



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No. 20-038A

Public Employee. /

AMENDED ABSTRACT OPINION¹

I. STATEMENT OF THE CASE

Public Employee (“Public Employee”), 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 Public Employee’s conduct as it relates to the Ethics in Government Law (“Ethics Law”) set forth in Chapter 281A of the Nevada Revised Statutes. Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.² The Commission considered the request for an advisory opinion, a list of proposed facts that were affirmed as true by Public Employee and publicly available information.

Public Employee sought an opinion from the Commission regarding the applicability of the Ethics Law and its “cooling-off” requirements set forth in NRS 281A.550(5) and NRS 281A.410(1)(b) to potential employment with a private consulting business (“Consulting Business”), which is a vendor for Public Entity. After fully considering Public Employee’s request and analyzing the facts and circumstances Public Employee presented, the Commission deliberated and advises that the “cooling-off” provisions of NRS 281A.550(5) do not preclude Public Employee from employment with Consulting Business. However, Public Employee must comply with the one-year prohibition set forth in NRS 281A.410(1)(b) restricting the provision of paid representation or consulting services to a private person (including future employers such as Consulting Business) on any issues that were under consideration by Public Entity during the term of Public Employee’s public service, which restriction captures Consulting Business’s contract with Public Entity.

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.³ Although a full written opinion was served on Public

¹ The Amended Abstract Opinion serves to clarify certain facts.

² The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Wallin and Commissioners Duffrin, Gruenewald, O’Neill and Yen.

³ 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 first-party 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).

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.

II. QUESTION PRESENTED

Public Employee seeks guidance on the application of the Ethics Law to Public Employee's circumstances. Specifically, Public Employee asks whether the "cooling-off" provisions of the Ethics Law set forth in NRS 281A.550(5) or NRS 281A.410(1)(b) would prohibit Public Employee, for one year after Public Employee's separation from public service, from employment with a contract vendor who provides services to Public Entity. If NRS 281A.550(5) applies, Public Employee seeks relief from its strict application pursuant to NRS 281A.550(6).

III. FINDING OF FACTS

1. Public Employee is employed by Public Entity.
2. Consulting Business has a vendor contract with Public Entity that exceeds \$25,000 but was awarded in excess of a year ago.
3. The contract awarded to Consulting Business was one of several awarded to multiple private businesses to provide services to Public Entity on an "as needed" basis. Even though the vendor contract was awarded over a year ago, Consulting Business has yet to provide any deliverables to Public Entity under the contract.
4. As part of Public Employee's public duties, Public Employee was part of the team that reviewed multiple applicants' responsive bids and recommended Consulting Business and other applicants as qualified bidders.
5. Public Employee's public duties did not permit Public Employee to participate in the contract negotiation phase of the bid process. Such matters were handled under the authority of other staff of Public Entity.
6. Public Employee's public position has no final decision-making authority relating to the contract awarded to Consulting Business or any other qualified bidder.
7. Public Employee has discussed future employment with Consulting Business but has not yet accepted the private employment position.
8. In providing Public Employee's separation notification to Public Entity, Public Employee was advised that Public Employee's position is subject to a cooling-off period.
9. Public Employee will not proceed with employment with Consulting Business should it be prohibited under the Ethics Law.
10. Public Employee believed that the cooling-off provisions did not apply to employment through a consulting relationship. Consequently, Public Employee sought this advisory opinion from the Commission before proceeding with any future employment.
11. If the Commission determines NRS 281A.550(5) does apply, Public Employee indicates that Public Employee's employment with Consulting Business would not

be contrary to the public trust, the ethical integrity of Public Entity or the Ethics Law based upon the following:

- a) Public Employee's separation public service does not reflect a revolving door situation.
- b) Public Employee will affirmatively avoid any perceived or actual conflicts of interest.
- c) Public Employee indicates that Public Employee's knowledge and experience would benefit Nevada consumers if Public Employee is permitted to obtain employment with Consulting Business.
- d) Although Consulting Business could potentially assign Public Employee duties associated with Public Entity's vendor contract, there currently are no duties to be performed.
- e) Public Employee's participation on the committee reviewing the responses to the bid applicants may appear to have influenced the award of the contract. However, neither Public Employee nor Public Employee's position have any control or ability to influence the actual award of work for which vendors would be compensated.
- f) Public Employee had no intention of separating from public service or seeking employment outside of public service at the time Public Employee served on the review committee.

12. Public Employee verifies that Public Employee will continue to comply with the 12-month limitations set forth in NRS 281A.410(1)(b) for any issues under consideration by Public Entity during Public Employee's tenure of public service.

IV. STATEMENT AND DISCUSSION OF RELEVANT ISSUES AND STATUTES

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 against certain former public officers and employees to prevent these government actors from using any proprietary or regulatory information or relationships belonging to the public to create competitive disadvantages or other misuse of government information in the private sector contracted with or regulated by the governmental entity.

Based upon Public Employee's public position, Public Employee is a public employee as that term is defined in NRS 281A.150 and 281A.180. Public Employee seeks guidance from the Commission on whether NRS 281A.550(5) or NRS 281A.410(1)(b) restrict Public Employee's from pursuing employment endeavors with Consulting Business, a private vendor for Public Entity. If NRS 281A.550(5) applies, Public Employee requests relief from the strict application pursuant to NRS 281A.550(6).

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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” – 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.

3. “Cooling-Off” – Accepting Employment with Contract Vendor

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.

4. Relief from Strict Application of “Cooling-off” Requirements

NRS 281A.550(6), (7), (8) and (9) provide:

6. A current or former public officer or employee may file a request for an advisory opinion pursuant to NRS 281A.675 concerning the application

of 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 advisory opinion to that effect and grant such relief. {

7. For the purposes of subsection 6, the request for an advisory opinion, the advisory opinion and all meetings, hearings and proceedings of the Commission in such a matter are governed by the provisions of NRS 281A.670 to 281A.690, inclusive.

8. The advisory opinion does not relieve the current or former public officer or employee from the strict application of any provision of NRS 281A.410.

9. For the purposes of this section:

(a) A former member of the Public Utilities Commission of Nevada, the Nevada Gaming Control Board or the Nevada Gaming Commission; or

(b) Any other former public officer or employee governed by this section, ↳ is employed by or is soliciting or accepting employment from a business, industry or other person described in this section if any oral or written agreement is sought, negotiated or exists during the restricted period pursuant to which the personal services of the public officer or employee are provided or will be provided to the business, industry or other person, even if such an agreement does not or will not become effective until after the restricted period.

V. DECISION

This request signifies concerns triggering the "cooling-off" prohibitions of the Ethics Law under NRS 281A.550(5) and NRS 281A.410(1)(b). The Legislature has identified limited circumstances in which a public employee may be restricted in future employment endeavors in the private sector so as not to dilute the public's faith in government. Notably, the Legislature, in enacting the distinct and separately enforceable restrictions in NRS 281A.550 and NRS 281A.410, has not prohibited all future private income or employment opportunities. Each statute has a varied focus, but similarly serves to protect the public trust including the associated relationships acquired during public service and expertise obtained as a result of public duties.

The Commission considers whether NRS 281A.550(5) applies and, if applicable, whether Public Employee should be granted relief pursuant to NRS 281A.550(6). Thereafter, the Commission provides Public Employee guidance on the mandatory provisions of NRS 281A.410(1)(b), which prohibit former public officers/employees from providing paid counseling and representation to private persons or entities, including future employers, consulting firms, for a 12-month period on any issues under consideration by the employing agency during the public officer's/employee's public service.

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A. THE COOLING-OFF PROVISIONS OF NRS 281A.550(5) DO NOT RESTRICT PUBLIC EMPLOYEE FROM SEEKING EMPLOYMENT WITH CONSULTING BUSINESS UNDER THE CIRCUMSTANCES

As the Commission has explained: “[t]he Legislature has identified certain restrictions governing whether a public officer or employee may pursue future employment in the private sector so as not to dilute the public’s faith in government. Notably, the Legislature has limited future private employment opportunities that may derive, in part, out of public experiences, including on relationships acquired during public service or expertise obtained in a particular field earned as a result of public duties. The Legislature has tackled unique employment engagements that directly signal impropriety as a result of specific positions or ability to influence public duties that necessarily interact with private employment opportunities.” *In re Durski*, Comm’n Op. No. 18-118A (2018), at p. 9.

In particular, NRS 281A.550(5) prohibits seeking or accepting employment with a private entity that contracts with the State or a political subdivision if the contract amount exceeds \$25,000, the contract was awarded within the 12 months immediately preceding the termination of public service, and the position held by the former public officer or employee at the time the of the contract award allowed the former public officer or employee to affect or influence the award of the contract. All conjunctive requirements of NRS 281A.550(5) must be present for the one-year “cooling-off” prohibition to apply to restrict the employment.

Consulting Business is a private contract vendor for Public Entity. The approved subject contract amount exceeds \$25,000 and services are to be received by Public Entity on an “as needed” basis. Services from Consulting Business are not currently utilized by Public Entity. Nevertheless, the fact that Consulting Business has not provided any deliverables under the contract is not relevant because NRS 281A.550(5) only requires the contract be awarded for its application.

Of more relevance is whether Public Employee, in carrying out Public Employee’s public duties, had any influence on the contract award, and the fact that Consulting Business’s contract was awarded in excess of 12 months prior to Public Employee’s separation date from public service. In review of the circumstances associated with Public Employee’s public duties during the contract selection process, the Commission determines that Public Employee’s role as one of the reviewers to determine whether the responding applicants were qualified is within the scope of NRS 281A.550(5). One requirement of NRS 281A.550(5) is whether the position held by a public officer or employee at the time the of the contract award allowed the public officer or employee to affect or influence the award of the contract.

If public duties place the public officer/employee in a processing role greater than clerical such as a reviewer, the Commission has found the statutory element present. Public Employee’s role with respect to this contract was not insignificant and satisfies the required element. This determination is consistent with statutory requirements and the Commission’s opinion precedent, in which the Commission has determined that the public officer or public employee need only be part of the process rather than the final decision maker for applicability of NRS 281A.550. See *In re Public Employee*, Comm’n Op. No. 17-28A (2018) (public employee not required to be final decision maker or hold a position directly responsible for making recommendations because public duties performed even under supervision may be sufficient for application of the restrictions set forth in NRS 281A.550). Further, impartiality or lack of bias in processing a contract may be considered when granting relief from NRS 281A.550(5); however, it is not an element of basic

statutory application of the provisions of NRS 281A.550(5). See *In re Public Employee*, Comm'n Op. No. 19-068A (2019).

Public Employee has provided a copy of Consulting Business's contract which was awarded in excess of 12 months prior to Public Employee's anticipated date of separating from public service, and there are no recent amendments to the contract within the past year. Although, the subject contract otherwise is within NRS 281A.550(5), the conjunctive statutory requirement that the contract be awarded within the preceding 12-month period is not present.⁴ Therefore, based upon the circumstances presented, the Commission determines that NRS 281A.550(5) does not preclude Public Employee from employment with Consulting Business because all requirements of NRS 281A.550(5) have not been met. Because NRS 281A.550(5) does not apply, the Commission need not determine whether relief is appropriate pursuant to NRS 281A.550(6). As it appears that this situation may be fluid, in that Public Entity may request the provision of contract services from Consulting Business at any time under the existing contract, the Commission further advises that if any other contract or amendment thereto is provided to Consulting Business prior to Public Employee's departure from public service, NRS 281A.550(5) must be revisited to determine whether it is applicable to the new contract or amendment because the 12-month requirement will then have been met with regard to a Consulting Business contract with Public Entity.

Although the Commission recognizes the technical timing of the contract award as outside the 12-month period required to enforce the cooling-off prohibition established in NRS 281A.550(5), the Commission nevertheless construes the circumstances presented herein as an unintended loophole to the statute. From an appearance standpoint, Consulting Business could be awarded the opportunity to provide services to Public Entity at any time and is simultaneously offering a lucrative employment opportunity to Public Employee who was influential in assessing and grading the applicants that sought to qualify under the contract, including Consulting Business. Therefore, the Commission is concerned that Public Employee will accept employment from Consulting Business during a period of time in which Consulting Business is up-to-bat to provide services to Public Entity, or vice-versa, that Public Entity will request services to be provided by Consulting Business and immediately thereafter Public Employee will accept such employment. The timing of the private employment opportunity infers appearances of impropriety. Nevertheless, the Commission is satisfied with Public Employee's assertions that Public Employee has not had any opportunity to influence contract services that may be requested from or provided by Consulting Business under a contract that was awarded more than 12 months ago.

The Commission takes this opportunity to caution public officers/employees that the requirements of NRS 281A.550(9) restrict seeking or obtaining employment if it is restricted by NRS 281A.550 before securing relief from the "cooling-off" provisions. As the Commission has stated and hereby reinforces:

To do otherwise is at one's peril. At a minimum, the restricted conduct hinders, and in this case, serves, in part, to preclude the ability of the Commission to grant relief from the "cooling-off" prohibition under NRS 281A.550(6).

In re Public Employee, Comm'n Op. No. 19-051A (2019), at p. 8. In this opinion the public employee applied for and accepted the position with a contract vendor at a time when the

⁴ Consulting Business has no subsequent contract amendment, the date of which would be used to calculate the 12-month period.

public employee did not have knowledge regarding the requirements of NRS 281A.550 or NRS 281A.410(1)(b). Once the statutory requirements were realized, the public employer retracted the acceptance and sought an advisory opinion from the Commission. Such relief was not granted, in part, based upon the fact that there was a solicitation and acceptance of employment from a restricted vendor.

Public Employee easily could have been in this same position, but for the timing of the contract award to Consulting Business and Public Employee's anticipated date of separation from public service. Accordingly, the Commission in this opinion highlights this issue so that other public officers/employees are vigilant to comply with the Ethics Law. The Commission is in a better position to consider granting relief when there is no issue associated with the restriction on soliciting or obtaining private employment. Separately from whether the restrictions of NRS 281A.550(5) applies to the contract with Consulting Business, the Commission recognizes that the presented facts demonstrate that Public Employee sought employment with Consulting Business. See NRS 281A.550(9).

As a preventative measure, Public Employee is further referred to a prior opinion of the Commission that details certain provisions of the Code of Ethical Standards set forth in NRS 281A.400. *In re Public Employee*, Comm'n Op. No. 18-80A (2019) provides direction on properly maintaining proper separation between public duties and private interests in seeking private employment, including refraining from seeking employment through the use of a public position. If Public Employee is assigned any matters relating to Consulting Business, Public Employee must comply with the disclosure and abstention requirements of NRS 281A.420 given Public Employee's future employment with Consulting Business. The proper and likely result of a full disclosure will be for Public Entity to completely separate Public Employee from any duties relating to Consulting Business.

B. NRS 281A.410(1)(b) – COUNSELING OR REPRESENTING A PRIVATE PERSON FOR COMPENSATION ON ISSUES UNDER CONSIDERATION BY PUBLIC ENTITY

NRS 281A.410(1)(b) restricts, for one year, representing or counseling any private person (including an employer or other business entity) for compensation on any issue that was under consideration by the employing agency during the employment of a public officer or employee. See also *In re Public Employee*, Comm'n Op. No. 18-015A (2018), at pgs. 8-9 and *In re Public Officer*, Comm'n Op. No. 16-68A (2016), at pgs. 8-9. An issue under consideration includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations. See NRS 281A.410(1)(b). Further, private employment duties associated with representing or counseling a private employer is encompassed in and often is precluded by the restriction. See *In re Sweeney*, Comm'n Op. No. 15-70C (2016), (violation found even where the former employee did not realize Public Employee's counseling or representation of a private person (Public Employee's private employer) was restricted by NRS 281A.410(1)(b)).

Except as specifically provided otherwise in NRS 281A.410(2) and (3), which provisions are not applicable to these circumstances, the statutory restrictions are mandatory, not subject to relief, and apply even when the provisions of NRS 281A.550 do not restrict the proposed employment. Accordingly, the Commission advises Public Employee that Public Employee may not, for the one-year period following Public Employee's separation from public service, represent or counsel any private person for compensation on any issue that was under consideration by the agency during Public Employee's public service, which restriction would include any services provided to Public

Entity by Consulting Business under its current contract. In other words, if the employment position with Consulting Business has any duties pertaining to any issue that was under consideration by Public Entity, which captures the Consulting Business's vendor contract even though the contract deliverables have yet to be performed, Public Employee is restricted by NRS 281A.410(1)(b) from performing such duties as they could constitute representing the interests of Consulting Business during the restricted 12-month period after Public Employee's separation from public service.

VI. CONCLUSIONS OF LAW

1. Public Employee is a public employee as defined by NRS 281A.150 and 281A.180.
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 officer or employee under NRS 281A.665.
3. Public Employee is not restricted by the one-year "cooling-off" prohibitions set forth in NRS 281A.550(5) from employment with Consulting Business because Consulting Business's vendor contract was awarded in excess of 12 months prior to Public Employee's anticipated date of separation from public service.
4. Pursuant to NRS 281A.410(1)(b), Public Employee may not represent or counsel a private person or entity (including Consulting Business) for compensation for at least one year after the termination of Public Employee's public service on any issues that were under consideration by Public Entity during Public Employee's tenure.

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 9th day of July, 2020.

NEVADA COMMISSION ON ETHICS

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

By: ABSENT
Teresa Lowry, Esq.
Commissioner

By: /s/ Kim Wallin
Kim Wallin, CPA
Vice-Chair

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

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: ABSENT
Damian R. Sheets, Esq.
Commissioner

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

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