

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion of
SARAH FERGUSON, Field Agent, Nevada Gaming Control Board

This opinion is in response to an opinion request by Sarah Ferguson who, at the time of the request was employed as a field agent for the Nevada State Gaming Control Board (Board). The issue in this matter is whether Ms. Ferguson is prohibited from obtaining employment as an internal auditor by the Riviera Hotel in Las Vegas, a business regulated by the Board, until one year after termination of her service or period of employment with the Board.

This matter came before the Commission for a hearing on the merits of the opinion request on March 20, 1995. The hearing was held by telephonic communication between the offices of Chairman, Thomas R. C. Wilson, in Reno, Nevada and Vice-Chairman William Morris in Las Vegas, Nevada. Ms. Ferguson and Mr. William Bible, Chairman of the Gaming Control Board were present in Vice-Chairman Morris' office in Las Vegas and testified in the matter. The opinion request and hearing were confidential pursuant to NRS 281.511(4), and accordingly, the hearing was not open to the public.

The Commission deliberated immediately after the hearing and orally advised Ms. Ferguson of its decision in the matter. Thereafter, confidentiality was waived by Ms. Ferguson. The Commission incorporates its oral decision into the following findings and issues the following opinion:

FINDINGS OF FACT

1. The State Gaming Control Board and the Nevada Gaming Commission has statutory authority to administer state gaming licenses for the protection of the public and in the public interest. NRS 463.140(1). Their powers include: inspection and examination of all premises, equipment, and supplies wherein gaming is conducted or gambling devices or equipment are manufactured, sold, or distributed; the authority to access, inspect and audit all papers, books and records of any applicant or licensee, respecting the gross income produced by any gaming business, and require verification of income; and the authority to investigate for the purposes of prosecution, any suspected violations of gaming laws, or other related legal authority NRS 463.140(2) and (3).
2. Pursuant to NRS 463.080(1)(a), the State Gaming Control Board, with the approval of the Nevada Gaming Commission, may establish, and from time to time alter, a plan of organization as it may deem expedient. The Board is presently organized into seven divisional units: Administration, Audit, Investigations, Corporate Securities, Electronic, Enforcement, and Tax & License. Personnel positions are funded from one general budget account and are transferred from one division to another as the need arises. All agents of the Board are paid at the same salary levels regardless of their divisional assignments, although unclassified personnel salaries are pay-coded by divisions. The Board has developed job descriptions which are specific to the jobs in each of the divisions. If the organizational structure changes, the job descriptions are amended. When a position becomes vacant, recruitment for applicants is specific to the affected division.
3. Regulation 6.020 of the Nevada Gaming Commission and State Gaming Control Board provides the following:
 1. The board shall organize and maintain an audit division and a tax and license division whose authority it shall be:
 - (a) To conduct periodic audits or reviews of the books and records of nonrestricted licensees;

- (b) To review the accounting methods and procedures used by licensees;
 - (c) To review and observe methods and procedures used by licensees to count and handle cash, chips, tokens, negotiable instruments, and credit instruments;
 - (d) To examine the licensees' records and procedures in extending credit, and to confirm with gaming patrons the existence of an amount of debt and any settlement thereof, unless the licensee requests that the debt or settlement not be confirmed;
 - (e) To examine and review licensees' internal control procedures;
 - (f) To examine all accounting and bookkeeping records and ledger accounts of the licensee or a person controlling, controlled by, or under common control with the licensee;
 - (g) To examine the books and records of any licensee when conditions indicate the need for such action or upon the request of the chairman or the commission; and
 - (h) To investigate each licensee's compliance with the Gaming Control Act and the regulations of the commission.
2. The audit division shall conduct each audit in conformity with the statements on auditing standards. The audit division shall prepare an appropriate report at the conclusion of each audit and shall submit a copy of the report to the board.
3. At the conclusion of each audit, the audit division shall review the results of the audit with the licensee. The licensee may, within 10 days of the review, submit written reasons why the results of the audit should not be accepted. The board shall consider the submission prior to its determination.
4. When the audit division or tax and license division finds that the licensee is required to pay additional fees and taxes or finds that the licensee is entitled to a refund of fees and taxes, it shall report its findings, and the legal basis upon which the findings are made, to the board and to the licensee in sufficient detail to enable the board to determine if an assessment or refund is required. [Emphasis added.]

4. In August, 1985, Ms. Ferguson was hired as an audit agent in the Las Vegas Audit Division of the State Gaming Control Board. Ms. Ferguson's duties were primarily to review licensees' internal control procedures to track and report gaming revenue. Ms. Ferguson would, on occasion, perform on-site verification of the number of slot machines at a selected sample of restricted licensees.

5. In October, 1993, Ms. Ferguson was transferred to the Tax and License Division of the Board where she worked as a field agent. In this capacity, from October, 1993, through February, 1995, Ms. Ferguson reviewed industry letters of comment related to the proposed Minimum Internal Control Procedures for Group III gaming licensees and made suggestions to the Board related to those responses. A Group III license is defined in Regulation 6.010(6) of the Nevada Gaming Commission and State Gaming Control Board as either: (a) A nonrestricted licensee having gross revenue of less than \$1 million for the 12 months ending on June 30th each year; or (b) A nonrestricted licensee, whose operation consists primarily of a race book or sports pool or both, that accepts less than \$10 million in wagers during the 12 months ending on June 30th each year.

6. Ms. Ferguson did not personally direct any audits or participate on an audit team in either of her positions with the State Gaming Control Board. She neither directed nor was involved in any audit of the Riviera Hotel. Ms. Ferguson was not involved and she did not participate in any decisions or actions which had a significant affect on the Riviera Hotel.

7. On March 8, 1995, Ms. Ferguson tendered her resignation from the Tax and License Division of the Board to

become the Internal Auditor with the Riviera Hotel in Las Vegas on March 27, 1995.

8. Ms. Ferguson's anticipated duties as Internal Auditor consist primarily of review and implementation of internal control procedures for the Riviera Hotel as prescribed by the Minimum Internal Control Standards for Group I and II licensees under Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board.

The Riviera Hotel holds a Group I gaming license issued by the state pursuant to chapter 463 of the NRS, and is regulated by the State Gaming Control Board.

A Group I license is defined in Regulation 6.010(4) as either: (a) A nonrestricted licensee having gross revenue of \$3 million or more for the 12 months ended June 30th each year; or (b) a nonrestricted licensee, whose operation consists primarily of a race book or sports pool or both, that accepts \$50 million or more in wagers during the 12 months ended June 30th each year.

A Group II license is defined in Regulation 6.010(5) as either: (a) A nonrestricted licensee having gross revenue of \$1 million or more but less than \$3 million for the 12 months ended June 30th each year; or (b) A nonrestricted licensee, whose operation consists primarily of a race book or sports pool or both, that accepts \$10 million or more but less than \$50 million in wagers during the 12 months ended June 30th each year.

9. Ms. Ferguson does not possess any knowledge of gaming industry trade secrets, be they those of a business competitor of the Riviera Hotel, or otherwise.

OPINION

Based on these Findings the Commission concludes that Ms. Ferguson was a public employee as defined by NRS 281.436 at the time she submitted her opinion request to the Commission.

The Commission has jurisdiction over this matter pursuant to NRS 281.511(1).

The issue in this opinion is whether, pursuant to NRS 281.236(3), the "cooling off" statute, Ms. Ferguson, who was has resigned from her position as field agent in the Tax and License Division of the Gaming Control Board (Board), was prohibited from commencing employment as an internal auditor by the Riviera Hotel in Las Vegas, until one year following her resignation from the Board. Ms. Ferguson additionally requested the Commission, should it determine the statute is generally applicable, to waive strict application of its provisions in accordance with NRS 281.436(4).

NRS 281.236 provides in pertinent part as follows:

3. In addition to the prohibitions set forth in subsections 1 and 2, a business or industry whose activities are governed by regulations adopted by a department, division or other agency of the executive branch of government shall not, except as otherwise provided in subsection 4, employ a former public officer or employee of the agency, except a clerical employee, for 1 year after the termination of his service or period of employment if:

(a) His principal duties included the formulation of policy contained in the regulations governing the business or industry;

(b) During the immediately preceding year he 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 him; or

(c) as a result of his governmental service or employment, he possesses knowledge of the trade secrets of a direct business competitor.

4. A public officer or employee may request the commission on ethics to apply the relevant facts to his case to the provisions of subsection 3 and determine whether relief from the strict application of the provisions is proper. If the commission on ethics determines that relief from the strict application of the provisions of subsection 3 is not contrary to:

(a) The best interests of the public;

(b) The continued integrity of state government; and

(c) The code of ethical standards prescribed in NRS 281.481, it may issue an order to that effect and grant such relief...

The application of the prohibition of the foregoing statute is restricted by a "grandfather clause", which provides the following:

The provisions of subsection 3 of [NRS 281.236] do not apply to the service or employment of a public officer or employee who is serving or is employed by an agency, division or department of the executive branch of government on July 12, 1993, or was such an officer or employee before July 12, 1993, unless on or after that date, that person is appointed to serve as an officer or retained as an employee of another agency, division or department of the executive branch of government for which subsequent employment is restricted pursuant to subsection 3 of [NRS 281.236(3)]. See Reviser's Notes to NRS 281.236; [Emphasis added.]

Ms. Ferguson was employed as an auditor in the Auditing Division of the State Gaming Control Board in August 1985, prior to the effective date of the 1993 Act amending the NRS 281.236. In October 1993, Ms. Ferguson was transferred to the Tax & License Division of the Board, to act in the position as field agent. The grandfather clause is not applicable to a "...person who is...retained as an employee of another agency, division or department..." on or after July 12, 1993 (emphasis added). The question is therefore, whether, despite her initial employment by the Board prior to July 12, 1993, her transfer to the Tax & License Division in October, 1993, constituted service or retention by another division of the Board thereby rendering the grandfather clause inapplicable to barring application of the provisions of subsection 3 of NRS 281.236 to Ms. Ferguson's situation.

The statutory authority at NRS 463.080(1)(a) governing the organization of the State Gaming Control Board, gaming regulations and job duties required of Ms. Ferguson in her respective positions as audit agent in the Audit Division, and Field Agent in the Tax & License Division, reveals that these "divisions" of the Board were designed in its discretion to serve as administrative working units rather than separate, independent, insulated entities whose powers and duties are statutorily segregated and identified.

Unlike departments such as the Department of Commerce or the Department of Human Resources, the Nevada legislature did not mandate the manner in which the State Gaming Control Board must be structured. NRS 463.080(1)(a) provides that "the State Gaming Control Board, with the approval of the commission [the Nevada Gaming Commission] may establish, and from time to time alter, such a plan of organization as it may deem expedient." (Emphasis added.) Moreover, as far as the Gaming Control Board is structured, not only is there an overlapping of functions engaged in by Ms. Ferguson as a result of her, albeit, separately-identified job descriptions in the Audit, and Tax & License Divisions of the Board, but both administrative divisions are mandated with the authority to conduct audits and reviews and examine and review licensees' internal control procedures and books and records, in addition to investigating each licensee's compliance with the Gaming Control Act (NRS 463.010 et seq.).

Although Ms. Ferguson was employed by different administrative divisions of the State Gaming Control Board, the discretionary manner in which they are organized permitted her to transfer from one to another without rendering inapplicable the exception to the provisions of NRS 281.236(3) under the statute's grandfather clause. However, even were the exception to NRS 281.236(3) inapplicable to Ms. Ferguson's job duties with the Gaming Control Board these duties were not such that activities she performed or knowledge she acquired during that time which would bar the Riviera Hotel from employing Ms. Ferguson immediately pursuant to the provisions of NRS 281.236(a) (b) and (c), rather than waiting for one year "cooling off period" from resignation from her current employment.

Specifically, Ms. Ferguson's principle duties as an audit agent in the Audit Division of the Board did not include the formulation of regulatory policy governing the gaming business or industry within the meaning of NRS 281.236(3)(a). The extent of her policy input during her tenure as field agent in the Tax & License Division was limited to suggestions made in response to her review of industry letters of comment related to proposed minimum control procedures for Group III licensees, a category of licensees which does not include the Riviera Hotel.

The prohibitive language of NRS 281.236(b) does not preclude Ms. Ferguson from accepting employment with the Riviera Hotel. Ms. Ferguson's transfer to the Tax & License Division in October 1993, did not result in Ms. Ferguson directly performing activities, nor did she control or was she allowed to influence any audit, decision, investigation, or other action, which at all affected the Riviera Hotel or the gaming business or industry generally. Ms. Ferguson has not been involved in any investigations beyond the normal questions related to a minimal revenue review process for a Group III license. The Riviera Hotel is licensed under Class I requirements.

NRS 281.236(c) is inapplicable to Ms. Ferguson's circumstances, because she does not possess knowledge of the trade secrets of any direct business competitor of the Riviera Hotel as a result of her governmental employment.

The Commission concludes that the provisions of NRS 281.236(3) do not apply to Ms. Ferguson on the facts of her employment by the Board and does not meet any of the prerequisites, however, the grandfather clause provisions (NRS 281.236) apply in her circumstances of the one-year employment prohibition. For both reasons, it is not necessary for the Commission to determine whether circumstances exist such that relief from strict application of the provisions is proper within the meaning of NRS 281.231(4).

CONCLUSION

Sarah Ferguson would not violate the provisions of NRS 281.236 by commencing employment at the Riviera Hotel on any date she desires. NRS 281.236(3) does not require a one-year delay in Ms. Ferguson's employment as internal auditor at the Riviera Hotel because:

1. As to Ms. Ferguson, the grandfather clause to NRS 281.236(3) operates to bar applicability of the statute's one-year "cooling-off" requirement; and
2. None of Ms. Ferguson's employment activities with the Board fell within the duties, activities, or knowledge of the industry by a former public employee, which would under the provisions of NRS 281.236(a)(b) and (c) prohibit her employment by the Riviera Hotel until one year after termination of her employment with the Board.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific facts and circumstances. The provisions of NRS 281.236 quoted and discussed above must be applied on a case-by-case basis, the results of which may vary depending on the specific facts and circumstances involved.

DATED: August 9, 1995.

NEVADA COMMISSION ON ETHICS

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