



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of **Heath Burnette**, Network Specialist II,
Gaming Control Board,
State of Nevada,

Request for Opinion No. 12-18A

_____ Public Employee. /

OPINION

I. STATEMENT OF THE CASE

Public employee, Heath Burnette ("Burnette"), requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1)¹ regarding the propriety of his anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS"). A quorum² of the Commission heard this matter on May 1, 2012. Burnette appeared telephonically from Las Vegas, and provided sworn testimony.

At the conclusion of the hearing, and after full consideration of the facts, circumstances and testimony presented, the Commission deliberated and orally advised Burnette of its decision that as an employee of the Nevada Gaming Control Board ("Board") he may pursue private employment from an entity regulated by the Board. The Commission now renders this final written Opinion stating its findings of fact and conclusions of law.

The facts in this matter were obtained from documentary and testimonial evidence provided by Burnette. The Commission's findings of fact set forth below accept as true those facts Burnette presented for the purposes of the advice offered in this Opinion. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this Opinion.

¹ Burnette waived confidentiality with respect to this request for opinion.

² The following Commissioners participated in this opinion: Chairman Erik Beyer and Commissioners John Carpenter, Timothy Cory, Gregory J. Gale, Magdalena M. Groover, Paul H. Lambole, James M. Shaw, and Keith A. Weaver.

II. QUESTION PRESENTED

Burnette asks the Commission whether the cooling-off provisions of the Ethics Law require him to wait for one year after leaving the employment of the Board before he could be employed by an entity which the Board regulates.

III. FINDINGS OF FACT

1. In his public capacity, Burnette serves as a Network Specialist II for the Board. Burnette is employed by the Information Technology Department of the Board to conduct computer maintenance, email troubleshooting and help desk service functions for the Board's internal systems. He works only with the Board's internal computer network and email systems to ensure that Board employees can communicate with the Board server and network; he has no interaction with or information concerning other State agencies or any of the Board's licensees other than to ensure that the Board's employees can access necessary information from Board licensees.
2. Burnette's supervisory chain-of-command includes a supervisor, manager and the Chief of Administration (formerly the Chief of Technology).
3. An employment recruitment agency, Dice ("Dice"), solicited Burnette for a job with the Information Technology Department of a private entity, Global Cash Access, Inc. ("GCA"). Burnette maintains his resume and updated job information and interests

in Dice's database for potential employment opportunities.

4. Dice Holdings, Inc. ("Dice Holdings"), is a "provider of specialized career websites for select professional communities . . . to help . . . customers source and hire the most qualified professionals in select and highly skilled occupations, and to help those professionals find the best job opportunities in their respective fields and further their careers." Dice, a Dice Holdings service, is a "career site for technology and engineering professionals . . . enable[ing] employers to reach hard-to-find, experienced and qualified technology and engineering candidates."
See <http://www.diceholdingsinc.com> and <http://media.dice.com>.

5. GCA provides cash access products and related services throughout the gaming industry, including several gaming establishments in Nevada.
6. In 2011, pursuant to NRS Chapter 463, the Nevada Legislature required all "cash access and wagering instrument service providers," to procure a license to operate in the State from the Nevada Gaming Control Board. GCA provides cash access products and services for Nevada gaming establishments and was required to obtain a license from the Board.³ Burnette was not aware

³ Pursuant to NRS 463.01395, a "cash access and wagering instrument service provider" means "a provider of services or devices for use by patrons of licensed gaming establishments to obtain cash or wagering instruments through a variety of automated methods, including, without limitation: 1) Wagering

of these licensing requirements and did not assist the Board in developing any of the laws or regulations regarding such licensure from an information technology perspective. Any information technology input from Board staff would have come from his supervisors or the Chief of Administration.

7. GCA uses an operating system known as "Linux," which is similar to the Microsoft operating system. Very few people in Las Vegas are certified to operate the Linux operating system. Burnette is certified to operate the Linux system and this certification is one of the reasons Dice sought Burnette for the position with GCA.
8. Burnette's anticipated job duties for GCA will include handling the servers that transfer money between the banks and GCA and providing other information technology services; such duties will not include matters or issues under consideration by the Board for purposes of GCA's license or other regulatory compliance or oversight of GCA's license.
9. At the time Dice/GCA solicited Burnette for employment, Burnette was unaware that GCA was an entity which required licensure from the Board. GCA obtained its license in March 2012, about the same time that Burnette was scheduled to interview for the position. Upon learning of its licensure, Burnette told GCA that any employment offer

would need to be contingent on the Commission's opinion regarding any "cooling-off" obligations. GCA offered the position to Burnette and agreed to hold the position open until Burnette received approval from the Commission pursuant to this Opinion.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Burnette serves as a Network Specialist II for the Board, a state agency that regulates the gaming industry. He is contemplating employment with a cash access and wagering instrument service provider in Nevada which was recently licensed by the Board. He questions whether he may accept employment with the provider within the one-year cooling-off period under these circumstances.

In answering this question, the Commission considers: 1) whether NRS 281A.550(3) applies to Burnette's circumstances, and 2) if so, whether the Commission should grant him relief from the strict application of the one-year cooling-off period and allow him to pursue employment with the cash access provider. The Commission also interprets Burnette's obligations or prohibitions regarding representation or counseling pursuant to NRS 281A.410(1)(b).

The "cooling off" provisions of the Ethics Law promote public integrity and transparency in government by discouraging former public employees from compromising their public

instrument issuance and redemption kiosks; or 2) Money transfers through mobile or Internet services.

responsibilities by using opportunity, information, relationships, or experience gathered from public service to benefit them in their private capacity. *See In Re Sheldrew*, RFO No. 00-44 (2000); *In re Roggensack*, RFO No. 06-60 (2006); *In re Public Employee*, RFO No. 11-50A (2011); and *In re Public Employee*, RFO No. 11-96A (2012).

B. RELEVANT STATUTES

1) Public Policy

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.

Burnette is employed by the Board, and he is therefore a public employee who must commit himself to avoid conflicts of interest between his private interests (pursuing private employment by a regulated entity) and those of the general public whom he serves. Nevada's Ethics Law mandates that public officers hold public office for the public benefit and avoid conflicts of interests. The Ethics Law is concerned with situations involving public officers that create appearances of impropriety and conflicts of interest, as well as actual impropriety and conflicts to promote the integrity in public service. As an employee of the Board, Burnette

holds a public position and must therefore commit himself to avoid both actual and perceived conflicts between his private interests and those of the public he serves.

Whether such a conflict would arise between his duties as a Network Specialist II for the Board and his private interests in pursuing employment with a cash access and wagering instrument service provider which the Board regulates must be considered based on his duties and responsibilities for the Board and the public interests that may be implicated if Burnette seeks or accepts private employment from a regulated entity.

Based on the record before the Commission, Burnette sought employment with GCA without knowing it was an entity licensed by the Board and has not accepted employment with GCA or any other Board licensee. The Commission therefore expressly finds that Burnette has not under any circumstances committed any violation of the provisions of the Ethics Law. Our opinion is concerned solely with his anticipated future activities.

2) Cooling Off – Accepting Employment

NRS 281A.550(3) provides:

3. In addition to the prohibitions set forth in subsections 1 and 2, and except as otherwise provided in subsections 4 and 6, a former public officer or employee of a board, commission, department, division or other agency of the Executive Department of State Government, except a clerical

employee, shall not solicit or accept employment from a business or industry whose activities are governed by regulations adopted by the board, commission, department, division or other agency for 1 year after the termination of the former public officer's or employee's service or period of employment if:

(a) The former public officer's or employee's principal duties included the formulation of policy contained in the regulations governing the business or industry;

(b) During the immediately preceding year, the former public officer or employee directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business or industry which might, but for this section, employ the former public officer or employee; or

(c) As a result of the former public officer's or employee's governmental service or employment, the former public officer or employee possesses knowledge of the trade secrets of a direct business competitor.

As a former public employee of the Board (Executive Department of State Government), unless he was deemed a clerical employee, Burnette would be prohibited, for one year after the termination of his public service, from soliciting or accepting employment from any gaming business which is regulated by the Board if, as a public employee, his principle duties included formulating policy contained in the Board's regulations, he directly performed activities, or controlled or influenced an

audit, decision, investigation or other action, which significantly affected the business or industry which might otherwise employ him, or he has obtained trade secrets of a direct business competitor.

As a Network Specialist II for the Board, Burnette's duties include information technology matters related to the Board's internal computer systems. Such duties are not "clerical" in nature. The Commission has not before defined or expressed what types of public positions constitute clerical work. However, the Commission evaluates the nature of a clerical position based on the facts and circumstances presented by the individual's duties. The plain and ordinary meaning of a "clerical employee" means: "one employed to keep records or accounts or to perform general office work." See *Merriam Webster Dictionary*, <http://www.merriam-webster.com/dictionary/clerk> (defining "clerk"). In this case, performing substantive work related to the Board's computer system and network server to ensure that the Board's employees have necessary computer operations and access to the network server does not constitute general office work or record-keeping for the Board. Rather, Burnette is responsible for ensuring that the Board's sole computer network is accessible and useable by the entire Board staff. Accordingly, Burnette is not a clerical employee and the Commission must consider whether his public duties constitute the type of responsibilities that the cooling-off provisions of NRS 281A.550(3) are intended to impose.

Burnette testified that he has no role in developing or influencing policy decisions or recommendations

regarding any regulations adopted by the Board, including matters relating to information technology. Rather, his supervisor and the Chief of Administration make recommendations regarding policy matters affecting the Division to the Board. Burnette also testified that his duties pertain solely to working with other network specialists and employees to maintain the internal computer network system of the Board under the direction of a supervisor. His work does not involve substantive access to or information regarding persons or entities regulated by the Board. Although he testified that he may have access to a licensee's computer or information under limited circumstances, such access is for the sole purpose of ensuring that various Board employees can access that information to perform their duties related to the licensee.

Burnette further stated that his duties as a Network Specialist do not reveal the trade secrets of any company, including GCA. His internal network and computer maintenance duties do not reveal any proprietary information concerning particular regulated businesses or the gaming industry.

While Burnette's duties include neither the formulation of policy in the regulations of the Board (NRS 281A.550(3)(a)) nor reveal trade secrets of any entity or facility regulated by the Board (NRS 281A.550(3)(c)), the Commission also considers whether Burnette's duties to maintain the Board's internal computer network system constitute "directly perform[ing] activities, or control[ing] or influenc[ing] an audit, decision, investigation or other action, which significantly affect[s] the

business or industry [(e.g., regulated gaming entity)]" which might otherwise employ him (NRS 281A.550(3)(b)).

Burnette clarified that maintenance of the Board's internal computer system is conducted with other network specialists and under the direction of various supervisors and internal policies and procedures pursuant to established information technology standards for the Board's unique gaming requirements. In previous cases, the Commission has found that conducting investigations or inspections of licensees under the direction of supervisors did not constitute activities which "significantly affected" a business or industry. See *In Re Wynn*, RFO 10-70A (2010), and *In Re Public Employee*, RFO 11-50A (2011). In this case, Burnette has no interaction with the Board's licensees and his employment activities are limited to internal computer maintenance under the direction of a supervisor.

Further, his duties for the Board's unique internal operating systems do not involve the performance of any activities which impact GCA, or other cash access and wagering instrument service providers licensed by the Board. Therefore, based on the facts presented by Burnette, the Commission finds that Burnette's duties within the immediately preceding year as a Network Specialist II to maintain the Board's internal computer network system do not constitute performance of activities, or the control or influence of an activity, which *significantly affects* a person or entity regulated by the Board or the gaming industry. Accordingly, Burnette's duties do not satisfy the requirements of NRS 281A.550(3) and he is not required to satisfy the one-year

cooling-off period before accepting employment from GCA.

Because Burnette does not satisfy the requirements of NRS 281A.550(3) to impose the cooling-off requirement, the Commission need not address whether relief from the strict application of NRS 281A.550(3) is applicable pursuant to NRS 281A.550(6).

3) Cooling-Off – Representing or Counseling

NRS 281A.410(1)(b) provides, in relevant part:

In addition to the requirements of the code of ethical standards:

1. If a public officer or employee serves in a state agency of the Executive Department or an agency of any county, city or other political subdivision, the public officer or employee: . . .

(b) If the public officer or employee leaves the service of the agency, shall not, for 1 year after leaving the service of the agency, represent or counsel for compensation a private person upon any issue which was under consideration by the agency during the public officer's or employee's service. As used in this paragraph, "issue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

Although *employment* is authorized before the one-year cooling-off period based on Burnette's circumstances, he is nevertheless prohibited from

representing or counseling a person or entity regulated by the Board, or any other private person, upon any issue that was under consideration by the Board during his tenure pursuant to NRS 281A.410(1)(b). The evidence presented confirms that GCA obtained a license from the Board in March 2012 and therefore its initial investigation and licensure was an issue under consideration by the Board during Burnette's employment. See *In re Public Employee*, RFO No. 09-48A (2012) (a matter handled by any of the various divisions of a State agency is considered an issue under consideration by the agency). However, his anticipated duties for GCA will involve only the provision of internal information technology services applicable to GCA, such as the technology services required to ensure cash transactions are available between the banks and GCA.

Recognizing that his private qualifications in information technology extend beyond his unique knowledge of the Board's internal computer network system, Burnette is considering private employment in his field with GCA. If he is employed by GCA, an entity regulated by the Board, Burnette intends to serve the limited technology needs of GCA for the provision of its services, and not the needs of GCA related to its licensure with the Board or to provide GCA with any advantage or insight into the Board's requirements for licensure. He does not intend to represent or counsel GCA on any specific matters that were before the Board during his tenure.

While his intentions and anticipated duties are clear, the Commission nonetheless recognizes that there is a changing dynamic to the information

technology industry in which the technology quickly evolves and demands for knowledgeable, qualified staff become necessary to compete. Regulated entities are often interested in employees who have worked for the licensing agency because of certain skill sets and understanding of regulatory schemes. The Commission therefore advises Burnette to be cautious of unanticipated requests from GCA in the immediate year which seek advice or representation on matters affecting GCA's license from the Board.

The Commission has been consistent in its interpretation of NRS 281A.410(1)(b) prohibiting representation or counseling despite authorization to be employed pursuant to NRS 281A.550(3). *See In re Horky*, RFO 05-23. (former investigator of Gaming Control Board not subject to the employment prohibition of NRS 281A.550(3), but prohibited from representing or counseling a gaming entity or licensee upon an issue under consideration by the Board during his tenure).

In other former opinions, the Commission has elaborated on what actions constitute consulting or representing a private person, and what "issues" may be under consideration by an agency to implicate NRS 281A.410(1)(b). *See In re Public Employee*, RFO No. 09-48A (2012) (serving as independent compliance officer of a regulated business on matters concerning its license constituted advising the entity on issues under consideration by agency and consulting/representing includes rendering advice regarding specific – not general - issues concerning the licensee before the Board). *See also In*

re Public Employee, RFO No. 11-50A (2011) (former public employee authorized to accept employment from regulated entity but prohibited from representing, counseling or advising the entity on any specific issue under consideration by public agency for one year) and *In re Public Employee*, RFO No. 11-96A (2011) (facility's violation of agency inspection constituted issue under consideration by agency and Public Employee was prohibited from representing facility in private capacity regarding that violation).

V. CONCLUSIONS OF LAW

1. Burnette is a "public employee," and his contemplated future conduct would make him a "former public employee" as defined by NRS 281A.160 and 281A.180.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. The "cooling-off" provisions set forth in NRS 281A.550(3) do not prohibit Burnette from accepting employment with GCA, a Board licensee, within one year after his termination from public service with the Board. Burnette's duties are not clerical and do not involve the formulation of policy contained in the regulations of the Board, performance of activities or control or influence over a decision or investigation which significantly affected GCA's licensee or receipt of any trade secrets of a direct business competitor.

4. Although Burnette may accept employment, he may not represent or counsel (i.e., advise) GCA for compensation regarding any specific issue under consideration by the Board (including any division of the Board) while Burnette was employed by the Board.

Dated this 15th day of August, 2012.

NEVADA COMMISSION ON ETHICS

By: Erik Beyer
Erik Beyer
Chairman