

Abstract of Advisory Opinion No. 95-61

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Advisory Opinion of former Public Officer

This Opinion is in response to a first-party opinion request filed with the Nevada Commission on Ethics (NCOE) by Requester, who, effective January 1, 1996, resigned from his position as Education and Information Director of an agency of the State of Nevada to accept employment as the administrator of a School.

The issue presented is whether the "cooling-off" statute (NRS 281.236) prohibits Requester from commencing his new employment for one year following termination of his public employment, and, if so, whether circumstances exist to provide relief from the strict application of NRS 281.236. At the time Requester submitted his request for an opinion, he had not commenced his new employment, however, he subsequently decided to begin his new employment without compensation, pending the Commission's ruling.

A hearing on the opinion request was held on February 16, 1996, in Las Vegas, Nevada. Requester appeared and presented testimony. He did not waive statutory confidentiality and the proceeding was therefore not open to the public.

Based on the foregoing, the NCOE makes the following Findings of Fact, Conclusions of Law, and Opinion.

FINDINGS OF FACT

1. The Requester's employing Division (Division) of the Nevada Department is authorized by NRS to administer the law governing the same subject matter of which the Requester anticipates administering at the school. Pursuant to NRS, a Commission is mandated to act in an advisory capacity to the Division, adopting regulations and conducting hearings on those related matters.
2. NRS [omitted] provides that the Division, with the approval of the Commission, shall:
 1. Adopt reasonable regulations defining what constitutes:
 - (a) A course of instruction in [subject] principles, practices, procedures, law and ethics, which course of instruction must include the subjects upon which an applicant is examined in determining his fitness to receive an original [subject-related] license.
 - (b) A school offering such a course.
 2. Adopt regulations providing for the establishment and maintenance of a uniform and reasonable standard of instruction to be observed in and by such schools.
3. An applicant for a license is required by NRS [omitted] to furnish proof satisfactory to the Division that he has successfully completed a course of instruction in the principles, practices, procedures, law, and ethics of the subject area, which course may be an extension or correspondence course offered by the University and Community College System of Nevada, by any other accredited college or university, or by any other college or school approved by the Commission. NRS [omitted] sets forth the specific types of classes to be completed and the number of classroom hours and semester units to be achieved.
4. NRS [omitted] provides that the Commission shall prescribe standards for the continuing education of persons licensed pursuant to NRS [omitted] by adopting regulations which include renewal and reinstatement of licenses and to provide a basis and method of qualifying educational programs and certifying attendance which will satisfy all educational requirements. The standards prescribed must permit alternatives of subject material, recognizing

specialized areas of practice and the available alternative programs. The standards must include, where qualified, generally accredited educational institutions, private vocational schools, educational programs and seminars of professional societies and organizations~ other organized educational programs on technical subjects, or equivalent offerings. The Commission shall qualify any appropriate educational course given by an accredited university or community college.

5. Post-secondary educational institutions which provide the academic, vocational or professional training and services necessary to achieve and maintain a license of the related subject are licensed by the Nevada Commission on Post-Secondary Education. There are approximately 15 schools licensed in the State of Nevada, each offering a pre-licensing curriculum and continuing education of certified or licensed persons authorized to conduct business of that subject matter. Thus, while the Commission reviews and qualifies the curricula for educational programs for training of the related subject, the institutions are actually licensed and regulated by the Commission on Post-Secondary Education.

6. On March 23, 1994, Requester was hired by the chief of the Division to act as Education and Information Director of the Division. Until January 1, 1996, Requester was employed in the classified service of the state under the direct supervision of the chief. Requester does not and never has possessed a license of this subject matter.

7. The Class Specification for an "Education and Information Officer" is defined as follows:

Under general supervision, researches issues of concern to the agency and the relevant target population; develops and coordinates educational programs; reviews and monitors courses of instruction and instructors; facilitates communication among the target population and state and federal agencies; develops media releases, newsletters and informational brochures; and performs related work as required. Areas of specialization include: Indian affairs, securities, and health.

The duties required of the Education and Information Director included reviewing and monitoring the educational programs required for licensure to ensure that such programs were in compliance with statutory requirements by reviewing and recommending approval or disapproval of courses of instruction and instructors, by recommending course accreditation, by establishing and implementing procedures for conducting audits of continuing education courses, by establishing and implementing procedures for acceptance of alternative education courses, and by investigating and recommending resolution of student complaints.

8. During his employment as Education and Information Director of the Division, Requester was responsible for the yearly approval of new curriculum and over 1,100 continuing education classes and course renewals offered by Nevada post-secondary subject area schools, at the approximate rate of 80 courses per month. Requester reviewed each newly proposed program and course to determine whether it satisfied the specific statutory and regulatory requirements of the Division and whether it would be taught adequately and correctly. Based in part upon Requester's recommendation, the Commission would vote to approve or disapprove programs and courses.

9. While his recommendations concerning the approval of the newly proposed programs or courses always required final approval by the Commission, Requester was specifically allowed to use his discretion in cases of the renewal of the existing, pre-licensing curriculum and continuing education curriculum of formerly accredited schools. In April of each year, Requester sent out standard forms to post-secondary subject area schools requesting information concerning those courses the schools wished to renew. Requester's reviews of the course renewals generally consisted of cursory inspections aided by a checklist and feedback obtained through student course evaluations.

10. Requester was also responsible to make annual assessments to assure that existing school faculty were qualified and that newly hired instructors possessed the minimum five years' teaching experience required by the

Division.

11. Requester was not involved in any activity regarding audits or decisions made concerning the School other than the renewal of its ongoing, pre-license curriculum and the approval of one new continuing education course by the Commission. All of the school's remaining 19 continuing education courses were approved by the Commission prior to Requester's employment with the state.

12. In October 1995, Requester investigated employment opportunities at the School and informed its administrators that he was interested in obtaining a position there. The school, licensed by the Nevada Commission on Post-Secondary Education, conducts both pre-licensing and continuing education for obtaining and maintaining a subject area license as regulated by the Division. The facility offers 20 continuing education courses and has a faculty of six instructors.

13. In approximately November 1995, the School offered Requester the position of school administrator. On November 27, 1995, Requester announced that he would accept. In January 1996, Requester began working for the School without compensation pending issuance of the NCOE ruling on his request for an opinion.

14. The duties of administrator of the School include development, recommendation, and approval of course syllabus and materials for both pre-licensing and continuing education for obtaining and maintaining a license. The administrator is additionally responsible for coordinating programs and supervising class instructors. Requester performs some tutoring himself, but acts essentially as a manager of the school.

15. Requester does not have knowledge of any trade secrets of any schools in Nevada which provide pre-licensing education or continuing education courses.

16. While an officer of the Division, all information Requester acquired concerning the program of the School or the curriculum of any other competitor program was public record. Requester did not possess any confidential information about the faculty of curriculum strength of any particular post-secondary school.

OPINION

The NCOE has jurisdiction in this matter pursuant to NRS 281.511(1). Based upon the Findings of Fact, the NCOE concludes that at the time that he filed his request for an Opinion, Requester was a public employee as defined in NRS 281.436. NRS 281.236(3), the relevant statutory provision in this matter, provides in pertinent part that:

[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...employ a former public officer or employee of the agency...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.

The NCOE may grant relief from the strict application of the provisions of NRS 281.236(3) if it finds that the former state employee's employment 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." NRS 281.236(4).

The questions before the NCOE are whether NRS 281.236(3) applies to Requester's employment as the administrator of the School, an industry and school of which curriculum is regulated by his former public employer and, if so, whether the NCOE should grant Requester relief from the strict application of NRS 281.236(3) under the facts and circumstances of this particular matter.

We find that Requester's employment as the Education and Information Director of the Division falls within NRS 281.236(3)(b) because Requester's former job duties, as described by both the Nevada Department of Personnel and Requester himself, included the review, monitoring, and in some cases, approval of the faculty and curriculum of schools and courses regulated by the Commission, including the School. Thus, under NRS 281.236(3)(b), the School would be prohibited from employing Requester until January 1, 1997, unless the NCOE determines that Requester's employment would be entitled to special relief afforded in NRS 281.236(4).

We find that Requester's employment by the School is entitled to special relief under NRS 281.236(4). Requester's employment is in the best interests of the public and the continued integrity of state government because it in no way threatens the competitors of the School nor gives that school unfair advantage or knowledge. Requester's involvement with any particular school or course, including the School and its courses, was conducted within the limitations of his position as imposed by the Division and Commission. We find no evidence of favoritism by Requester towards the School. We also find no violation of NRS 281.481 in the manner in which requester entered into employment by the School. There is no evidence that Requester possessed any special information otherwise unavailable publicly or that he used any influence he may have had as a result of his public employment to obtain his eventual private employment.

By this Opinion, we acknowledge that it is common for people to work in governmental positions and then to leave for related employment in the private sector. Such moves from the public to the private sector may work to the benefit of the public, since the private sector is enriched' and made more efficient and effective through the special knowledge and understanding of former government employees. We find that NRS 281.236(4) was intended to facilitate such beneficial moves from the public to private sectors so long as the moves do not endanger either the public or private sectors and so long as there is nothing otherwise unethical in the way that the employment relationship occurred. In exercising the discretion provided by NRS 281.236(4), we will examine each case on its unique facts and circumstances.

CONCLUSION

The NCOE finds that Requester's commencement of employment by the School prior to January 1, 1997, was prohibited by NRS 281.236(3)(b). Nevertheless, pursuant to NRS 281.236(4) the NCOE grants relief to Requester from strict application of NRS 281.236(3). Requester may immediately work for the School, and his employment previous to this Opinion did not violate the Nevada Code of Ethics and may be compensated retroactively (as may be negotiated, of course, between Requester and the school).

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances. The provisions of NRS 281.236 and NRS 281.481 quoted and discussed above must be applied on a case-by-case basis, with results which may vary depending on the specific facts and circumstances involved.

DATED this 6th day of May, 1996.

NEVADA COMMISSION ON ETHICS

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