

## Abstract of Opinion No. 90-4

### BEFORE THE NEVADA COMMISSION ON ETHICS

This opinion is in response to the request of a regulatory commissioner. The commissioner also serves as the executive director of the regulatory commission. There are several questions posed by the opinion request, and each will be addressed in separate sections.

This matter came before the Ethics Commission, sitting in executive session, at which time the Commission heard testimony from the commissioner. The Commission thereafter deliberated in executive session that same day.

Based upon the foregoing, the Commission makes these Findings of Fact and issues the opinion that follows.<sup>[1]</sup>

#### FINDINGS OF FACT

1. The commissioner is a governor-appointed member of the regulatory commission. The commission appointed her executive director and pays her a salary of \$47,000 for her full-time activities in that capacity. She currently is on leave without pay status in her position as executive director. This leave without pay status is a result of a current lack of funding for the commission. When she returns to full-time status with the commission in her capacity as executive director, the amount she earns will be a principal source of income for her household.

2. The commission regulates a specific industry in Nevada. The commission contracts for the services of those individuals who assist the commission with the regulation of these facilities.

3. The employees who will work in a specific area will be full-time employees of the commission. Some will serve in the classified service of the state and others will serve in the unclassified service of the state. Currently there are 22 employees of the commission. The commission sets the salaries for the unclassified employees of the commission, and recommends the classified employee salaries to the legislature. The majority of these employees are on leave without pay status with the state due to a lack of funding.

Beginning in September 1991, a specific facility will operate in rural Nevada. The owner or owners of the facility must be licensed by the commission. All employees of the facility must be issued work cards by the commission in order to obtain employment at the facility. Employees of the commission will work on-site at the facility to ensure compliance with the statutes and regulations governing the industry in Nevada.

The licensing of individuals to run facilities such as the one which will operate in rural Nevada, is an extensive process, which requires an in-depth background investigation of the licensure applicant. Further, the commission is a member of a regulatory association. This organization has a computer network which assists the individual member commissions with the background investigation necessary prior to licensure.

The licensing of individuals by the commission is an administrative function carried out by the senior steward. If a license is denied by the senior steward, it may be appealed to the commission.

4. The Nevada commission works in conjunction with another regulatory board in regulation of the facilities in Nevada. This other regulatory board oversees the operation of all aspects of a sister agency at the facilities. The commission regulates owners and operators, and regulates all individuals who are employed by any facility.

5. The commission is funded through a 3 percent regulatory fee that is imposed on the profits of the facility.

6. The proposed facility in rural Nevada is the only for-profit facility currently proposed in Nevada. It is currently

under construction and is estimated to be completed in 1991. The track would require many employees of the commission to be on-site at the facility.

7. As executive director, the commissioner is responsible for the oversight employees of the commission at the facility. The commissioner will have greater contact with employees and owners of the facility than would any other member of the commission.

8. The commissioner's son-in-law, who is not living with her or receiving any financial support from her, is a gaming device sales representative. His sales district encompasses the area in which the greyhound racing facility is located. He desires to bid on the contract for gaming devices at the facility.

9. The commissioner's brother, who is not living with her or receiving any financial support from her, is applying for the food and beverage manager position at the facility. In order for him to obtain this position, he must be licensed by the commission. The commissioner and her brother have no current business relationships.

10. The commissioner's daughter, who is not living with her, or receiving any financial support from her, works for an interior design firm who may obtain the contract for the interior design work at the facility. The interior design work will be accomplished prior to the opening of the facility.

## **OPINION**

### **I. Generally**

Based on the Findings of Fact, the Commission concludes that the commissioner is a public officer in her capacity as a commissioner, as well as in her capacity of executive director of the commission, as defined by NRS 281.4365(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 interest.
- (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 281.481-281.511, inclusive), the opinions of the Commission may include guidance to the public official pursuant to NRS 281.521(1):

1. The commission's opinion may include guidance to a public office 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 judgment 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 judgment 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.

## **II. Disclosure**

The standards to which public officers and employees must conform their conduct to are found at NRS 281.501(3).

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 the full nature and extent of the gift, loan, commitment or interest. 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.

## **III. Abstention**

Additional standards govern the conduct of members of the legislative branch when performing a legislative function. NRS 281.501(2) states:

In addition to the general requirements of the code of ethical standards, a member of the legislative branch shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of the 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 interest of others.

It must be presumed that the independence of judgment of a reasonable person would be materially affected by his pecuniary interest where the resulting benefit or detriment accruing to him is not greater than that accruing to any other member of the general business, profession, occupation or group.

The foregoing standards raise the question of whether a reasonable person's independence of judgment would be materially affected.

## **QUESTION 1**

"Due to my position as a commissioner/director, I will be spending a great deal of time at

the facility. Is it proper to allow the track to buy my dinner if the occasion arises?"

NRS 281.481 states in pertinent parts:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument, or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.
2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions, or advantages for himself, any member of household, any business entity in which he has a significant pecuniary interest, or any other person.

The commissioner has advised the commission that she will frequently be present at the facility as part of her duties as executive director of the commission. She must oversee commission employees who are actively engaged in the regulation of the activities of the facility. The commission may have as many as 22 employees present at the facility at anyone time.

Complimentary meals, shows and event tickets are given to Nevada's public officers. The complimentary benefits are offered and given simply because one is a public officer. The acceptance of such gifts in a regulatory setting poses a quandary for the public officer. As the practice continues, so does the quandary of that officer. The public officer feels the pressure to accept; it may be expected of his or her position to attend events, and attendance may be perceived as "politically" necessary. The expense, of course, is a burden.

The practice described above is characterized more by shades of gray than of black or white, so guidance from the Ethics Commission was requested concerning the provisions of NRS 281.481 and of (i) what may one accept which would not "tend improperly to influence...." (NRS 281.481(1)), and (ii) when is acceptance a "use [of] his position in government to secure...unwarranted privileges....(NRS 281.481(2)).

NRS 281.481(1) prohibits the seeking or acceptance of "any gift...which would tend improperly to influence..." That requires a relationship of cause and effect between the gift, or gifts cumulatively, and the resulting influence which is a question of fact. That the relationship may not exist is more likely in the general circumstances of a public officer who receives complimentary tickets or meals or other benefits only occasionally and then from a variety of sources. Where a public officer is a regulator and such gifts are from a person or entity subject to such regulation, however, the relationship between the gift(s) and a resulting influence is direct and more apt to "tend improperly to influence a reasonable person in his position....Depending upon the frequency of the gift(s), the cumulative effect of complimentary meals from the race track regulated by the commission and executive director may so "tend improperly to influence." Where the issue of what may "tend improperly to influence" lies directly between the regulator and the regulated, absent other facts, it must be assumed that a pattern of such gifts would tend improperly to influence.

NRS 281.481(2) prohibits the "use [of] his position in government to secure...unwarranted privileges, preferences, exemptions, or advantages...." This provision raises to specific issues: (i) Whether a position of a public officer warrants any "privileges, preferences, exemptions, or advantages" and, (ii) Whether such "privileges, preferences, exemptions, or advantages" are offered simply because of the position in government" held by the public officer and, if accepted, are therefore secured by the "use of his position in government."

**(i) Whether any privilege, etc. is warranted.**

It would seem that public office or position should warrant no privilege, preference, exemption or advantage. The

legislative intent as to what are warranted or "unwarranted privileges, preferences, exemptions, or advantages" is not possible to determine if one starts from the premise that public office or position warrants no privilege whatsoever. The prohibition against only those privileges which are "unwarranted" suggests legislative intent that certain privileges are warranted. The statutory provision, however, does not suggest how one must somehow distinguish between those which are warranted and those which are not.

If we are to look to customs and practices, perhaps such "privileges," as are generally and customarily given are warranted if given commonly and without discrimination to public officers and without regard to any particular governmental jurisdiction, policy, decision, act or vote. That is, if complimentary meals, beverages and event tickets are given commonly to all public officers, perhaps NRS 281.481(2) was intended by the Legislature to mean that such are warranted.

That cannot be said, however, of the direct and specific relationship between the regulator and the person or entity regulated. Such complimentary meals or "privileges, preferences, exemptions (from payment) or advantages" are not warranted in view of the relationship between the gift and the ongoing regulatory jurisdiction of the commission and its executive director over the donor of the privilege.

**(ii) Whether the acceptance of privilege, etc. constitutes the use of a position in government to obtain the privilege.**

The public officer or employee's use of "position in government to secure...privileges, preferences, exemption or advantages...", suggests an overt act of using position to obtain it. That would seem to mean that if the privilege is not requested or otherwise sought, but instead is merely offered by another because of the "position in government" he or she holds, its mere acceptance by the public officer does not constitute his or her use of "his position in government" to obtain the privilege. Such may be legislative intent if limited to the occasional complimentary privilege from unrelated sources. If the privilege, preference, exemption, or advantage is offered to a public officer or employee who will perform some particular governmental policy, decision, act or vote which directly affects the donor, then the acceptance of the offered privilege which is offered solely because of his or her position in government would seem to constitute the use of that position to secure the privilege itself.

This would seem clearly to be the case where the privilege, preference, exemption or advantage is offered by the regulated party to the regulator because of his or her position in government and the regulatory jurisdiction exercised over the regulated" party. Accordingly, the acceptance of such a gift or privilege from a regulated party by the public officer or employee who is a regulator, constitutes a use of his or her position in government to secure the gift or privilege, and is prohibited by NRS 281.481(2). [2]

## QUESTION 2

"My son-in-law works for a gaming device company, and they are attempting to get their machines in the facility, and it is his account. Should this concern me?"

The commissioner's son-in-law is not licensed or regulated by the commission, nor is he in any direct business relationship with the commissioner. What he does have is a personal relationship with the commissioner. Whether this personal relationship gives rise to any implications within the provisions of the Ethics in Government chapter is the question before the commission.

First and foremost, it is clear from the facts presented that neither the commission nor its executive director in any way regulates the distributor of gaming devices at the facility. This regulatory authority rests solely with the Gaming Control Board, as does the ability to regulate the owner/operator of any gaming device installed at the facility. The commission works with the Gaming Control Board in regulating the owner/operator of the gaming devices placed at

the facility if that person is also the owner or operator of the facility. It is not clear who will have that position at the facility.

The commissioner's son-in-law is the agent for the gaming device company, one of several vendors who will compete as distributors of gaming devices for the opportunity to sell or lease their machines to the operator at the facility. There is no opportunity for the commissioner, in a direct manner, to control the outcome of the process by which the vendor of the devices will be selected. Thus, the Ethics in Government chapter is not affected. The commissioner is again cautioned however, due to the fact that she may exert influence over the selection of her son-in-law as the vendor simply by virtue of her position as the regulator of the person who will be selecting that vendor. The commission does not assume that the commissioner would use her position in such a manner, but NRS 281.481(2) prohibits a public officer from using his position in government to secure unwarranted privileges for any person. Viewing this matter entirely from an appearance perspective, the commissioner should exercise caution. This provision of the opinion should not be construed to assume that such activity would occur but, the ability or opportunity is nevertheless available, and such opportunity carries with it the potential appearance of impropriety. If in fact such influence was exerted, it would be improper. As with all public offices, the commissioner must protect the public trust as charged by NRS 281.421.

### **QUESTION 3**

"My daughter works for a commercial design firm, and they are interested in bidding for the interior job. She could possibly handle the account. Is this a problem?"

The discussion set forth under question 2 applies equally to the discussion of this question. The commissioner's daughter works for a potential vendor of services to the owner/operator of the facility. The services to be performed by the interior design firm will be completed by the time the facility is open for business. The commission does not regulate the interior design of the facility. At most, the opportunity exists for the commissioner to use her position to influence the selection of the vendor. Again, the Commission does not presume that such opportunity will be exercised, nevertheless the commissioner should use prudence in protecting the public interest that has been entrusted to her and not involve herself in any such decision-making process.

The commission specifically recognizes that it has no control over the decisions of individuals who currently are not public officers or employees. The commissioner cannot be restricted in the discharge of her duties by the business opportunities which present themselves to members of her family. Both her son-in-law and her daughter are entitled to pursue the opportunities which come to them in the normal course of their day-to-day business. The commissioner is not involved in the business dealings or opportunities available to her children. She exerts no regulatory control over the awarding of the contracts regarding gaming devices or interior design. That decision is solely one for the owner/operator of the facility.

### **QUESTION 4**

"My brother is a food and beverage manager, and is applying for the position at the facility. If he is selected for the position, would this be a problem?"

The food and beverage manager for the owner/operator of the facility is a position which would require licensure by the commission. This licensure is accomplished at the staff level by a senior employee, an employee of the commissioner's in her capacity as the executive director of the commission. If a license application is denied by the senior employee, it may be appealed to the full commission. Thus the commissioner is involved both at the administrative level, by having direct supervisory control of the senior employee as executive director, and as a commissioner, should a license denial be appealed.

NRS 281.481(2) advises that no public officer may use his position in government to secure or grant unwarranted privileges for himself, or any member of his household or a business in which he has a significant pecuniary interest, or any other person. "Household" is defined in NRS 281.434 as an association of persons who live in the same home or dwelling, sharing its expenses, and who are related by blood, adoption, or marriage. The commissioner and her brother do not reside in the same home or dwelling, nor do they share expenses for a home or dwelling. As related above, they have no business relationship in either.

NRS 281.501(3) requires disclosure by a public officer in three instances if a matter is pending before him or her for any action. If a public officer has received a gift or loan relating to the matter; if the officer is committed in a private capacity to the interest of another or if the officer has a pecuniary interest with respect to the matter, the officer must disclose the full nature and extent of the gift, commitment or interest. In the present inquiry, the commissioner has not related any facts which would indicate she has accepted any gift or loan from her brother respecting this matter, nor does she have any personal pecuniary interest in the matter. She has a personal relationship with her brother by virtue of their membership in the same family.

A filial relationship, analyzed in the context of the facts present gives rise to a commitment in a private capacity to the interest of another, namely her brother. Thus, the commissioner must disclose to her fellow commissioners that she has this interest when the matter is being considered by the senior steward, as the commission is also her employer as well as if the matter ever comes before the commission on an appeal basis, as a member of the commission.

Additionally, should the application of the commissioner's brother come before the commission on an appeal basis, the provisions of NRS 281.501 must be reviewed for its impact on her ability to consider the matter. NRS 281.501(c) states that a member of the legislative branch may not vote upon 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 "(h)is commitment in a private capacity to the interest of others."

In this instance, it cannot be said that the commissioner is not interested in her brother's welfare. It is reasonable to conclude that the blood relationship of a brother and sister creates a commitment in a private capacity to the interest of another and as such the independence of judgment of the reasonable man in her situation would be materially affected. The commissioner should abstain from any consideration of her brother's application for license and should recuse herself from any oversight and regulation of him as a licensee of the commission should he obtain the employment he is seeking with the greyhound racing facility and indeed becomes a licensee of the commission.

## QUESTION 5

"To my knowledge, none of our commissioners have ever completed a disclosure statement. Do we need to?"

NRS 281.561, in part, requires a public officer who holds an appointive office shall file statements of financial disclosure:

3. Every public or judicial officer, whether appointed or elected, shall file a statement of financial disclosure each year of the term, including the year the term expires, on or before the anniversary of his appointment or election to that office.
4. A public or judicial officer who leaves office on a date other than the expiration of his term or anniversary of his appointment or election, shall file a statement of financial disclosure within 60 days after leaving office. A statement filed pursuant to one of the subsections of this section may be used to satisfy the requirements of another subsection if the initial statement was filed within 3 months before the other statement is required to be filed. The public or judicial officer shall notify the commission in writing of his intention

to use the previously filed statement to fulfill the present requirement.

A public officer is defined at NRS 281.4365 as a person elected or appointed to a position which is established by the constitution of the state of Nevada, a statute of this state or an ordinance of any of its counties, or incorporated cities and which involves the exercise of a public power, trust or duty. Because the commission regulates a particular activity in the state, it discharges a public duty within the meaning of this statute, and therefore the commissioners are required to file statements of financial disclosure in accordance with NRS 281.561.

DATED: November 17, 1991.

NEVADA COMMISSION ON ETHICS

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

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[1] This opinion is limited to the facts presented. Given other facts the opinion of the commission could differ.

[2] See footnote 1.