STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion Concerning the Conduct of JOHNNY GORUM, City Council Member, City of West Wendover, State of Nevada,

Subject. /

Request for Opinion No.: 09-67C

INVESTIGATOR'S REPORT (Tab A):

Introduction

1. Request for Opinion No. 09-67C (Ethics Complaint). (Tab B):

On September 3, 2009, complainant Scott Weyland filed an Ethics Complaint against public officer Johnny Gorum, a City Council Member of the City of West Wendover, alleging that Gorum violated NRS 281A.420(4)[1] by failing to disclose his commitment in a private capacity to his employer Peppermill Casinos Inc. before he voted on the change to City Code 3-5-4, and NRS 281A.420(2)[2] when he failed to abstain from voting on the same.

2. Jurisdiction:

As a City Council member, no dispute exists that Gorum is a public officer as defined in NRS 281A.160. Therefore, the Nevada Commission on Ethics has jurisdiction to investigate and take appropriate action in this matter pursuant NRS 281A.280 and NRS 281A.440.

[1] The disclosure requirements were revised and moved by the 2009 Legislature to subsection 1 of NRS 281A.420. The applicable statute at the time of the alleged violation was NRS 281A.420(4).

[2] The abstention requirements were revised and moved to subsection 3 of NRS 281A.420 by the 2009 Legislature. The applicable statute at the time of the alleged violation was NRS 281A.420(2).

3. Issues:

The issues are whether Gorum violated:

I. NRS 281A.420(4)[3] by failing to disclose his commitment in a private capacity to his employer, Peppermill Casinos Inc., during the March 3, 2009 meeting before he voted on the change to City Code No. 3-5-4 which was presumed to affect his employer's interests.

II. NRS 281A.420(2)[4] by failing to abstain from voting on the change to City Code No. 3-5-4 during the March 3, 2009 meeting.

III. NRS 281A.420(2) by failing to abstain from voting on the change to the City Code No. 3-5-4 during the March 17, 2009 meeting.

4. Response to the Ethics Complaint. (Tab C):

Gorum's response to the Ethics Complaint was submitted by his legal counsel Gary Di Grazia, Esq. on October 20, 2009. The response admitted that Gorum did not disclose his commitment in a private capacity to his employer, Peppermill Casinos Inc., on March 3, 2009, but that Gorum's failure to disclose was inadvertent. Furthermore, the response indicated that Gorum's employment is widely known in the community, and the legal counsel present at the meeting did not remind him of the need to disclose this fact. (Response, Tab C, page 9, ¶3).

In addition, the response indicated that "after concerns arose with respect to the vote," the matter was placed on the agenda for the March 17, 2009 City Council meeting as "[r]econsideration of decision and vote on March 3, 2009, with respect to Proposed Change to City Code 3-5-4-(D) regarding Non Restricted Gaming Licenses Concerning the Related

[3] See Footnote 1 herein.
[4] See Footnote 2 herein.

Definition and Requirements for “Rural Resort Hotel” and Requirements for Granting Licenses to Permit Nonrestrictive Gaming Operations and Other Matters Appropriately Related Thereto".

Finally, the response indicated that Gorum sought to address his failure to disclose at the prior meeting at his first available opportunity at the March 17, 2009 meeting. The City Council took the matter under reconsideration and Gorum voted only after disclosure. (Exhibit 4, page 47), (Exhibit 7, part II, time : 07:50). Gorum claims that this action remediated his failure to follow the statutory disclosure requirements on March 3, 2009.

Investigation Resources

1. Witnesses interviews and responses. (Tab D):

I interviewed the following individuals and reviewed their responses:

- Gary Lewis, vice president of Peppermill Casinos Inc, West Wendover operations on November 18, 2009. (Telephone conversation only).
- Johnny Gorum, follow-up response to investigator's questionnaire on November 17, 2009. (Exhibit 1).
- Scott Weyland on November 16, 2009. (Exhibit 2).
- Johnny Gorum, response to investigator's questionnaire on November 12, 2009. (Exhibit 3).

2. Documents. (Tab E):

I obtained and reviewed the following documents and materials relevant to the investigation:

- Exhibits received with subjects' responses for cases 09-66C, 09-67C, 09-68C, and 09-69C. (Exhibit 4). (Pages 16 to 52 of each response are identical and are provided in the Panel's exhibit books only once).
- Minutes from March 17, 2009, West Wendover City Council meeting. (Exhibit 4, page 46).
- Minutes from March 3, 2009, West Wendover City Council meeting. (Exhibit 4, page 17).
- Letter from Bill Paganetti, president of Peppermill Casinos Inc., to Donnie Andersen, mayor of the West Wendover, dated March 2, 2009. (Complaint, Tab B, page 3).
- Minutes from January 6, 2009, West Wendover City Council meeting. (Exhibit 5).
- Minutes from June 20, 2006, West Wendover City Council meeting, City ordinance 2006-04, and City Code 3-5-4. (Exhibit 6).
- Video recording of the March 3, 2009, and March 17, 2009, West Wendover City Council meeting. (Exhibit 7).
- Commission's Notice to Subject, Ethics Complaints 09-66C, 09-67C, 09-68C and 09-69C and related correspondence. (Exhibit 8).

3. <u>Relevant Statutes and Commission's Opinions. (Tab F):</u>

- NRS 281A.420[5].
- NRS 281A.480(5).
- NCOE Opinion, <u>In re Salerno</u>, RFO No. 09-21A. (The City Councilman must disclose his business relationship and abstain whenever related matters come before the City Council).
- NCOE Opinion, abstract, RFO No. 02-25. (Public officer was not required to abstain from voting on matters before the regulatory commission relating to the industry-related vocational schools in general.

[5] Statute applicable at the time of the alleged violation. Changes were made by the 2009 legislation and become effective May 28, 2008, therefore after the alleged violation.

- NCOE Opinion, In re Woodbury, RFO No. 99-56. (Whenever a law firm that employs county commissioner's son appears before the county commission, the commissioner must disclose his relationship and determine the need for abstention).
- NCOE Opinion, In re Griffin, RFO No. 98-29. (Public officer who was a mayor and a business owner met exception required for disclosing and abstaining since he would not have benefited any more than any of his competitors).
- Nevada Attorney General opinion, AGO 98-27. (Abstention is only required where there exists objective evidence that a reasonable person in the public official's situation would have his or her independence of judgment materially affected by a commitment in a private capacity to the interests of others).

Investigative Findings

Gorum is a member of the City of West Wendover City Council (City Council), elected in November 2008 with his term expiring in November 2012. (Exhibit 3, ¶ 1). In addition to his City Council position, Gorum is employed as a flight program manager at Rainbow Hotel and Casino in West Wendover, a property owned by Peppermill Casinos Inc. (Exhibit 3, ¶ 2).

After reviewing the evidence, my findings are as follows:

On June 20, 2006 the City Council adopted Ordinance 2006-04 to regulate nonrestricted gaming licenses within the City. The Ordinance was subsequently incorporated as a City Code 3-5-4. Among other requirements, City Code 3-5-4, section D 2(a) requires nonrestricted gaming licensees to make "[a] minimum of one hundred fifty rooms available for sleeping accommodations." (Exhibit 6).

During the last week of February 2009, the agenda posted for the March 3, 2009 regular City Council meeting included an item regarding a proposed revision of City Code 3-5-4 under agenda item #6d. Prior to the March 3, 2009 meeting, Gorum met with Peppermill Casinos Inc.

Vice President Gary Lewis. In my conversation with Lewis on November 18, 2009, Lewis stated that he met shortly with Gorum at Peppermill Casinos Inc. human resources building in West Wendover to discuss the proposed change to the City Code. Both Gorum and Lewis stated that the meeting placed no pressure or made any suggestion as to Gorum's vote on that agenda item. Lewis stated that he had approached Gorum and wanted to give input as a concerned citizen of the community in which he had resided for more than 30 years. Lewis further explained that while the Peppermill welcomes competition, he believes everyone should follow the same rules.

As to any perceived "pressure" from the management of Peppermill, no basis for that perception was discovered in this investigation. In fact, on January 6, 2009, the City Council voted unanimously to impose fines in the amount of $5, 973 on the Rainbow Casino and $6, 101on the Montego Bay Casino for their late payment of room tax. Both properties are owned by the Peppermill Casinos Inc., which employs Gorum and three other members of the City Council. All council members employed by the Peppermill Casinos Inc., including Gorum, disclosed their commitments in a private capacity to their employer; however, they did not abstain, and voted to impose the fines. (Exhibit 5).

At the March 3, 2009 City Council meeting, a local developer, Steve Weinstein, asked the City Council to reconsider the City Code provision because he wanted to build a local casino. Based on the current economic situation, he requested some leniency to allow him to build the required sleeping rooms at a later date. Weinstein offered to pay the room tax on the required rooms even though the rooms would not exist initially. After extensive discussion at the meeting, the Council voted to reject the requested changes to the City Code. None of the Council members made a disclosure before voting. (Exhibit 4, page 19). (Exhibit 7, Part I, time: 1:57:40).

On March 13, 2009, City Attorney Di Grazia issued a confidential memorandum[6] to the City Council advising reconsideration of the March 3, 2009 vote due to "concern that arose with respect to the vote." (Response, Tab C, page 4, line 18). On March 17, 2009, the City Council held the meeting to "cure" the members' failure to disclose.

1. **Allegation one:** On March 3, 2009, Gorum failed to disclose his commitment in a private capacity to his employer Peppermill Casinos Inc. before the vote on the change to City Code 3-5-4.

NRS 281A.420(4) provides:

> A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:
> (a) Regarding which he has accepted a gift or loan;
> (b) ***Which would reasonably be affected by his commitment in a private capacity to the interest of others***; or
> (c) In which he has a pecuniary interest,
> ***Without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered***. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 or any contributions to a legal defense fund that the public officer reported pursuant to NRS 294A.286 in a timely manner. **(Emphasis added).**

A commitment in a private capacity is defined by NRS 281A.420(8) as:

> As used in this section, ***"commitment in a private capacity to the interests of others" means a commitment to a person:***
> (a) Who is a member of his household;
> (b) Who is related to him by blood, adoption, or marriage within the third degree of consanguinity or affinity;
> (c) ***Who employs him or a member of his household***;
> (d) With whom he has a substantial and continuing business relationship; or
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection. **(Emphasis added).**

[6] The confidentiality of said memorandum was waived in Subject's Response received October 19, 2009.

The allegation contends that Gorum failed to disclose his commitment in a private capacity to his employer Peppermill Casinos Inc. before he voted on a change to the City Code 3-5-4. The video recording from the March 3, 2009 City Council meeting provides conclusive evidence supporting the allegation. Gorum voted on the change to the City Code without disclosing his commitment to his employer. (Exhibit 7, Part I, time: 1:57:40).

2. **Allegation two:** On March 3, 2009, Gorum failed to abstain from voting on the change to the City Code 3-5-4.

NRS 281A.420(2) provides:

> Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, ***a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:***
> (a) His acceptance of a gift or loan;
> (b) His pecuniary interest; or
> (c) ***His commitment in a private capacity to the interests of others***.
> It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others. **(Emphasis added).**

As to the allegation that Gorum failed to abstain from voting on the change to the City Code 3-5-4, the video recording of the March 3, 2009 City Council meeting provides conclusive evidence supporting the allegation. Gorum participated in the vote on the change to the City Code. (Exhibit 7, Part I, time: 1:57:40).

3. **Allegation three:** On March 17, 2009, Gorum failed to abstain from voting on the change to City Code 3-5-4.

NRS 281A.420(2) provides:

> Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, ***a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:***
> (a) His acceptance of a gift or loan;
> (b) His pecuniary interest; or
> (c) ***His commitment in a private capacity to the interests of others***.
> It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others. **(Emphasis added).**

On March 17, 2009, the City held a meeting upon the advice of legal counsel Di Grazia. Item "[r]econsideration of decision and vote on March 3, 2009, with respect to Proposed Change to City Code 3-5-4-(D) regarding Non Restricted Gaming Licenses …" was placed on the agenda. The sole purpose of the "reconsideration of decision and vote …" was to remediate the council members' failure to disclose the commitment in a private capacity between Peppermill Casinos Inc., and four of the five Council Members. The matter was reconsidered, and four of the five City Council members including Gorum disclosed their commitments to this employer. However, Gorum did not abstain from the vote. (Exhibit 7, Part I, time: 1:57:40).

In addition to the issues raised in the Complaint, the Commission may need to address whether the disclosure requirement may be "cured" by re-taking a vote after a prior failure to disclose. Should such an act be valid, the Commission's findings regarding the alleged violations may be different.

Dated this 23 day of November 2009.

NEVADA COMMISSION ON ETHICS

Mike Vavra, MPA, Investigator