



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No. 19-100A

Public Employee. /

### **ABSTRACT OPINION**

#### **I. STATEMENT OF THE CASE**

Public Employee employed by Public Entity, State of Nevada, requested this advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675 regarding the propriety of past, present or 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 NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.<sup>1</sup> The Commission considered the request for an advisory opinion, information provided by Public Employee that was affirmed as true, and available public information.

Public Employee seeks an opinion from the Commission regarding the applicability of the Ethics Law to the acceptance of a monetary award for participation in an industry program from a private business connected to regulated industry. After considering Public Employee's request and analyzing the facts and circumstances presented by Public Employee, the Commission advises Public Employee how the circumstances implicate the Ethics Law and how best to mitigate the situation.

The Commission now renders this Abstract Opinion stating its formal findings of fact and conclusions of law. The facts in this matter were obtained from documentary evidence provided by Public Employee. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact set forth below accept as true those facts Public Employee presented. 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.<sup>2</sup> Although a 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 requester.

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

<sup>2</sup> 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 the 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 Employee seeks guidance on the application of the Ethics Law to whether the acceptance or retention of a monetary educational award is appropriate under the Ethics Law.

## **III. FINDING OF FACTS**

1. Public Employee is employed by Public Entity.
2. At the expense of Public Entity, Public Employee participated in an industry-related program associated with Public Employee's public duties.
3. A private business associated with the regulated industry provides monetary award to persons participating in these industry programs.
4. Public Employee received a monetary award from the private business.
5. Public Entity classifies the monetary award as a prohibited gift.

## **IV. STATEMENT AND DISCUSSION OF RELEVANT ISSUES AND STATUTES**

### **A. OVERVIEW OF ISSUES**

In this opinion, the Commission considers the implications under the Ethics Law where a public employee accepts a monetary award for participating in the industry program under circumstances where the public employer paid for the program and it was attended as part of the public employee's public duties. Under NRS 281A.020, public employees must commit themselves to avoid actual and perceived conflicts of interest and must comply with the provisions established in the Ethics Law associated with seeking or accepting gifts and economic opportunities set forth in NRS 281A.400(1) and (2). In addition, the disclosure requirements of NRS 281A.420(1) are implicated when a public officer or employee seeks or accepts a gift or economic opportunity that relates to public duties.

### **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.

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**2. Gift/Economic Opportunity that would Improperly Influence a Public Officer to Depart from the Faithful and Impartial Discharge of Public Duties**

**NRS 281A.400(1) provides:**

1. 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.

**3. Misuse of Public Position for Unwarranted Benefit**

**NRS 281A.400(2) provides:**

2. 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.

**4. Disclosure Requirements**

**NRS 281A.420(1) provides:**

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;

(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; or

(d) Which would reasonably be related to the nature of any representation or counseling that the public officer or employee provided to a private person for compensation before another agency within the immediately preceding year, provided such representation or counseling is permitted by NRS 281A.410,

↳ without disclosing information concerning the gift or loan, the significant pecuniary interest, the commitment in a private capacity to the interests of the other person or the nature of the representation or counseling of the private 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, upon the person to whom the public officer or employee has a commitment in a private capacity or upon the private person who was represented or counseled by the public officer or employee. 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.

## V. DECISION

### A. MONETARY AWARDS FOR INDUSTRY PROGRAMS

The Commission has issued fact-specific opinions addressing the propriety of receiving gifts or economic opportunities associated with educational conference fees, transportation, lodging and meals. In *In re Public Officer*, Comm'n Op. No. 11-36A (2012), the Commission reviewed prior opinions and application of NRS 281A.400(1) and (2) to circumstances where a vendor, who had an existing contract with a State Agency, offered an expense-paid trip for an agency representative to attend a symposium sponsored by the vendor. The vendor invited clients to the annual symposium to receive feedback on its products and services, which included sharing perspectives and experiences relevant to industry trends. The Commission determined the symposium was directly related to the State's interests in administering and promoting its programs as the conference was educational in nature and, importantly, that the invitation would not tend to improperly influence a reasonable public servant to depart from his official duties. See NRS 281A.400(1). However, the Commission recognized that even under circumstances where the gift has an educational or training component and/or is beneficial to the public, there is a perceived *quid pro quo*. "Consequently, the Commission is careful to review requests for opinions regarding such invitations on facts specific to the request to ensure the propriety of the intended [conference or matter] travel and to encourage agencies to adopt ... policies appropriate to their needs." *Id.*, at pgs. 4-6.

The analysis applied by the Commission in its consideration of the propriety of an industry-related gift or economic opportunity under NRS 281A.400 has five ethical considerations: (1) the purpose of the program or funding; (2) whether the program provides insight into current and future issues facing the agency and assists in fulfillment of public duties; (3) whether the gift or economic opportunity is merely a show of appreciation; (4) whether the gift or economic opportunity would influence a public officer to depart from his public duties; and (5) whether the gift or economic opportunity is warranted rather than unwarranted and does not detract from maintaining appropriate industry relationships and avoids ethical concerns. *Id*

The considerations are germane to monetary awards provided to public officers and employees by an industry-related private entity. The program taken by Public Employee served to assist in the performance of public duties. This is easily confirmable in this matter because Public Entity paid for the program taken by Public Employee and allowed the attendance of the program during normal working hours, as part of public duties.

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Regarding considerations (1) and (2), Public Employee applied for and has accepted the monetary award for the program. Of concern, are considerations (3) though (5), because:

1. The amount of the monetary award is not a mere showing of appreciation, it is not trivial and constitutes a significant pecuniary interest under the Ethics Law.<sup>3</sup>
2. The appearance of impropriety and *quid pro quo* implications pertaining to public officers and public employees whose public duties are associated with industry regulation, accepting a significant monetary award from an industry-related private entity.
3. Acceptance of the significant monetary award could detract from maintaining appropriate industry relationships and avoiding ethical concerns and appearances of impropriety.

These considerations directly relate to the requirements of NRS 281A.400(1) and (2) and are referenced below in the appropriate section.

#### **1. NRS 281A.400(1) - Improper Gifts/ Economic Opportunities**

NRS 281A.400(1) prohibits public officers and employees from seeking or accepting a gift, service favor, economic opportunity for oneself or any person to whom there is a commitment in a private capacity, which would tend to improperly influence a reasonable person in the same situation to depart from the faithful and impartial discharge of public duties. The monetary award is a significant pecuniary interest and provides the recipient with a gift or economic opportunity. The crux of the issue is whether its acceptance or retention would influence a reasonable person in Public Employee's situation to depart from public duties. Actual departure from public duties is not required, and the Commission does not perceive that to be the case in this matter. Nevertheless, under the Ethics Law, the standard for application of NRS 281A.400(1) is whether a reasonable person in Public Employee's situation would be placed in a position to depart from public duties for application of NRS 281A.400(1). See *also* Factor (4).

Public officers and employees have a duty to avoid an appearance of impropriety related to conflicts of interest. NRS 281A.020. The significant amount of the monetary award and involved regulatory interests formed the platform for considering whether there is an ethical conflict. In the Commission's precedential opinions pertaining to an agency's acceptance of assistance for industry programs, the public agency accepts the gift and makes the determination as to which public officer/employee should attend. It is not a direct monetary gift to the public officer or employee as selected by the payor and the agency's determination serves to add a layer of ethical checks and balances not present when significant funds are provided directly to the public officer or employee.

Further, the fact that Public Entity has classified the monetary award as a gift causes concern. In this request, the Commission recognizes that the ethical conflict, even though there are mitigating factors, creates at a minimum an appearance of impropriety and the provisions of NRS 281A.400(1) are certainly implicated given the amount of the recognition and the perception of *quid pro quo* related to direct monetary awards to the

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<sup>3</sup> A significant pecuniary interest is one that "the associated benefits or detriments are important and not incidental, trivial or *de minimis*." See NRS 281A.139 and *In re Public Officer*, Comm'n Op. No. 19-049 (2019) at p. 7

public officer or employee. Such recognitions could have, or be perceived to have, an underlying purpose of seeking favoritism or a departure from faithfully performing public duties, which at this point should be addressed through mitigation in the form of self-reporting and policy/rule compliance. To further mitigate past conduct, Public Employee is referred to the supervisory head of Public Entity to self-report. Public Employee's proper disclosure to the supervisory head of the organization also will assist in compliance with the disclosure obligations applicable to public employees established in the Ethics Law pursuant to NRS 281A.420(1).<sup>4</sup>

## **2. NRS 281A.400(2) – Improper Use of Government Position**

NRS 281A.400(2) prohibits using a public position to secure or grant unwarranted privileges, preferences or advantages to benefit oneself, any business entity in which there is a significant pecuniary interest, or any person to whom there is a commitment in a private capacity. Unwarranted means without justification or adequate reason. *Id.* Public Entity has determined that the monetary award constitutes a gift, which required that appropriate separation between conflicts and public duties be maintained, in order to avoid any ethical appearance of impropriety. See also the considerations detailed in *In re Public Officer*, Comm'n Op. No. 11-36A (2012) application of NRS 281A.4500(2).

NRS 281A.400(2) could be implicated if Public Employee had used a public position to accept or secure the monetary award. Nevertheless, there are many elements associated with the application of NRS 281A.400(2) to Public Employee's acceptance or retention of the monetary award and the Commission has not been provided all necessary information to issue guidance to Public Employee. Given the involved regulatory interests of Public Entity, without the benefit of an investigation or contested proceedings, there is an incomplete factual record on which the Commission is requested to provide guidance in the advisory context on the application of NRS 281A.400(2).<sup>5</sup>

However, in furtherance of its outreach and education, the Commission has and continues to encourage policy development by the affected public agencies pertaining to gifts and economic opportunities that may be afforded public officers and employees. See *In re Public Officer*, Comm'n Op. No. 11-36A (2012). Policy development can serve to maintain proper ethical standards. In prior opinion precedent, the Commission has questioned the practices of the regulated industry and affected agency personnel when there is either an appearance of impropriety or actual impropriety related to the use of a public position for a private matter. See *In re Public Employee*, Comm'n Op. No. 18-080A (2019). The Commission detailed the ethical considerations under NRS 281A.400 when proper separation is not maintained between public duties and private interests, stating:

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<sup>4</sup> NRS 281A.420(1) requires a public employee to sufficiently disclose to the supervisory head of the organization the acceptance of a gift or loan, pecuniary interest, or commitment in a private capacity to the interest of another person that is reasonably affected by an official matter.

<sup>5</sup> The Commission may issue an opinion interpreting the Ethics Law if it receives an advisory opinion from a public officer or employee pursuant to NRS 281A.675, as is the case here. Alternatively, the Commission may receive or institute an ethics complaint pursuant to NRS 281A.710. In the advisory context, the requester provides the necessary factual information to render the opinion, and in an ethics case, the Commission has the benefit of an independent investigation and contested proceedings to develop the factual record. If an ethics complaint is instituted, the Commission must ascertain whether a violation is willful after application of the mitigating factors set forth in NRS 281A.775. However, the Commission efforts at outreach and education caution against initiating a complaint in the context of an advisory opinion. *In re Public Officer*, Comm'n Op. No. 15-71A (2016), at p. 8. The Commission does not intend to thwart or punish a public officer or employee from seeking educational guidance and advice and will not initiate its own complaint in this matter, but it also may not prevent a complaint filed by the public.

The dilemma for the employing public entity is to maintain the integrity of its regulatory operations by requiring its employees to properly separate their private interests from public duties in furtherance of assuring that regulatory operational compliance over the regulated industry is instituted without bias or personal interest. Every public employer that controls, establishes and enforces regulatory policy has a “substantial interest in maintaining the ethical integrity of its policy and regulatory operations.” *In re Public Employee*, Comm’n Op. No. 18-021A (2018) at pgs. 6-7. The public integrity of the involved public entity is compromised by an industry and vendor practice and custom and the acceptance of such practice and custom by the entity and its employees to recruit from the public sector.

*Id.*, at p. 8.

To summarize, given the incomplete record before it, the Commission is not able to determine whether Public Employee improperly used a public position to secure an unwarranted gift or economic benefit. The Commission is only able to provide guidance to Public Employee to avoid any appearance of impropriety and mitigate the ethical dilemma associated with these matters and encourage policy development.

## **B. OTHER IMPLICATED LAWS**

Although the Commission is not charged with the enforcement of other State or local laws, regulations or policies, it may reference them in its opinions even though it is not required to under the provisions of NRS Chapter 281A. Public officers and employees have an independent duty to determine the existence of other applicable laws, regulations and policies associated with their public employment and related situations. Further, an opinion issued by the Commission does not excuse the duty to comply with such requirements.

## **VI. CONCLUSIONS OF LAW**

1. Public Employee is a “public employee,” as defined by NRS 281A.150.
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 Employee is advised to comply with the requirements of the Code of Ethical Conduct set forth in NRS 281A.400(1), as instructed in this opinion.
4. In order to affirmatively avoid conflicts of interests and potential violations of the disclosure requirements of NRS 281A.420(1), Public Employee is advised to properly disclose to the supervisory head of Public Entity the receipt of the monetary award.

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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 29<sup>th</sup> day of January, 2020.

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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By: /s/ Kim Wallin  
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By: /s/ Barbara Gruenewald  
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By: /s/ Amanda Yen  
Amanda Yen, Esq.  
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