.

Executive Director Daley announced that Mr. Howland, the Commission's former General Counsel had secured a judgment against Dr. Robert Prokop for late filing fees. This is on appeal to the Court of Appeals.

Executive Director Daley lastly reported the continuing Federal Court case by Mr. Prokop against members of the Commission, members of the staff and variety of others.

Discussion followed.

Consideration of change of October meeting date – Chairman McCollister asked a favor of the Commission, to change the next meeting date from October 9, to October 16, 2009. There were no objections.

Chairman McCollister stated to let the record show Commissioner Nelson was excused at 10:46 a.m.

Discussion New Per Diem and Expense Reimbursement Procedures - The Executive Director indicated that the State is changing its procedures, it wants to eliminate issuing checks or warrants on paper and use direct deposit. Referring the Commissioners to their packets, where a few options are set forth in a memo.

Report of Conflicts Committee – Chairman McCollister indicated that there were no objections to report. Chairman McCollister reported that the new Executive Committee members are Paul Hosford, Richard Nelson and Kim Quandt.

Report of Executive Committee – Commissioner Barry indicated that there were no issues to present at this time.

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Closed Session - Motion by McCollister, second by Schweikart that the NADC go into Closed Session pursuant to the confidentiality provisions of the NPADA - Roll Call Vote: Commissioners Barry, Brostrom, Gale, Hosford, McCollister, Quandt and Schweikart voted yes. Motion carried (7-0-0).

The NADC went into Closed Session at 10:46 a.m.

The NADC returned to Open Session at 11:20 a.m.

Action on or Announcement of Closed Session matters - Executive Director Daley indicated there were no actions of the Commission to be announced from Closed Session.

Adjournment – Motion by Quandt, second by Barry, that the NADC adjourn. Roll Call Vote: Commissioners Barry, Brostrom, Gale, Hosford, McCollister, Quandt and Schweikart voted yes. Motion carried (7-0-0).

Chairman McCollister declared the meeting adjourned at 11:20 a.m.