



STATE OF NEVADA  
COMMISSION ON ETHICS

**BEFORE THE NEVADA COMMISSION ON ETHICS**

**IN THE MATTER OF THE  
REQUEST FOR ADVISORY OPINION OF  
JEFFREY J. HORKY, Senior Agent,  
State Gaming Control Board**

**Advisory Opinion No. 05-23**

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on May 4, 2005, on the request for advisory opinion filed with the Commission pursuant to Subsections 3 and 4 of NRS 281.236 by Jeffrey J. Horky, a Senior Agent employed by the State Gaming Control Board (hereinafter the "Board"), Las Vegas, Nevada. NRS 281.236 makes no provision for a confidential hearing. Notice of the hearing was properly served and posted in accord with the Nevada Open Meeting Law.

Mr. Horky seeks an opinion from the Commission finding that either (1) the provisions of NRS 281.236, Subsection 3, do not apply to him with regard to the one-year "cooling off period;" or (2) if those provisions do apply, he is entitled to relief from strict application thereof pursuant to the provisions of NRS 281.236, Subsection 4.

After full consideration of the request for an advisory opinion and considering all of the facts and circumstances presented, the Commission deliberated and orally advised Mr. Horky of its decision in the matter. The Commission incorporates its oral decision into the following findings and issues this opinion.

## FINDINGS OF FACT

1. Mr. Horky was, at the time of the hearing, a Senior Agent with the Investigations Division of the Board. He was employed by the Board for a total of eight-and-one-half years (including a nine-month interruption in service).
2. Mr. Horky was one of six agents in the Board's Investigation Division. The six agents, working under the direction and supervision of one Senior Agent, conducted background and financial investigations of eleven individuals related to Wynn Resorts, Ltd. and Wynn Las Vegas, LLC (hereinafter "Wynn"), and five corporate investigations.
3. The Wynn investigations began in April, 2004, and were completed in February, 2005.
4. At the conclusion of the investigations, the Nevada Gaming Commission approved the Wynn gaming applications at its regularly scheduled meeting on March 24, 2005.
5. In connection with the Wynn applications, and under the direction of a Senior Agent, Mr. Horky:
  - Conducted the financial investigation of Marc Rubinstein, General Counsel and Secretary to Wynn Resorts, Ltd. and Wynn Las Vegas, LLC;
  - Conducted the financial investigation of Yoshiyuki Shoji, Executive Officer of Aruze Corporation, and President/Secretary of Aruze USA, Inc. (a substantial shareholder in Wynn);
  - Conducted the financial investigation of Tomohiro Okada, Controlling Shareholder of Aruze Corporation;

- Interviewed key employees for key employee profiles (these individuals did not require licensing);
  - Assisted with initial interviews of all eleven individual applicants; and
  - Merged the background and financial information, written by the other five agents and the Senior Agent, into one complete report.
6. Other than the personal financial investigation of Marc Rubinstein, Mr. Horky had no responsibility for the investigation of the top executives of Wynn or any involvement in the investigation of the various corporate applications.
  7. During the same time frame as the Wynn investigation, Mr. Horky was promoted from Agent to Senior Agent. However, his duties and responsibilities relative to the Wynn applications continued as those of an Agent under the supervision of a Senior Agent.
  8. On March 29, 2005, the week following the Nevada Gaming Commission's approval of the Wynn applications, Marc Rubinstein, Wynn's General Counsel, telephoned Mr. Horky to schedule a lunch for the purpose of offering him employment with Wynn.
  9. Mr. Horky's telephone conversation with Mr. Rubinstein on March 29, 2005, was the first discussion he had with anyone from Wynn or any of its subsidiaries concerning possible employment.
  10. Mr. Horky met with Mr. Rubinstein for lunch on April 1, 2005. Mr. Rubinstein asked Mr. Horky whether he would be interested in interviewing for a position as Compliance Supervisor for Wynn Las Vegas. Mr. Horky indicated that he would be interested.

11. Wynn's Compliance Supervisor position requires a knowledge and understanding of gaming laws and regulations and their application.
12. On April 7, 2005, Wynn Las Vegas senior management interviewed Mr. Horky.
13. On April 11, 2005, Mr. Horky received and accepted an offer of employment from Wynn under the terms of an employment agreement effective May 23, 2005 (although Wynn verbally agreed to an extension of the effective date pending a hearing in this matter before the Nevada Commission on Ethics). Under the terms of the employment agreement, Mr. Horky will receive a salary comparable to his salary as Senior Agent with the Board. He will receive no signing bonus or stock options.

#### **CONCLUSIONS OF LAW**

1. At the time of this hearing, Mr. Horky was a public employee as defined by NRS 281.436.
2. The Commission has jurisdiction over this matter pursuant to NRS 281.511(1) and NRS 281.236(4).

**WHEREFORE**, on motion duly made, seconded, and approved by a four-to-two vote, the Commission renders the following Opinion:<sup>1</sup>

#### **OPINION**

The issue in this opinion is whether, pursuant to NRS 281.236(3), the "cooling off" statute, Mr. Horky is prohibited from commencing employment with Wynn until one year following his resignation from the Board. Should the Commission determine the statute is

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<sup>1</sup>Commissioners Timothy Cashman, Rick Hsu, Caren Jenkins and George Keele voted to approve the motion, while Commissioners William Flangas and James Kosinski voted nay. Commissioner Mark Hutchison did not attend the meeting.

generally applicable, Mr. Horkey requests a waiver of the statute's strict application in accordance with NRS 281.236, Subsection 4.<sup>2</sup>

In *NCOE Opinion 00-44*, the Commission recognized the legislature's intent when enacting NRS 281.236:

"One goal of the Nevada Legislature in enacting subsection 3 of NRS 281.236 was to significantly reduce the temptation for a public officer or employee to compromise public duties in favor of possible employment opportunities within the business or industry which the public officer or employee regulated. Public suspicions arise about the integrity of government and the ethical standards of public officers and employees, if a regulator is permitted to accept such employment immediately after concluding one's public service."<sup>3</sup>

In pertinent part, NRS 281.236, Subsection 3, states:

"In addition to the prohibitions set forth in subsection 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."

The facts presented in this matter establish that Mr. Horkey's duties as an Agent with the Board did not include the formulation of policy contained in regulations governing the business

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<sup>2</sup> NRS 281.236, Subsection 4, states: "A public officer or employee may request the commission on ethics to apply the relevant facts in 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 decision of the commission on ethics in such a case is subject to judicial review."

<sup>3</sup> See, *Matter of Judy Sheldrew*, NCOE Opinion 00-44.

or industry of which Wynn is a part. Therefore, NRS 281.236, Subsection 3(a) does not apply to Mr. Horky. Nor does Mr. Horky possess knowledge of trade secrets of a direct business competitor of Wynn and thus, NRS 281.236 Subsection 3(c) is similarly inapplicable to Mr. Horky's circumstances. The question, then, becomes whether Mr. Horky, during the immediately preceding year, directly performed activities, or controlled or influenced a decision, investigation, or other action, which significantly affected the business or industry that sought to employ him.

Mr. Horky, under the direction of a Senior Agent, conducted background and financial investigations on license applicants including the General Counsel and Secretary of Wynn and two individuals who are substantial shareholders in Wynn. However, his actions in performing these duties did not "significantly affect" Wynn. In concert with five other agents and a Senior Agent, Mr. Horky compiled a report for the Nevada Gaming Commission's consideration in issuing the licenses. Testimony in this matter provided that agents issuing the licensing report for the Nevada Gaming Commission do not make individual recommendations, rather, the Board as a whole makes a recommendation and the Gaming Commission has the final authority regarding approving licenses. Further, during the investigation process, if a license applicant was found to have a questionable background or finances, that applicant would have been removed by Wynn and replaced with another applicant. Therefore, the success of Wynn's application with the Nevada Gaming Commission did not rest with Mr. Horky's approval of those individuals he investigated.

Nothing in the record suggests that Mr. Horky compromised his public duties in order to gain favor in the form of employment with Wynn. Accordingly, the prohibitive language of NRS 281.236(b) does not preclude Mr. Horky from accepting and commencing employment with Wynn immediately after concluding his public service.

The Commission concludes that the provisions of NRS 281.236 do not apply to Mr. Horky. Therefore, 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 281.236(4).

While Mr. Horky is not subject to NRS 281.236 with regard to the matter at issue, the Commission points out that Mr. Horky's employment activities in the private sector are subject to the restrictions of NRS 281.491, Subsection 1, which provides:

*“A . . . public employee of the executive branch shall not accept compensation from any private person to represent or counsel him on any issue pending before the agency in which that officer or employee serves, if the agency makes decisions. Any such officer or employee who leaves the service of the agency shall not, for 1 year after leaving the service of the agency, represent or counsel for compensation a private person upon any issue which was under consideration by the agency during his service. As used in this subsection, “issue” includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.”* (Emphasis added.)

Therefore, for one year after leaving his position with the Board, Mr. Horky may not represent or counsel for compensation a private person upon any issue (as defined above) which was under consideration by the Board during Mr. Horky's tenure.

**NOTE: THIS MATTER IS A FIRST-PARTY ADVISORY OPINION REQUEST. FOR PURPOSES OF A FIRST-PARTY ADVISORY OPINION REQUESTED PURSUANT TO NRS 281.511(1) AND NRS 281.236(4), ALL FACTS IN THE MATTER ARE PROVIDED BY THE PUBLIC OFFICER REQUESTING THE ADVISORY OPINION, AND THE COMMISSION MAKES NO INDEPENDENT INVESTIGATION AS TO THE TRUTH OF THOSE FACTS. THE RECORD HEREIN, THEREFORE, CONSISTS SOLELY OF FACTS PROVIDED ON THE RECORD BY THE PUBLIC OFFICER, AND THIS OPINION IS BASED SOLELY UPON THOSE FACTS. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE PROVIDED BY THE PUBLIC OFFICER IN THIS ADVISORY 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: August \_\_18\_\_\_\_, 2005.

NEVADA COMMISSION ON ETHICS

By: \_\_\_\_\_/s/\_\_\_\_\_  
CAREN JENKINS, Chairman