



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Public Employee**, Public Agency,
State of Nevada,

Advisory Request No. 19-005A

Public Employee./

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Employee (“Public Employee”) is employed by a public agency (“Public Agency”) in the State of Nevada, and requested this advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.675 regarding the propriety of Public Employee’s anticipated future conduct as it relates to the Ethics in Government Law (“Ethics Law”) set forth in Chapter 281A of the Nevada Revised Statutes (“NRS”). Pursuant to Section 13 of the Commission’s approved regulation, LCB File No. R108-18, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.¹ Materials provided for consideration by the Commission included the request for an advisory opinion, any information received from Public Employee, any obtained publicly available information and a list of proposed facts that were affirmed as true by Public Employee.

Public Employee sought an opinion from the Commission regarding the applicability of the Ethics Law, including its “cooling-off” provisions, set forth in NRS 281A.550(3) and NRS 281A.410(1)(b), and the Code of Ethical Standards, set forth in NRS 281A.400, to Public Employee’s circumstances. Public Employee’s current public employer has regulatory authority over the future employer, which is another public entity (“Public Entity”). Additionally, after Public Employee separates from public service for the Public Agency, Public Employee anticipates providing certain pro-bono private counseling services to a private person assisting the Public Entity in certain regulatory matters before the Public Agency.

After fully considering Public Employee’s request and analyzing the facts, circumstances and testimony presented by Public Employee, the Commission deliberated and advised Public Employee of its decision that the provisions of NRS 281A.550(3) do not apply to Public Employee’s circumstances because the prospective employment is not within the scope of conduct regulated by the provisions of NRS 281A.550(3). Further, Public Employee is advised that Public Employee must comply with NRS 281A.410(1)(b) for any private representation of issues that were under consideration by the Public Agency during Public Employee’s public service and Public Employee must comply with the Code of Ethical Standards set forth in NRS 281A.400 by maintaining proper separation between Public Employee’s current public duties and Public Employee’s private interests in seeking future employment.

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Weaver and Commissioners Duffrin, Gruenewald, Lowry, O’Neill, Wallin and Yen.

Public Employee has elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this Abstract Opinion.

The facts in this matter were obtained from documentary evidence provided by Public Employee and available public information related to the Public Agency. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact are set forth below. Facts and circumstances that differ from those presented in the record and relied upon by the Commission may result in different findings and conclusions than those expressed in this opinion. Although the full written opinion was served on Public Employee, for confidentiality reasons, this Abstract Opinion redacts certain Findings of Fact, provides a summary of issues and removes other identifying information to protect the confidentiality of the subject.

II. QUESTION PRESENTED

Public Employee questions whether the "cooling-off" provisions of the Ethics Law set forth in NRS 281A.550(3) and NRS 281A.410(1)(b), and the Code of Ethical Standards set forth in NRS 281A.400, would apply to Public Employee's circumstances relating to employment with another public entity that is under the regulatory authority of Public Employee's current public employer.

III. FINDING OF FACTS

1. Public Employee is a public employee as that term is defined by NRS 281A.150.
2. Public Employee is employed by the Public Agency and has public duties pertaining to regulatory authority over certain public entities.
3. With regard to Public Employee's public duties for the Public Agency, Public Employee testified that as part of his/her principle duties, Public Employee has provided suggestions to co-workers or superiors regarding regulations governing the industry or businesses including public entities over which the Public Agency has any oversight.
4. In Public Employee's public position, Public Employee has been involved in making decisions and performing actions that affected public entities regulated by the Public Agency.
5. Public Employee anticipates seeking employment from the Public Entity, which is under the regulatory authority of the Public Agency.
6. After departing from public service for the Public Agency and prior to employment with the Public Entity, Public Employee anticipates providing certain counseling services, without any remuneration, to a separate private person/entity in furtherance of providing assistance to the Private Entity (the anticipated future employer) with certain regulatory matters before the Public Agency.
7. Public Employee acknowledges that for one year after Public Employee's separation from public service, NRS 281A.410 would preclude Public Employee's private representation or consultation of a private person/entity for compensation regarding any issue that was under consideration by the Public Agency during Public Employee's term of service for that agency.

8. Public Employee has knowledge of the statutory and regulatory personnel policies, regulations and laws applicable to public employment for the Public Agency and he/she will comply with all applicable polices, regulations and laws in providing private consulting services or associated with any subsequent employment.

IV. STATEMENT AND DISCUSSION OF RELEVANT STATUTES AND ISSUES

A. OVERVIEW OF ISSUES

The Ethics Law promotes public integrity through the appropriate separation between public duties and private interests by Nevada's public officers and employees. In furtherance of that mission, the Ethics Law imposes a one-year "cooling-off" requirement on former public officers and employees to prevent these government actors from using any proprietary or regulatory information, access or relationships belonging to the public to create competitive disadvantages or other misuse of government information in the private sector regulated by the governmental entity. Pursuant to NRS 281A.550, the Ethics Law governs the conduct of former public officers and employees in the context of the "cooling-off" requirements to ensure they do not use former information, relationships, or experiences acquired from public service, which belong to the public, to benefit them or the employing regulated business or industry in a private capacity.

Specifically, Public Employee seeks guidance on whether the "cooling-off" provisions contained in NRS 281A.550(3) prohibit Public Employee, within 1 year after the termination of Public Employee's public service, from seeking or obtaining employment with a public entity under the control of the Public Agency. In reviewing this request for opinion, the Commission considers whether NRS 281A.550(3) applies to Public Employee and addresses the applicability of NRS 281A.410(1)(b) governing the one-year prohibition against representing or counseling a private entity on matters that were under consideration by the Public Agency during Public Employee's tenure and NRS 281A.400, the Code of Ethical Standards.

B. RELEVANT STATUTES

1. Duty to Avoid Conflicts of Interest

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" – Accepting Employment

NRS 281A.550(3) provides:

3. In addition to the prohibitions set forth in subsections 1 and 2, and except as otherwise provided in subsections 4 and 6, a former public officer or employee of a board, commission, department, division or other agency of the Executive Department of State Government, except a clerical employee, shall not solicit or accept employment from a business or

industry whose activities are governed by regulations adopted by the board, commission, department, division or other agency for 1 year after the termination of the former public officer's or employee's service or period of employment if:

(a) The former public officer's or employee's principal duties included the formulation of policy contained in the regulations governing the business or industry;

(b) During the immediately preceding year, the former public officer or employee 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 the former public officer or employee; or

(c) As a result of the former public officer's or employee's governmental service or employment, the former public officer or employee possesses knowledge of the trade secrets of a direct business competitor.

3. "Cooling-Off" – Representing or Counseling

NRS 281A.410(1)(b) provides:

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.

4. Code of Ethical Standards, in pertinent part:

NRS 281A.400(1) provides:

A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

NRS 281A.400(2) provides:

A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee has a commitment in a private capacity.

NRS 281A.400(5) provides:

If a public officer or employee acquires, through the public officer's or employee's public duties or relationships, any information which by law or practice is not at the time available to people generally, the public officer or employee shall not use the information to further a significant pecuniary interest of the public officer or employee or any other person or business entity.

NRS 281A.400(7) provides:

7. Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer or employee who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

↪ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

NRS 281A.400(10) provides:

A public officer or employee shall not seek other employment or contracts for the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity through the use of the public officer's or employee's official position.

V. DECISION

The Commission provides guidance on whether Public Employee is subject to the one-year "cooling-off" provisions of NRS 281A.550(3) and whether the restrictions set forth in NRS 281A.410(1)(b) apply to Public Employee's circumstances. In addition, the Commission discusses the implications of NRS 281A.400, the Code of Ethical Standards, to the circumstances pursuant to NRS 281A.665.²

² Public Employee's circumstances do not implicate the "cooling-off" provisions of NRS 281A.550(5).

A. THE “COOLING-OFF” PROVISIONS OF NRS 281A.550(3) DO NOT BAR PUBLIC EMPLOYEE FROM SEEKING FUTURE EMPLOYMENT FOR THE PUBLIC ENTITY

Public Employee asks for guidance from the Commission on whether it is appropriate, given the requirements of NRS 281A.550(3), to seek or obtain employment with the Public Entity, since it is regulated by the Public Agency. In application of NRS 281A.550(3), the Commission reviews the circumstances pertaining to a transition from public service to a private industry or business that is regulated by the employing public agency. In this matter, the anticipated future employment is to another public entity regulated by the Public Agency rather than a private business or industry.

In a prior opinion addressing a transition from the public to the private sector, the Commission focused on the scope of the prohibitions delineated in NRS 281A.550(3) to determine that the anticipated public-sector position was not prohibited because it is not with “a business or industry whose activities are governed by regulations adopted by the board.” The Commission determined:

The relationship between a Public Agency, as the regulator, and the employing entity, as the business or industry being regulated, is a statutory condition to the application of the one year “cooling-off” requirement. Under present circumstances, the anticipated employment is with the government rather than with the private industry or business it serves to regulate. Accordingly, Public Officer’s potential public employment does not violate the provisions of NRS 281A.550(3).

In re Public Employee, Comm’n Op. No. 15-49A (2016) at p. 6.

Under the circumstances presented, the Public Agency’s statutory and regulatory duties are directed to the public sector and regulate public entities rather than private business or industry. Therefore, the Commission determines that NRS 281A.550(3) does not apply to the specific circumstances and the statutory language does not preclude future employment with the Public Entity.

B. NRS 281A.410(1)(b) LIMITATIONS

With regard to NRS 281A.410(1)(b), this statute does not specifically prohibit future employment within the public or private sector. Instead, the statute imposes a one-year “cooling-off” period from providing consulting services or representation of private persons for compensation on any issue under consideration during Public Employee’s term of office with the Public Agency. Should Public Employee receive any compensation for Public Employee’s representation or counseling services on behalf of a private person, including a private sector business or industry, Public Employee must comply with the mandatory provisions of NRS 281A.410(1)(b).

This restriction would preclude providing compensated counseling and representation services to a private entity that is assisting the Public Agency to comply with regulatory matters. In *In re Public Employee*, Comm’n Op. No. 18-015A (2018), the Commission applied the mandatory restrictions of NRS 281A.410(1)(b) to a public employee’s anticipated employment with a private vendor that provided compensated contract services to the former employing public agency. *See also In re Public Employee*, Comm’n Op. No. 18-078A (2018). However, if the consulting services are without remuneration of any kind or for a matter that does not constitute an “issue under consideration,” the limitations of NRS 281A.410(1)(b) would not apply.

C. IMPLICATIONS UNDER CODE OF ETHICAL STANDARDS SET FORTH IN NRS 281A.400 AND DISCLOSURE REQUIREMENTS OF NRS 281A.420

Public officers and employees must commit themselves to avoid conflicts between private interests and those of the general public served. In furtherance thereof, Public Employee has a duty to avoid actual and perceived conflicts of interest, and Public Employee may not use a public position to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself/herself or for any person to whom Public Employee holds a commitment in a private capacity. See NRS 281A.020; NRS 281A.065; NRS 281A.400.

NRS 281A.065(4) establishes that public officers and employees have a commitment in a private capacity to their employer. The statute makes no distinction between private and public employers and the Commission has instructed that public officers or employees have a commitment in a private capacity to the interests of their public employers. See *In re Public Officer*, Comm'n Op. No. 13-77A (2014) at p. 5; *In re Public Officer*, Comm'n Op. No. 14-33A (2014) at p. 4. Consequently, the employer's interests are deemed to be that of the public officer or employee.

Specifically, Public Employee's duties as a public employee include compliance with the Code of Ethical Standards set forth in NRS 281A.400. Several sections of NRS 281A.400 are implicated when a public officer or employee seeks employment with any public entity over which the Public Agency has supervision or control, including:

1. NRS 281A.400(1) – seeking or accepting employment or economic opportunities that would tend improperly to influence a reasonable person to depart from public duties.
2. NRS 281A.400(2) – using public position to secure unwarranted privileges/advantages.
3. NRS 281A.400(3) – participating as an agent of government on private contracts in which one holds a significant pecuniary interest.
4. NRS 281A.400(5) – using nonpublic information obtained through public duties or relationships to further a significant pecuniary interest.
5. NRS 281A.400(7) – Improperly using government time, property, equipment or facilities for personal purposes.
6. NRS 281A.400(10) – seeking employment/contracts through use of public position.

With regard to the application of NRS 281A.400, the Commission reviews the circumstances associated with conduct alleged to be a violation of this statute on a case-by-case basis to determine whether there has been a use of a public position to seek or gain a business opportunity or employment. For example, the Commission found that NRS 281A.400(2) is implicated when a public officer/employee uses a current public position to either hire oneself or asks a subordinate to assist with obtaining employment for the public officer. See *In re McNair*, Comm'n Op. Nos. 10-105C, 10-106C, 10-108C, 10-109C, and 10-0115C (2011) and *In re Maurizio*, Comm'n Op. No. 09-40C (2010). In addition, the Commission has confirmed that a public officer/employee may not use a public position as a "selling point" in marketing future private services. See *In re Public Employee*, Comm'n Op. No. 16-72A (2016); *In re Hales*, Comm'n Op. No. 07-13A (2008).

The Commission will consider whether the job would have been provided but for the public position held or whether the employment or contract closely relates to the public duties of the public officer or employee. See *In re Cegavske*, Comm'n Op. No. 05-16A (2005) (concerns about whether public officer would have been provided the business opportunity but for the current public position; however, caution was advised since there was insufficient evidence for an unequivocal finding) and *In re Public Employee*, Comm'n Op. No. 15-28A (2016) (concerns expressed regarding use of public position to seek post-termination consulting contract with employing public entity because anticipated private services were similar to Public Employee's assigned public duties).

In a recent opinion, the Commission prominently stated and providently cautioned that "[c]entral to these standards of conduct is the public policy concern regarding improper use of a public position to acquire a private or personal gain. The statutory provisions are not subject to relief or waiver by the Commission. So, appropriate care must be taken by public officers/employees, including Public Officer, to comply with these provisions and maintain the integrity of public service by avoiding actual conflicts or even an appearance of impropriety by properly separating private interests from public duties." *In re Public Officer*, Comm'n Op. No. 17-39C (2018) at p. 8.

Concerns would be present if a public officer or employee does not comply with the Ethics Law and its precedential opinions and he/she were to reach out to other public employees or utilize other relationships obtained through Public Employee's public position to seek future employment. Further, public officers and employees must protect the public trust and avoid improper use of government time, resources, property or facilities to benefit a personal interest. Public Employee is advised to maintain proper separation between Public Employee's private interests in seeking future employment and Public Employee's public duties.

In addition, if Public Employee's public duties for Public Agency are engaged with regard to the Public Entity while Public Employee is seeking employment therewith, before acting upon the matter, Public Employee must properly disclose the conflict to the supervisory head of the Public Agency and potentially abstain in order to comply with NRS 281A.420.

D. OTHER IMPLICATED LAWS

The employing Public Agency has statutory, regulatory and policy requirements over its personnel that could apply to the circumstances, which are known to Public Employee. Although the Commission does not have jurisdiction to directly enforce these laws, regulations or policies, Public Employee is referred to the official legal counsel or supervisory head of the Public Agency to assure Public Employee's compliance therewith while serving as a public employee.

VI. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Public Employee was a public employee as defined by NRS 281A.150.
2. Pursuant to NRS 281A.675 and NRS 281A.550(6), the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to the Public Employee under NRS 281A.460.

3. Public Employee is advised that future public service for the public entity does not fall within the scope of the prohibitions delineated in NRS 281A.550(3) because the public service would not be for a private “business or industry whose activities are governed by regulations” adopted by the Public Agency.
4. Pursuant to NRS 281A.410(1)(b), Public Employee may not represent or counsel a private person or entity for compensation for one year after the termination of Public Employee’s public service on any issues that were under consideration by the Public Agency for the entire period of Public Employee’s public service, which restriction would encompass any private person or private entity that provides compensated consulting services to a public agency or entity under the authority of the Public Agency.
5. Based upon the specific circumstances provided by Public Employee, the anticipated employment with the Public Entity does not implicate the provisions of NRS 281A.410(1)(b), which restrict the representation or counseling of any private persons or entities, for at least one year after the termination of public service, on any issues that were under consideration by the public agency served.
6. On future public matters implicating Public Employee’s potential employment, Public Employee is advised to comply with the requirements of the Code of Ethical Conduct set forth in NRS 281A.400.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

Dated this 14th day of March, 2019.

NEVADA COMMISSION ON ETHICS

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

By: /s/ Teresa Lowry
Teresa Lowry, Esq.
Commissioner

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

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

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: /s/ Kim Wallin
Kim Wallin
Commissioner

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

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