



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No.19-083A

_____ Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer ("Public Officer"), employed by Public Agency ("Public Agency"), State of Nevada, requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675, regarding the propriety of Public Officer'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 The Commission considered the request for an advisory opinion, information provided by Public Officer that was affirmed as true, and available public information.

Public Officer sought an opinion from the Ethics Commission regarding Public Officer's responsibilities under the Ethics Law associated with Public Officer's public duties and anticipated private business and employment ("secondary employment"). After fully considering Public Officer's request and analyzing the facts, circumstances and documentation presented by Public Officer, the Commission advises Public Officer that the secondary employment is not prohibited by the Ethics Law; however, Public Officer must properly navigate the requirements of the Ethics Law to avoid conflicts of interest and possible statutory violations, as detailed herein. Furthermore, the Commission does not opine on whether the secondary employment is appropriate under Public Agency's personnel requirements and associated agency determinations.

Public Officer 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 Officer and available public information. 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 Officer, 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.²

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

² The Commission reserves its statutory authority should an ethics complaint be filed presenting contrary circumstances. See *In re Howard*, Comm'n Op. No. 01-36 (2002) (notwithstanding advisory opinion, public is not precluded from bringing ethics complaint) and *In re Rock*, Comm'n Op. No. 94-53 (1995) (reservation of right to review until time issue is raised).

II. QUESTION PRESENTED

Public Officer is employed by Public Agency and is contemplating secondary employment by establishing a private business to provide services to clients located in other states. Notably, some of these anticipated services are similar to the public duties performed by Public Officer. Public Officer confirms that Public Officer will comply with all Public Agency's personnel requirements applicable to the secondary employment and seeks guidance on the implications of the Ethics Law.

III. FINDINGS OF FACT

1. Public Officer is a public officer serving Public Agency.
2. Public Agency has consistent with State laws established policies associated with secondary employment, which require approval to assure the private employment is not incompatibility with public duties, separation between public duties and private secondary employment interests, and restrict improper use of public information and utilization of government time, public facilities, email and other equipment.
3. Public Officer will comply with statutes, regulations and policy requirements of Public Agency and State laws pertaining to secondary employment including obtaining all required approvals for the secondary employment.
4. Public Officer anticipates establishing a business providing services to clients located in other states that are similar to the public duties performed in Nevada, which clients may include public agencies.
5. Public Officer has not approached, marketed, or utilized a public position to solicit or leverage secondary employment opportunities or client contacts.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

Public Officer seeks guidance on implications under the Ethics Law pertaining to the proposed secondary employment if Public Officer were to establish a business to provide services to clients including public agencies located in other States, which private services have similarities to the public duties performed by Public Officer in Nevada. Public Officer does not intend to provide business services to any public agency located in the State of Nevada. Public Officer confirms that Public Officer will comply with the established policies of Public Agency pertaining to the proposed secondary employment.

The Commission initially confirms that it may consider but does not directly enforce government policies that are consistent with or implicate the Ethics Law. Further, the Commission does not interpret or enforce wage and hour laws or other laws pertaining to public employment. Consequently, Public Officer must complete due diligence with respect to all applicable laws, regulations and polices pertaining to Public Officer's public employment and the proposed secondary employment. Public Officer is advised to seek formal advice from Public Agency's official legal counsel on such matters and obtain approval for the secondary employment, as required by Public Agency. This opinion is limited to application of the Ethics Law to the given facts presented by Public Officer.

The Ethics Law promotes the appropriate separation between public duties and private interests. Public Officer has specific public responsibilities that must be separated from private employment interests and commitments in order to preserve the public trust. Secondary employment issues, especially if the secondary employment has similar duties

to those performed in contemporaneous public service, often place the public officer or employee in a position to face inevitable and possible reoccurring conflict situations. Public Officer must recognize and has a duty under the Ethics Law to avoid inherent conflicts associated with private employment interests. See NRS 281A.020.

In conflict situations, the Ethics Law requires compliance with the Code of Ethical Standards set forth in NRS 281A.400 and the disclosure/abstention requirements of NRS 281A.420. The public trust must be protected when a person has private commitments to a private employer that diverge with public duties. A private commitment may lead to conflict situations that must be recognized and navigated in compliance with the requirements of the Ethics Law, including the policy of the State of Nevada to avoid conflicts and appearances of impropriety as set forth in NRS 281A.020. Although under the circumstances, the secondary employment is not specifically prohibited under the Ethics Law, the Commission confirms that any failure to comply with the requirements of the Ethics Law, including avoidance of conflicts, maintaining the time and resource commitments owed to Public Agency and other requirements pertaining to pecuniary interests and private commitments, could harm the public trust and possibly violate the Ethics Law.

B. RELEVANT STATUTES

The following provisions of the Ethics law are relevant to this matter.

1) Duty to Avoid Conflicts of Interest

NRS 281A.020 provides in relevant part:

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) “Commitment in a private capacity” and “Pecuniary interest” Defined

NRS 281A.065 provides, in relevant part:

“Commitment in a private capacity,” with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

- ...
4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
 5. With whom the public officer or employee has a substantial and continuing business relationship; . . .

NRS 281A.139 provides:

“Pecuniary interest” means any beneficial or detrimental interest in a matter that consists of or is measured in money or is otherwise related to money, including, without limitation:

1. Anything of economic value; and
2. Payments or other money which a person is owed or otherwise entitled to by virtue of any statute, regulation, code, ordinance or contract or other agreement.

3) Improper Use of Government Position

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 to the interests of that person. As used in this subsection, "unwarranted" means without justification or adequate reason.

NRS 281A.400(7) provides:

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. 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 through the use of the public officer's or employee's official position.

4) Disclosure and Abstention

NRS 281A.420(1) and (3) provide, in relevant part:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a significant pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interests of another person,

↳ without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's significant pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

* * *

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's significant pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of another person.

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V. COMMISSION DECISION

A. PECUNIARY INTERESTS AND COMMITMENTS IN A PRIVATE CAPACITY RELATED TO SECONDARY EMPLOYMENT

The Legislature has deemed private pecuniary interests and certain identified relationships as commitments implicating conflicts of interest. As any public officer or employee, Public Officer has a significant pecuniary interest in maintaining employment and associated wages and benefits. See *In re Public Officer*, Comm'n Op. No. 15-74A (2018). In addition, NRS 281A.065 details the types of relationships to which public officers and employees have statutory private commitments to include an employer (including one's own business). See NRS 281A.065(4).

As a result of the proposed secondary employment, the associated interests of the employer are statutorily attributed to Public Officer, which may establish conflicts with public duties. *In re Brown*, Comm'n Op. No. 13-28A (2013). As explained in *Brown*, "[t]he Ethics Law recognizes various conflicts or perceived conflicts between public duties and a person with whom public officers and employees have employment commitments." *Id.*, at 9. Accordingly, Public Officer must consider the implications of the secondary employment and associated business relationships and interests in addressing any related public matters, including compliance with the standards of conduct with regard to Public Agency's matters affecting the private secondary employment, as set forth in the various sections of NRS 281A.400.

B. IMPROPER USE OF GOVERNMENT POSITION – APPLICABILITY OF NRS 281A.400(1), (2), (7) AND (10)

Public Officer has a duty to protect the public trust and separate public responsibilities from private interests in the secondary employment. Therefore, Public Officer may not use a public position in government to seek or gain an economic opportunity which would tend to influence a reasonable person in Public Officer's position to depart from the impartial discharge of public duties.

The provisions of NRS 281A.400 serve to assist Public Officer in maintaining a proper separation between private interests and public duties. For each referenced section of NRS 281A.400, Public Officer must be mindful of the following implications:

- NRS 281A.400(1) – Public Officer's public duties require Public Officer to represent Public Agency in its interactions with employees, vendors, and other persons and entities, and it is possible that the faithful discharge of public duties could be impacted if Public Officer were to contemporaneously market or promote private business matters. To avoid this conflict, Public Officer must appropriately separate public duties from private interests, and if they are anticipated to collide to avoid the conflict and notify/disclose to the Public Agency the full nature and extent of the conflict. See NRS 281A.420.
- NRS 281A.400(2) – Public Officer's public position could place Public Officer in a position to create an unwarranted benefit to further a private interest if Public Officer utilizes a public position to access a customer base of individuals who may be interested in private business services. Therefore, Public Officer must not use a public position to market a private business services or products. Public Officer also must not use

a public position as a selling point for purposes of advertising private business services or business products.

- NRS 281A.400(7) – Public Officer has acknowledged the ethical duty to fully separate private work from work as a public employee and knows that it is inappropriate to use government time, property or equipment for purposes related to secondary employment. Public Officer is advised to continue to comply with the provisions of this statute and to work on matters related to private secondary employment on Public Officer's own time and without using public time, equipment, property, resources or facilities of Public Agency to assure compliance with the Ethics Law and policies established by Public Agency.
- NRS 281A.400(10) – Public Officer is advised that referencing a public position in any marketing communications for secondary employment implicates this statutory prohibition.

In prior Commission opinions applying the provisions of NRS 281A.400, the Commission has reviewed the circumstances 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 private employment. For example, in *In re Public Employee*, Comm'n Op. No. 18-080A (2019), the Commission found that a public employee's conduct in using a public position and associated relationships with vendors implicated the improper use of a public position under the Ethics Law. The Commission also has found violations when a public officer/employee used a public position to either hire him or herself or asked a subordinate to assist with obtaining private 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); *In re Maurizio*, Comm'n Op. No. 09-40C (2010).

Even when the public officer or public employee does not use a public position to seek the employment opportunity or influence the assistance of a subordinate in the endeavor, other circumstances may be present warranting consideration under the Ethics Law. See *In re Public Employee*, Comm'n Op. No. 15-28A (2016) (concerns expressed regarding use of public position to seek post-separation consulting contract with the employing public entity because anticipated private services were similar to public employee's assigned public duties). Additionally, 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 Hales*, Comm'n Op. No. 07-13A (2008). In *Hales*, the Commission considered Hales' conduct and expressly qualified its guidance to her private marketing endeavors that intricately used her public office as a selling point to promote private services and applied opinion precedent issued by the Commission, some of which are cited in this opinion.

Public Officer is recognized for a thoughtful approach in seeking this opinion on whether secondary employment is prohibited by the Ethics Law. Nevertheless, it is evident that, concerns would be present if Public Officer were to reach out to potential clients or customers through a public position. Conceivably, through public duties, Public Officer has access to a target customer base of individuals who may be interested in the proposed business services. This is an advantage afforded Public Officer by virtue of the public position held by Public Officer. Potential conflicts stem from the possibility that Public Officer could market a private business by utilizing a public position.

Therefore, Public Officer must be proactive and diligent to maintain a proper separation between public duties and private interests by not engaging in conduct that creates unwarranted or improper private benefits by using a public position. The Commission advises Public Officer of the statutory requirements of NRS 281.400 and associated opinion precedent issued by the Commission, so this information may be applied to the circumstances once the details of Public Officer's proposed business are further developed.

C. DISCLOSURE AND ABSTENTION REQUIREMENTS

NRS 281A.420(1) prohibits a public employee from acting or working on a matter associated with public duties in which the public employee has a significant pecuniary interest, or which would reasonably be affected by the public employee's commitment in a private capacity to the interests of another, without first disclosing the nature and extent of the interest. See *In re Public Employee*, Comm'n Op. No. 13-78A (2014) (disclosure should include the public employee's actions/involvement regarding the matter to date). As the Commission explained:

A public officer/employee has an obligation to preserve the public trust and commit himself to avoid conflicts between his private interests and public duties. Where these conflicts arise in the context and consideration of public matters, the public officer/employee may, under certain circumstances, honor his obligations through appropriate disclosures and abstentions.

Id., at pgs. 9-10.

Under the circumstances presented, the Ethics Law does not prohibit Public Officer from providing private business services to persons or entities unrelated to Public Agency's operations or to those who hear about the business services through outreach and communication unrelated to Public Officer's public position. However, a potential conflict exists when Public Officer is assigned to work on a matter for any private client that implicates the public duties performed by Public Officer. The duty to disclose will arise whenever Public Officer has a conflict between public duties and private pecuniary interests and commitments. These conflicts could arise in several situations given certain similarities between public duties and the proposed private business services.

Pursuant to NRS 281A.420(1)(c), Public Officer is advised that a proper disclosure will be required each time public duties and private interests and commitments intersect. The purpose of the disclosure is to provide sufficient information regarding the conflict of interest to inform the Public Agency (or the supervisory head of the organization) of the nature and extent of the conflict and the potential effect of the action or abstention on Public Officer's private interests. Further, there may be times where Public Officer may need to make the disclosure to the public, if the private interests and commitments happen to implicate a matter associated with a public meeting:

With respect to those matters associated with a public meeting that implicate the disclosure requirements of NRS 281A.420(1), a public officer or employee, who is not a member of the public body, must make the disclosure to the supervisory head of the public officer's employee's organization. However, where the public officer or employee is the supervisory head of the organization, the statute is silent regarding to whom the supervisory head of the organization must report such conflict. Murnane, as the City Manager, is the Chief Executive Officer and supervisory head of the organization under Section 3.020 of the Henderson City Charter.

Disclosure to oneself is not reasonable because it does not provide a proper disclosure to inform “the public” of the potential effect of the action or abstention upon the person to whom Murnane has a [conflict]...., which is required by NRS 281A.420(1).

In re Murnane, Comm’n Op. No. 15-45A (2016), at pg. 13 (“*Murnane*”).

Since the nature of the proposed business services are relatively undefined, the Commission is not currently able to provide specific advice on a particular matter or client, including whether abstention would be required under NRS 281A.420. To issue guidance on a potential conflict of interest, the Commission must be provided a set of facts identifying the nature and extent of the conflict. See NRS 281A.675. However, in all circumstances, the Commission recommends that Public Officer take proper steps under the Ethics Law to avoid the potential conflict and, as particular circumstances arise, to seek the advice of Public Agency’s official legal counsel, which advice may provide certain protections from a willful violation of the Ethics Law provided it is sought in compliance with NRS 281A.790(5). In addition, the Commission’s advisory opinion process is available to assist Public Officer in these endeavors should Public Officer be permitted by Public Agency to pursue the secondary employment.

VI. CONCLUSIONS OF LAW

1. Public Officer is a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.675, the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to the public officer or employee under NRS 281A.665.
3. Public Officer does not violate the provisions of NRS 281A.020 and NRS 281A.400 by pursuing secondary employment, as presented and instructed in this opinion. However, Public Officer must commit to avoid using as public position to obtain any unwarranted preferences or advantages for Public Officer or any private person or entity (including the private business) to whom there is a private commitment under NRS 281A.065.
4. Pursuant to NRS 281A.400(7), Public Officer may not use government time, property, equipment or other facility to conduct secondary employment, including any private business.
5. Pursuant to NRS 281A.400(10), Public Officer may not market sales, services or products pertaining to the secondary employment by using a public position.
6. Pursuant to NRS 281A.420(1), prior to acting on a matter on behalf of Public Agency, Public Officer should properly disclose as required by NRS 281A.420 any secondary employment conflicts that intersect with public duties, as instructed in this opinion.
7. Given the affirmative requirements of NRS 281A.020 to avoid conflicts of interests between public duties and private interests, the Commission further advises Public Officer to take reasonable steps to avoid potential conflicts, which steps favor Public Officer complying with established policies of Public Agency and State law governing secondary employment, and for implications under the Ethics Law to promptly seek legal advice from official legal counsel for Public Agency in compliance with NRS 281A.790(5) and/or utilizing the Commission’s advisory opinion process.

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.

Dated this 11th day of December, 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
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