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OPINION NO. 2014-03

BOARDS AND COMMISSIONS; PUBLIC BODIES: An American Indian may be considered for appointment to, and may be appointed as, a general public representative on the Nevada Indian Commission.

Sherry Rupert, Executive Director
State of Nevada Indian Commission
5366 Snyder Avenue
Carson City, Nevada 89701

Dear Director Rupert:

Pursuant to NRS 228.150, you have asked the Attorney General for an opinion on the following question.

QUESTION

May the Governor appoint an American Indian to the Nevada Indian Commission to fill a position that is designated as a representative of the general public?

ANALYSIS

The Nevada Indian Commission (Commission) is a five-member board established by statute. NRS 233A.020. The purposes of the Commission are to study, report, and make recommendations concerning American Indians residing in Nevada. NRS 233A.090. See also Op. Nev. Att'y Gen. 2000-35 (December 13, 2000). Its

members are appointed by the Governor. NRS 233A.030. Three members must be Indians; two must be representatives of the general public. *Id.*¹

There is no legal reason why a person who is Indian² should be excluded from consideration for a position representing the general public. The statute on its face is unambiguous and is not exclusive: the appointee for a general public position must simply represent the general public. No intrinsic characteristic prevents a Native American from fulfilling this role.

Furthermore Native Americans are citizens of the states in which they reside. Indian Citizenship Act, 43 Stat. 253 (1924), codified as 8 U.S.C.A. § 1401. It has long been established that they are entitled to the same rights and privileges as any other state citizen. See, e.g., *Meyers By and Through Meyers v. Board of Educ. of San Juan School Dist.*, 905 F. Supp. 1544 (D. Utah 1995). See also *White Eagle v. Dorgan*, 209 N.W. 2d 621 (N.D. 1973) (Indians born in the United States and subject to its jurisdiction are citizens of the state in which they reside); *Luger v. Luger*, 765 N.W. 2d 523 (N.D. 2009) (members of tribes are citizens of the United States and of the state in which they reside and thus have the right to bring actions in state court). Cf. *In re Heff*, 197 U.S. 488 (1905) (an Indian is entitled to the benefit of, and is subject to, the laws of the State in which he resides the moment he becomes a citizen of the United States); *Wisconsin Potowatomies of Hannahville Indian Community v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973) (Indians are specifically declared by 8 U.S.C.A. § 1401 to be citizens of the United States and, under the Fourteenth Amendment, they are considered as well to be citizens of the state wherein their reservation is geographically located).

Thus a Native American who is a citizen of the State should not be excluded from consideration as a general public representative on the Commission. "The right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of the law. Ambiguities are to be resolved in favor of eligibility to office." *Nevada Judges Ass'n v. Lau*, 112 Nev. 51, 55, 910 P.2d 898, 901 (1996) (quoting *Gilbert v. Breithaupt*, 60 Nev. 162, 165, 104 P.2d 183, 184 (1940)). No plain provision, nor even any implication, bars Native Americans from the general public positions on the Commission.³

¹ In its entirety, NRS 233A.030 states: "The Governor shall appoint: 1. Three members who are Indians. 2. Two members who are representatives of the general public."

² In common parlance, the term "Indian" is often used interchangeably with "American Indian" and "Native American." However, "Indian" can also have specific legal meaning in different contexts. See e.g. Op. Nev. Att'y Gen. 12-01 at 2, n. 2 (Jan. 3, 2012). Herein, it is used in its broadest sense and interchangeably with Native American.

³ Compare *State ex rel. Oregon Consumer League v. Zielinski*, 654 P.2d 1161 (Or. App. 1982) (challenge to appointment to state agriculture board of person who was a farmer and an officer of two farming trade associations, on ground that she did not qualify for appointment as one of two members mandated to be "representative of consumer interests of the state").

Under these circumstances, the reasoning of the California Attorney General in Op. Cal. Att'y Gen. 81-701, 64 Ops. Cal. Atty. Gen. 685 (August 28, 1981) is persuasive. He concluded that "a physician and surgeon is qualified to be representative of the general public" to serve on the California Health Facilities Authority. He relied on reasoning similar to the Nevada Supreme Court's in *Nevada Judges Ass'n v. Lau*: "when the Legislature desires to exclude a member of a particular class or profession from serving as a 'public member' it appears to specifically so provide." Op. Cal. Att'y Gen. 81-701 at *2.

In the absence of a legislative exclusion, it is ultimately in the discretion of the appointing official—in this case, the Governor—whom to appoint, guided by the single statutory criterion, i.e., the appointee must be able and willing to represent the general public. The appointing authority's discretion will not be challenged unless it is arbitrary or capricious or is contrary to law in some respect. *Webb v. Workers' Compensation Com'n*, 730 S.W.2d 222 (Ark.1987) (gubernatorial power of appointment is vested with a reasonable latitude of discretion in classifying persons to be appointed to Workers' Compensation Commission, but that discretion is not without limit or restraint; classification of appointees to the Commission must measure up to minimal legal standards in order to comply with requirements of Workers' Compensation Act; whether such requirements have been met is subject to judicial review, and if they have not been met appropriate relief may be granted); *Marranca v. Harbo*, 197 A.2d 865, 869 (N.J. 1964). See also *Hollman v. Warren*, 196 P.2d 562 (Cal. 1948) (mandamus is not available to compel the Governor to exercise appointment discretion in a particular manner or to reach a particular result).

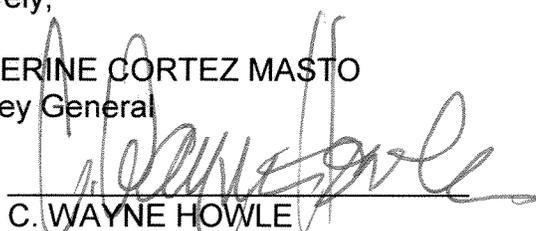
CONCLUSION

An American Indian may be considered for appointment to, and may be appointed as, a general public representative on the Nevada Indian Commission.

Sincerely,

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By


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