

Advisory Opinion No. 02-17

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Advisory Opinion of GWENDOLYN A. OSBURN, Health Facilities Surveyor II, Bureau of Licensure and Certification, Health Division, Department of Human Resources, State of Nevada.

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on October 16, 2002, on the confidential request for advisory opinion filed by Gwendolyn A. Osburn, Health Facilities Surveyor II, Bureau of Licensure and Certification, Health Division, Department of Human Resources, State of Nevada, pursuant to NRS 281.511, Subsection 1.

The matter was properly noticed as a confidential matter. However, Ms. Osburn waived confidentiality in this matter and the hearing was held in open session. Ms. Osburn appeared in person and was sworn and presented testimony.

Ms. Osburn requests the Commission's advisory opinion determining whether her private business enterprise and her public employment create an impermissible conflict between her private interest and her public duty under Nevada's Ethics in Government Law.

The Commission, after hearing testimony and considering the evidence presented herein, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In her public capacity, Ms. Osburn is employed by the State of Nevada as a Health Facilities Surveyor II for the Bureau of Licensure and Certification, Health Division, Department of Human Resources. She has been employed in that position for almost seven years.
2. As a State of Nevada Health Facilities Surveyor II, Ms. Osburn is responsible for performing the following duties under general supervision from higher level Health Facilities Surveyors:
 - inspect health care facilities^[1] for licensure or certification in accordance with federal and/or state regulations for licensure, Medicare and/or Medicaid;
 - conduct inspections of assigned facilities independently or as part of a multi-disciplinary team with members using their areas of special expertise to evaluate many different program components such as the inspection, review and evaluation of nursing services, laboratory services, admission, discharge, and resident rights processes and policies, dietary services and life safety code inspections;
 - participate in initial meeting with facility administrators to explain the inspection process, solicit cooperation, and obtain access to the information needed to complete the inspection;
 - review facility records including by-laws, policies, procedures and implementation practices to determine compliance with licensure and certification requirements;

- review patient records to determine whether medical and social services were provided in accordance with physician's diagnoses, orders and treatment plans, facilities' resident assessments, and residents' mental and physical condition;
- inspect the physical plant by touring the facility, counting rooms and beds, noting problems or deficiencies in construction standards, and evaluating infection control measures and environmental conditions relating to safety and sanitation;
- evaluate the type of care being provided by the facility by conducting patient, patient family and employee interviews and noting observations;
- prepare a summary of findings including identification of violations, for presentation to the facility administrator during the exit interview; prepare a formal report detailing the results of the inspection; make recommendations to Health Care Finance Administration (HCFA) regarding whether a facility should be certified for Medicaid/Medicare; determine and assist in the preparation of appropriate administration sanctions, fines or other actions depending on seriousness of violations, and forward to the Chief, Bureau of Licensure and Certification; recommend long term care enforcement remedies; review facility-prepared plans of correction and return for modifications as needed; conduct informal and formal dispute resolution meetings; conduct follow-up visits to facilities according to the schedule established in the final report to ensure that compliance is proceeding on schedule; testify as an expert witness or state's witness at legal proceedings; coordinate with a variety of official agencies to ensure protection and safety of the general public;
- investigate complaints against facilities by identifying the problem area, visiting the facility, determining whether a problem exists, and following up by responding to the complainant;
- review architectural drawings/plans to ensure compliance with State construction standards for facilities and life safety code standards; communicate final determinations to facilities and contractors;
- provide information to health care administrators and personnel and assist them in interpreting and meeting state and federal regulations and statutes; prepare and conduct formal provider training seminars;
- determine if a request for variance or waiver from federal and/or state regulations jeopardizes the health and safety of patients and employees; investigate circumstances of request; prepare findings of fact and position papers showing impact to public welfare and purpose of regulations; prepare an assessment of undue hardship to comply with requirements; present variance or waiver request to the State Board of Health; work with facility to ensure regulatory compliance of acceptable variance or waiver to requirements;
- research federal, State and local laws and regulations; prepare drafts of proposed regulations; solicit public comment and conduct public workshops; respond to public comment; present final regulations to the State Board of Health for approval; represent the bureau on advisory boards to interpret state and federal regulations and statutes; communicate and coordinate with other agencies;
- participate in presenting in-service training seminars for fellow surveyors on healthcare regulation issues and inform fellow workers of latest techniques for provision of services; instruct new

surveyors on duties, responsibilities and authority through the preceptorship program;

- maintain currency in trade literature, new federal, State and local government regulations and directives, instructions and manufacturers literature; monitor lab and health care industry for changes.

3. In performing her duties in her capacity as a State of Nevada Health Facilities Surveyor II, Ms. Osburn is required to apply objective state and federal rules and regulations when conducting official inspections of licensed health care facilities.

4. In her private capacity, Ms. Osburn is an “independent business owner” (IBO) in Quixtar, an online multi-level-marketing business.^[2]

5. Quixtar’s business scheme is based on the sale of a variety of products, such as soap, water purifiers, vitamins, and cosmetics.

6. A Quixtar IBO is recruited by and buys Quixtar products from another IBO. The recruiting IBO is known as “upline”. The recruited IBO in turn tries to recruit more IBOs. A recruited IBO is known as “downline.”

7. An IBO receives income in the form of a percentage of sales made by her recruits, and a percentage of sales of recruits of recruits, ad infinitum.

8. Ms. Osburn has 19 downline Quixtar IBOs she has recruited. Two of those 19 downline IBOs are nurses employed by health care facilities that may be subject to inspection by Ms. Osburn in her capacity as a State of Nevada Health Facilities Surveyor II. Those two IBOs in turn have downline IBOs who are employed by health care facilities that may be subject to inspection by Ms. Osburn in her capacity as a State of Nevada Health Facilities Surveyor II.

9. While on duty in her official capacity as a State of Nevada Health Facilities Surveyor II, Ms. Osburn has not solicited health facility personnel to purchase Quixtar products nor has she recruited them as Quixtar IBOs. Ms. Osburn conducts her activities related to Quixtar primarily on weekends.

10. Ms. Osburn has contact in the community with, and is a member of the same professional organizations as many health facility employees with whom she has contact in her official capacity as a State of Nevada Health Facilities Surveyor II.

CONCLUSIONS OF LAW

1. In her capacity as a Health Facilities Surveyor II with the Bureau of Licensure and Certification, Health Division, Nevada Department of Human Resources, Ms. Osburn is a “public employee” pursuant to NRS 281.436.

2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.511, Subsection 1, and NRS 281.521.

WHEREFORE, on motion duly made, seconded, and approved by majority vote,^[3] the Commission renders the following Opinion:

OPINION

NRS 281.481(7) prohibits a public officer or employee from using “governmental time, property, equipment or other facility to benefit his personal or financial interest.” Further, NRS 281.481(2) prohibits a public officer or employee from using his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for, *inter alia*, himself or any business entity in which he has a significant pecuniary interest.

Clearly, pursuant to NRS 281.481(7), Ms. Osburn is prohibited from soliciting for Quixtar product sales and/or recruiting as Quixtar IBOs those with whom she has contact while she is on official duty as a State of Nevada Health Facilities Surveyor II.

Likewise, pursuant to NRS 281.481(2), Ms. Osburn is prohibited from attempting to benefit her personal pecuniary interest and build her Quixtar business by soliciting for Quixtar product sales and/or recruiting as Quixtar IBOs those with whom she has contact while she is on official duty as a State of Nevada Health Facilities Surveyor II.^[4] NRS 281.481(2) prohibits a public officer or employee from using 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.”

Further, in NRS 281.421, the Nevada Legislature declared it 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 and (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. Public officers and public employees are certainly free to associate with anyone they choose in their private lives, and serving in public office while being employed in a private business does not, by itself, necessarily create an impermissible conflict between one’s private interest and public duty. However, Ms. Osburn is cautioned that using her personal time to cultivate contacts she makes initially as a result of her public employment into clients and/or associates to build her private business enterprise may, under certain facts and circumstances, raise an appearance of impropriety issue under NRS Chapter 281 and implicate a violation of Nevada’s Ethics in Government Law.

Based upon Ms. Osburn’s testimony and the evidence presented herein, the Commission finds that Ms. Osburn’s past conduct does not appear to have violated any provision of Nevada’s Ethics in Government Law as provided in NRS Chapter 281. However, the Commission cautions Ms. Osburn to be diligent in keeping her private business interests separate from her public duties so as not to violate the use of governmental time, property, equipment or other facility restrictions of NRS 281.481(7); and/or the unwarranted privileges/preferences/exemptions/advantages prohibitions of NRS 281.481(2); and so as not to raise an issue of an appearance of impropriety infringing the spirit of the public policy declarations of NRS 281.421.

NOTE: THE FOREGOING OPINION APPLIES ONLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES DEFINED HEREIN. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE IN THIS OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION. NO INFERENCES REGARDING THE PROVISIONS OF NEVADA REVISED STATUTES QUOTED AND DISCUSSED IN THIS OPINION MAY BE DRAWN TO APPLY GENERALLY TO ANY OTHER FACTS AND CIRCUMSTANCES.

DATED: December 17, 2002.

NEVADA COMMISSION ON ETHICS

By: /s/ TODD RUSSELL, Chairman

^[1] Including: hospitals, skilled nursing facilities, intermediate care facilities, intermediate care facilities for the mentally retarded, home health agencies, ambulatory surgical centers, facilities for treatment of

irreversible renal disease, hospital laboratories, independent physicians offices and environmental laboratories, rural health clinics, hospices, comprehensive outpatient rehabilitative facilities, independent physical therapists, outpatient physical therapy facilities, portable X-Ray facilities, adult day care facilities, adult group care facilities, alcohol and drug abuse treatment centers, obstetrical centers, independent centers for emergency medical care, rehabilitation clinics and occupational and physical therapists.

[2] Formerly Amway. In 2002 Quixtar took control of the North American Amway business. The multi-level-marketing practiced by Amway (and, purportedly, now by Quixtar) is apparently a legal pyramid scheme that does not charge people either for joining the company or for the privilege of recruiting others as IBOs. The company and IBOs profit from the sale of products.

[3] The vote was 4-1: Chairman Russell and Commission Members Sheets, Kosinski, and Hsu voted in favor; Commission Members Flangas opposed.

[4] In a prior opinion, the Commission identified “one manner in which a public office may be used for private gain is for a public officer to use his public status as a tool or device to generate business for his private business.” See, NCOE Opinion No. 00-55 (03/06/01).