

Hypothetical Advisory Opinion No. 89-6

BEFORE THE NEVADA COMMISSION ON ETHICS

The subject of this Opinion is whether a voting member of a legislative (governing) body, in this instance a city council, city commission or county commission of a city or county of Nevada, should vote on the issuance of gaming licenses and on increases of gaming machines to licensees within that city or county.

FINDINGS OF FACT

1. The individual (herein referred to as the "Public Official") is a voting member of the legislative (governing) body of a city council, city commission or county commission, of a city or county of Nevada. This Opinion is issued at the request of the Public Official.
2. Approval by the governing body is required for the initial issuance of a gaming license and for the expansion of existing gaming facilities by licensees.
3. The Public Official is employed as the sales manager of a Company which manufactures and sells gaming and roller change machines (hereinafter "Company"). The Public Official receives a salary from the Company, without commissions, which represents about fifty-five percent (55%) of his total annual income. The Public Official spends approximately 25 hours a week working for the Company and 40 hours a week working for the city or county.
4. Other salesmen with the Company are paid salaries plus commissions, and receive approximately the same compensation as the Public Official receives when their salaries and commissions are added together.
5. The Public Official and the rest of the Company's sales staff participate in weekly sales meetings. These meetings are also attended by the Company's service personnel and its research and development staff. The purpose of these meetings is to share information regarding the previous week's sales, prospective sales and particular sales calls, and to discuss the development of potential customers and proposed expansions by existing customers. Sales and market information received at these meetings comes from sales people employed by other gaming manufacturers, casino employees, food delivery people and social contacts, as well as from direct sales activities.
6. Most of the individual accounts on which the Public Official personally calls are in the region outside of the city or county, although some are within the city or county. The Public Official also sells machines to slot operators. During his employment with the Company, the Public Official has been responsible for approximately forty percent (40%) of the Company's sales.
7. The Public Official and the salesmen of the Company assist one another in servicing sales accounts regardless of which salesman is actually assigned to an account, or whether the account is within or outside the city or county. If the Public Official assists another salesman with a sale, he does not receive a portion of the commission.
8. The Public Official's position with the Company requires that he have a full knowledge of the gaming machine sales market, its activity and demand. His primary job responsibility is to increase the sale of the Company's gaming machines. Regardless of whether a specific application before the governing body of the city or county for a gaming license or for an increase in the number of gaming machines involves the Company's machines, the Company nevertheless has an interest in increasing the sales market, because its chances for greater sales volume and a greater share of the market increase each time an application is approved which increases the number of licensed gaming machines.

9. No stock of the Company has been made available for sale to its employees. The Company's sales of gaming machines presently represent a small percent of the market. The Company tries to sell its machines to all gaming-related businesses. It manufactures and sells machines for replacement purposes, as well as for expansions. The opportunity for sales of the Company's machines increases with each casino expansion.
10. The Company has not established quotas for its sales employees, although each salesman has a goal to meet where possible.
11. It is the Company's practice to put slot machines into casinos on a trial basis in order to generate sales. Other companies adhere to the same practice. At the end of the trial period, the manufacturer whose machine is the most profitable and performs the best is awarded the contract to install its machines in the casino. The other manufacturers are asked to remove their machines. When the Company installs machines on a trial basis and the machines produce an increase in revenue, the Company and the casino split the profit.
12. The jurisdiction of the governing body of the city or county for the issuance and revocation of gaming licenses is concurrent with the jurisdiction of the State of Nevada over gaming licenses.
13. Requests by casinos to increase the number of gaming machines, which they are licensed to operate, are a regular item on the governing body's consent agenda. Neither the application form filled out by the applicant nor the agenda disclose the brand of gaming machine for which the license, or its increase, is requested. The only information appearing on the governing body's consent agenda in most cases is the location and number of machines to be installed or added.
14. Because of the Public Official's employment by the Company and the information sharing which takes place at the weekly sales meeting, the Public Official has access to specialized knowledge of the slot machine market and of ending sales.
15. In practice, when the Public Official has known that the Company has already been selected as the vendor by a casino which has requested an increase of gaming machines from the governing body, he has abstained from voting on a requested license increase upon the advice of the city or county attorney.
16. In practice, where the Company has had machines in a casino on a trial basis and the casino has not yet selected a vendor, the Public Official has voted on the application to increase the number of gaming machines by that casino for the reason that he has not known whether the Company eventually will be the successful bidder.
17. Because the Public Official derives approximately fifty-five percent (55%) of his personal income from his employment by the Company and other facts determined in these Findings, he has a significant pecuniary interest in applications for a gaming license, the approval of gaming machines and an increase of the number of gaming machines in the area.

OPINION

Based upon the findings of fact, the Commission concludes that the Public Official is a public officer as defined by NRS 281.4365(1) and that he is a member of the legislative branch of government as defined in NRS 281.4355.

The subject of this Opinion is whether the Public Official should vote on applications for the issuance of gaming licenses and for additional gaming machines in gaming facilities within the city or county. This Opinion was requested by the Public Official and is therefore issued pursuant to NRS 281.511(1).

The Legislative Declaration and Findings which express the public policy of the Nevada Ethics in Government Law

appear at NRS 281.421:

"281.421 Legislative declaration and findings.

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 to avoid conflicts between his private interests and those of the general public whom he serves.

2. The legislature finds that:

- (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.
- (b) 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 roles of persons who are both public servants and private citizens."

Consistent with that policy and the specific provisions of the Code of Ethical Standards (NRS 281.481-281.551, inclusive) the opinions of the Commission may include guidance to the public official pursuant to NRS 281.521(1):

"1. The commission's opinions may include guidance to a public officer or employee on questions of whether:

- (a) A conflict exists between his personal interest and his official duty.
- (b) His official duties involve the use of discretionary judgement whose exercise in the particular matter would have a significant effect upon the disposition of the matter.
- (c) The conflict would materially affect the independence of the judgement of a reasonable person in his situation.
- (d) He possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision.
- (e) It would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter."

1. The findings of fact reflect that the Public Official receives approximately fifty-five percent (55%) of his personal income from his employment by the Company and that he has a significant pecuniary interest in the licensing of new gaming facilities and the expansion of existing gaming facilities within the region of the city or county. The cumulative effect of additional new facilities and expanding facilities is to increase the market in which the Public Official and his employer, the Company, can sell or otherwise place gaming machines, potentially resulting in a greater volume at the same market share or a larger share of the market.

Through his employment with the Company, the Public Official has full knowledge of market activity and demand. His primary responsibility is to increase the placement and sale of the Company's gaming machines in the particular region in which he is employed by the Company, although most of his individual accounts are outside of the city or county. Regardless of whether an application to the governing body for a new gaming license or for additional gaming machines involves the Company's machines, the Company is benefited because the opportunity for additional sales and a greater share of the market increases each time an application for a license or for additional machines is granted, thereby increasing the market for gaming machines within the city or county. The conflict exists whether or not the Public Official is paid a commission on individual sales or whether his employer, the Company, generally benefits by the creation of additional sales market.

The general requirements of the Code of Ethical Standards to guide public officers and employees are provided in NRS 281.481(3), which provides in part:

"3. No public officer or employee may approve, disapprove, vote, abstain from voting, or otherwise act upon any matter in which he has a significant pecuniary interest without disclosing the full nature and extent of his interest. Such disclosure must be made before the time when he is to perform his duty or concurrently with that performance...."

Based upon the fact that the Public Official has a significant pecuniary interest in (1) some, if not all, specific applications for a gaming license or for additional gaming machines, and (2) all such applications to the extent that each enlarges the sales market and all cumulatively define the sales market in which the Public Official and his employer, the Company, may compete to sell gaming machines to gaming licensees within the city or county, the Public Official should disclose the full nature and extent of his interest as provided by NRS 281.481(3).

2. Further, one should not vote upon a matter with respect to which the independence of a reasonable person, as distinct from the independence of the particular person, would be materially affected by his or her pecuniary interest. NRS 281.501(1) provides:

"1. In addition to the general requirements of the code of ethical standards, a member of the legislative branch should not vote upon but may otherwise participate in the consideration of a matter with respect to which the independence of judgement 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." (Emphasis added.)

The pecuniary interest of the Public Official is a "significant pecuniary interest" in the matter before the governing body as found from the facts. It can only be concluded that such an interest would materially affect the independence of judgement of a reasonable person in his or her consideration of the matter.

Accordingly, in addition to making disclosure of such an interest under NRS 281.481(3), the Public Official should abstain from voting pursuant to NRS 281.501(1).

3. NRS 281.501(2) cannot apply where the facts fall within the provisions of both NRS 281.481(3) and NRS 281.501(1). NRS 281.501(2) provides:

"2. A member of the legislative branch may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a business profession, occupation or group, is not greater than that accruing to any other member of the business, profession, occupation or group."

The provision cannot be read to mean that the Public Official can vote (1) even where he has a significant pecuniary interest in the matter; and (2) even where the independence of judgment of a reasonable person would be materially affected by that pecuniary interest, simply because all other gaming machine salesmen and companies ("any other member of the business, profession, occupation or group") would accrue the same benefit as would the Public Official and his employer. To read NRS 281.501(2) otherwise would render NRS 281.481(3) and 281.501(1) nugatory and without meaning.

NRS 281.501(2) is intended to prevent the disqualification from voting of a legislator who may represent a region of his or her state or community, or a general classification of constituents within it, of which he or she may be a member, such as agriculture, retail business, or a profession, and who is similarly affected by the legislation or application before the legislative body.

The permissive language of NRS 281.501(2) allowing the legislator or member of the governing body to vote may apply only where the legislator does not have a significant pecuniary interest under NRS 281.481(3) and where the independence of judgment of a reasonable person would not be materially affected by his or her pecuniary interest in the matter being considered under NRS 281.501(1).

Accordingly, because the Public Official does have a significant pecuniary interest in the matter, and the independence of judgment of a reasonable person in considering the matter would be materially affected by that pecuniary interest, the Public Official is not permitted to vote on the matter by NRS 281.501(2).

4. The Code of Ethical Standards contains a prohibition which, while not in violation, does warrant discussion in this Opinion for the general and future guidance of public officers and employees.

The Legislative Declaration and Findings contained in NRS 281.421 and the purpose of future guidance provided in NRS 281.521 require some discussion of NRS 281.481(2). Specifically, NRS 281.481(2) prohibits the use of public position to secure private advantage:

"2. No public officer or employee may use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person."

The Commission does not find or conclude, and no suggestion is made or inference is invited, that the facts of this matter demonstrate a violation. There is no evidence of a violation.

However, where a public officer has an existing business relationship or reasonably is likely to have a future business relationship with a person who has a matter before the governing body, the public officer can and should avoid the appearance of any improper use of his or her position by the disclosure and abstention from voting discussed elsewhere in this Opinion.

It should be recognized and remembered that a public position as a practical matter may work to provide commercial entry for private business, for the general reason that the businessman may have interests which come before a governing body for decision. The public perception quickly arises that an existing or likely future private business relationship between the public officer as a private person and a businessman who appears before the public officer involves a quid pro quo. The quid pro quo is perceived as private business for the public officer on the one hand in exchange for the influence of the public officer's decision on the other.

Of course, should the foregoing be the fact of the matter, then the facts would constitute the use of public position to secure a private advantage as prohibited by NRS 281.481(2). The only curative measure available is the public disclosure and abstention from voting earlier discussed.

Legalized gaming in Nevada is a unique industry, in which the gaming license to participate is a privilege, as is no other occupational license. The authority of a city council, a city commission or a county commission may be similar to that of the State of Nevada in granting a gaming license or granting its expansion. Decisions to deny or to condition the gaming license involve criteria which are at times subjective, wholly unlike the issuance of any ordinary business license or the decisions made upon many issues to come before a governing body.

Accordingly, for the guidance of public officers who find themselves in such private circumstances, the Commission advises that public officers use the avenues of public disclosure and abstention from voting to avoid a violation of NRS 281.481(2) and to adhere to the public policy declared and found by the Legislature in NRS 281.421 which, among other things, provides:

"2. The legislature finds that:

.....

(b) To enhance the peoples faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show that appropriate separation between the roles of persons who are both public servants and private citizens."

Dated: December 19, 1989

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R.C. WILSON, Chairman