



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of former **Public Officer**, Governing Body,
Public Agency, State of Nevada,

Request for Opinion No. **17-04A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer ("Public Officer"), a former member of a Governing Body ("Governing Body") of a public agency ("Agency") in the State of Nevada, requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.560(6) and NRS 281A.460 regarding the propriety of Public Officer's present and future conduct. Specifically, Public Officer seeks guidance associated with three contracts between the Agency and Public Officer's private employer ("Employer") as it relates to the Nevada Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS"). A quorum of the Commission heard this matter and Public Officer, represented by Public Officer's attorney, appeared in person and provided sworn testimony.¹

Public Officer sought an opinion from the Commission regarding the applicability of the "cooling-off" provisions of the Ethics Law set forth in NRS 281A.550 and NRS 281A.410(1)(b) to Public Officer's circumstances. Specifically, Public Officer questions the applicability of the Ethics Law to Public Officer's acceptance of private employment with a business entity seeking to contract with the Agency, which contract must be approved by the Governing Body.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and advises Public Officer that the one-year "cooling-off" provisions set forth in NRS 281A.550(5) do not apply to Public Officer's circumstances; however, the provisions of NRS 281A.410 apply to Public Officer with respect to the terms of the contract because such terms constitute "issues" under consideration for purposes of application of NRS 281A.410.

Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this abstract of the opinion to provide guidance to public officers and employees who may be similarly situated.²

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¹ The following Commissioners participated in this Opinion: Chair Lau, Vice-Chair Weaver and Commissioners Duffrin, Gruenewald, O'Neill, Stewart and Yen.

² Any individual comments made by commissioners during the hearing or deliberations are not binding on or part of the Commission's final decision and Opinion.

This opinion addresses only those circumstances within the jurisdictional limitations of the Commission applicable to former public officers and employees. The facts in this matter were obtained from documentary and testimonial evidence provided at the hearing. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact set forth below are accepted as true. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this opinion.

II. QUESTIONS PRESENTED/JURISDICTION

Public Officer seeks advice on whether the “cooling-off” provisions of the Ethics Law set forth in NRS 281A.550 are implicated by Public Officer’s current employment with Employer, a private business. The Employer and the Agency had a previous contractual relationship and Public Officer questions whether there are any restrictions imposed by the Ethics Law applicable to an anticipated future contract between Employer and the Agency, which must be approved by the Governing Body. A current or former public officer or employee may request that the Commission apply the relevant facts to NRS 281A.550(5) and determine whether relief from the strict application of those provisions is proper. Since the provisions of NRS 281A.410 impose further “cooling-off” considerations, the Commission will likewise address the requirements of that law under NRS 281A.460.³

III. FINDINGS OF FACT

1. At the time Public Officer requested this opinion, Public Officer had completed his public service as a member of the Governing Body of Agency and had accepted employment with the Employer, a private business.
2. Prior to completion of Public Officer’s public service, Employer and Agency had entered into a contract, which was approved by Governing Body (“First Contract”). The First Contract was to facilitate a donation to the Agency and was not associated with the provision of supplies, materials or equipment.
3. In the past, Employer negotiated, but never finalized a second contract with Agency (“Second Contract”). Representatives of the parties had held preliminary discussions seeking to define the terms of the Second Contract; however, those discussions did not result in any consensus, form, or establish any terms. The discussions occurred in meetings between Employer and staff of the Agency and Agency committees, with sparse reporting to the Governing Body during the time Public Officer served as a member of the Governing Body.
4. Employer ceased pursuing the discussions with Agency on the Second Contract because the concepts for the Second Contract had stagnated.
5. Employer now anticipates approaching Agency on a Third Contract. The Third Contract is distinct and different than the concepts proposed for the Second Contract and the Third Contract does not resemble what was previously discussed.

³ This Opinion is limited to questions related to “cooling-off” in Public Officer’s capacity as a former public officer. The Commission’s jurisdiction to issue advisory opinions associated with past, current or future conduct unrelated to “cooling-off” is provided to current rather than to former public officers or employees under NRS 281A.440(1).

Negotiations between the parties on the Third Contract are anticipated to commence in the near future.

6. Public Officer testified that Employer would like to utilize Public Officer's assistance in negotiating and finalizing the Third Contract. Public Officer did not receive any information from staff or from the minimal reporting to the Governing Body about the Second Contract during Public Officer's term of office for Agency and the information received by the Governing Body is not applicable to the Third Contract.
7. Public Officer has reviewed the cooling-off provisions of NRS 281A.550 and does not believe they apply to participating in future negotiations of the Third Contract because the private business is not regulated by the Governing Body. Public Officer also testified that, if NRS 281A.550 applies to Public Officer's circumstances, it would be in the best interests of the public, the ethical integrity of the Governing Body and not in contravention of the provisions of the Ethics Law, to grant relief pursuant to NRS 281A.550(6). The circumstances relating to why Public Officer seeks relief from the strict application of the "cooling-off" provisions set forth in NRS 281A.550 are not provided in this abstract opinion in order to retain the confidentiality of Public Officer.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

The provisions of the Ethics Law are interpreted and applied under the duty to avoid conflicts of interest established in NRS 281A.020. During Public Officer's service as a member of the Governing Body, Public Officer was required to commit to avoid both actual and perceived conflicts between Public Officer's private interests and those of the public whom Public Officer served. Therefore, the Commission must consider, in light of the provisions set forth in NRS Chapter 281A and as interpreted by applicable Commission precedent in similar circumstances, whether such conflicts existed between Public Officer's public duties as a member of the Governing Body and Public Officer's private employment interests. The applicability of the "cooling-off" provisions governing public officers and employees serving public entities are set forth in NRS 281A.550(5) and (6) and NRS 281A.410(1)(b).

In this Opinion, the Commission advises that the cooling-off provisions of NRS 281A.550(5) do not apply to the First or Third Contract. Although not anticipated, should the parties re-open negotiations on the Second Contract the provisions of NRS 281A.550(5) would apply. Furthermore, Public Officer must comply with the limitations on representing or counseling private persons on issues that were under consideration by the former agency, as required by NRS 281.410(1)(b), for one year after the end of Public Officer's term of office.

B. RELEVANT STATUTES

1. Duty to Avoid Conflicts/Public Trust

NRS 281A.020(1) provides:

1. It is hereby declared to be 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.

(b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

2. Cooling-Off – Employment Restrictions

NRS 281A.550(5) provides:

5. Except as otherwise provided in subsection 6, a former public officer or employee of the State or a political subdivision, except a clerical employee, shall not solicit or accept employment from a person to whom a contract for supplies, materials, equipment or services was awarded by the State or political subdivision, as applicable, for 1 year after the termination of the officer's or employee's service or period of employment, if:

- (a) The amount of the contract exceeded \$25,000;
- (b) The contract was awarded within the 12-month period immediately preceding the termination of the officer's or employee's service or period of employment; and
- (c) The position held by the former public officer or employee at the time the contract was awarded allowed the former public officer or employee to affect or influence the awarding of the contract.

3. Exception to “cooling-off” Requirements for Employment – Relief from Strict Application

NRS 281A.550(6) provides:

6. A current or former public officer or employee may request that the Commission apply the relevant facts in that person's case to the provisions of subsection 3 or 5, as applicable, and determine whether relief from the strict application of those provisions is proper. If the Commission determines that relief from the strict application of the provisions of subsection 3 or 5, as applicable, is not contrary to:

- (a) The best interests of the public;
- (b) The continued ethical integrity of the State Government or political subdivision, as applicable; and
- (c) The provisions of this chapter,

it may issue an opinion to that effect and grant such relief. The opinion of the Commission in such a case is final and subject to judicial review pursuant to NRS 233B.130, except that a proceeding regarding this review must be held in closed court without admittance of persons other than those necessary to the proceeding, unless this right to confidential proceedings is waived by the current or former public officer or employee.

4. “Cooling-Off” – Representing or Counseling

NRS 281A.410(1)(b) provides, in relevant part:

In addition to the requirements of the code of ethical standards:

1. If a public officer or employee serves in a state agency of the Executive Department or an agency of any county, city or other political subdivision, the public officer or employee:

* * *

(b) If the public officer or employee 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 the public officer's or employee's service. As used in this paragraph, "issue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

V. COMMISSION DECISION

A. THE "COOLING-OFF" PROVISIONS OF NRS 281A.550(5)

The Commission recognizes that pursuant to NRS 281A.550(5), a former public officer or employee of the State or a political subdivision, except a clerical employee, is prohibited from accepting employment from a person to whom a contract for supplies, materials, equipment or services was awarded by such government entities, for a 1-year period after termination if the following conditions for application of the restriction are present:

- (a) The amount of the contract exceeds \$25,000;
- (b) The contract was awarded within the 12-month period immediately preceding the termination of the officer's or employee's service or period of employment; and
- (c) The position held by the former public officer or employee at the time the contract was awarded allowed the former public officer or employee to affect or influence the awarding of the contract.

The Commission considers whether the provisions of NRS 281A.550(5) apply to Public Officer's circumstances and the three contracts at issue. In its consideration, the Commission reviews each contract or proposed contract independently, and advises as follows:

THE FIRST CONTRACT

The First Contract is not the type of contract governed by the provisions of NRS 281A.550(5) since no services, goods, or equipment was exchanged between the parties. The particular contract presented was a unilateral gift/donation and did not have terms that required expenditure of public funds or government resources. The Commission's reasoning was premised upon the factual circumstances presented. The Commission is not establishing precedent that a gift or donation form of contract may never be the type of contract governed by NRS 281A.550(5). The Commission will review the terms of any such contract to ascertain whether it falls within the statutory requirements. Accordingly, under the circumstances presented, the cooling-off provisions of NRS 281A.550(5) do not apply by reason of the public entity accepting gift funding from the private employer.

THE SECOND CONTRACT

The Second Contract was not finalized and negotiations stagnated. Employer no longer desires to pursue the matter. Furthermore, the Second Contract was not finalized during Public Officer's public service. Therefore, the cooling-off provisions of NRS

281A.550(5) do not apply given the particular circumstances associate with the Second Contract. Nonetheless, the circumstances establish that the terms associated with the Second Contract constituted an “issue” under consideration for application of NRS 281A.410, as set forth below.

THE THIRD CONTRACT

Based upon the testimony and facts presented, the Third Contract is a new contract on which negotiations will commence in the future. Accordingly, it does not fall within the restrictions imposed by NRS 281A.550(5), because the contract had not been discussed or finalized during Public Officer’s term of service. The Third Contract is significantly and materially different than both previous contracts, whether finalized or conceptual, such that it no longer resembles either and any prior contract discussions or terms have no application to the Third Contract.

B. NRS 281A.410 - “COOLING-OFF” LIMITATIONS ON REPRESENTING OR COUNSELING

NRS 281A.410(1)(b) establishes mandatory restrictions and relief from its provisions based upon public policy considerations is not available. The Commission recently confirmed the following parameters with respect to the provisions of NRS 281A.410(1)(b):

The one-year “cooling-off” requirement therefore precludes, for one year, participation on any issue that was under consideration before the former agency, including participation on issues related to a specific case or matters before the Legislature on “legislation” or the agency on “regulations” dealing with that same issue. To construe the exception otherwise would swallow the general prohibition and allow future participation in the same issue under the guise that the representation/counseling merely involved the consideration of legislation and/or administrative regulations. Such an outcome would enhance the former regulator’s active advantage or influence on the same issue in both old and new forums, and defeat the intent to reduce and remove the former regulator’s advantage or influence on the same issue for a 12-month period of time.

In re Public Officer, Comm’n Op. No. 13-09A (2013) (Emphasis added). See also *In re Sweeney*, Comm’n Op. No. 15-70 (2016) at p. 7, citing NRS 281A.410(1)(b); *In re Former Public Employee*, Comm’n Op. No. 13-29A (2013); *In re Public Employee*, Comm’n Op. No. 11-96A (2012).

The “cooling-off” provisions of the Ethics Law are intended to discourage former public officers and employees from using opportunities, information, relationships, or experience gathered from their former public service to benefit them in their private capacity. *In re Zingre*, Comm’n Op. No. 14-66A (2014). Therefore, if a former public officer or employee accepts employment with a private person or business, that employee may not share the information that was accessible to or acquired by Public Officer during Public Officer’s service with a public agency on any issues which were under consideration by that agency during the period of public service. See *In re Public Officer*, Comm’n Op. No. 87-04 (1987) (interpreting former NRS 281A.410(1)). Further, the Commission determines that given the direction provided in NRS 281A.410, a public officer’s or employee’s actual knowledge about the issue under consideration is not determinative because there is a duty to obtain this information to assure compliance with

statutory requirements of the Ethics Law. The circumstances are therefore reviewed to determine the applicability of NRS 281A.410(1)(b).

A contract, whether it be at the negotiation stage or operational stage during a public officer's or employee's term of service should be reviewed to determine whether it constitutes an issue under consideration for purposes of application of the provisions of NRS 281A.410. NRS 281A.410 does not require the public officer or employee to have specific knowledge regarding the issue under consideration by the agency during their public service. It is sufficient that the issue was under consideration by the public agency and that the public officers and employees had access to the information during the term of public service. Additionally, the Ethics Law imposes an affirmative duty on public officers to be informed regarding the Ethics Law, and to understand how the law governs their behavior. In furtherance of this duty, it is the public officer's responsibility to diligently obtain needed information on any matters or items which implicate the Ethics Law. See *In re Kim*, Comm'n Op. No. 09-11 (2012) and NRS 281A.020.

Accordingly, based upon circumstances presented, the Commission concludes that the restrictions set forth in NRS 281A.410(1)(b) apply to the First Contract and the Second Contract, but not the Third Contract. Should Public Officer, as a representative of private entity, and public entity revisit the discarded concepts of the Second Contract during the year following Public Officer's departure from public service, the provisions of NRS 281A.410 would apply.

VI. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officer was a public officer as defined by NRS 281A.160 and NRS 281A.180.
2. Pursuant to NRS 281A.550 and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. The "cooling-off" prohibition set forth in NRS 281A.550(5) does not apply to the First Contract because it does not constitute a contract for supplies, materials, equipment or services awarded by the Governing Body to a person who is contemplated by the provisions of NRS 281A.550(5).
4. The "cooling-off" prohibition set forth in NRS 281A.550(5) does not apply to the Second Contract because it was not finalized prior to Public Officer concluding public service as a member of the Governing Body of Agency.
5. Under the requirements of NRS 281A.410(1)(b), Public Officer is prohibited from representing or counseling for compensation Public Officer's employer, private business or any other person upon any issue that was under consideration by the Agency or the Governing Body during Public Officer's service for a period of one year after the end of Public Officer's term as a member of the Governing Body.
6. Under the requirements of NRS 281A.410(1)(b), the Commission determines that the First Contract and the discarded negotiations of the Second Contract were "issues" under consideration during Public Officer's term of public service as a member of the Governing Body and the statutory restrictions therefore apply.
7. Except as otherwise indicated above, the requirements of NRS 281A.410(1)(b), do not apply to the Third Contract because under the specific facts presented, it was not an issue under consideration during Public Officer's term of office.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated. The following Commissioners participated in this Opinion:

Dated this 25th day of September, 2017.

NEVADA COMMISSION ON ETHICS

By: /s/ Cheryl A. Lau
Cheryl A. Lau, Esq.
Chair

By: /s/ Philip K. O'Neill
Philip K. O'Neill
Commissioner

By: /s/ Keith A. Weaver
Keith A. Weaver, Esq.
Vice-Chair

By: /s/ Lynn Stewart
Lynn Stewart
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: /s/ Amanda Yen
Amanda Yen, Esq.
Commissioner

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner