

Abstract of Advisory Opinion No. 99-38

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR AN ADVISORY OPINION OF PUBLIC EMPLOYEE

This Opinion is in response to a first-party request for advisory opinion filed with the Nevada Commission on Ethics ("Commission") by Public Employee. Public Employee seeks relief from the application of NRS 281.236 in regards to future employment opportunities after his sudden loss of employment with a department, division or other agency of the executive branch of government.

The issue presented by Public Employee is whether the "cooling off" statute (NRS 281.236) prohibits Public Employee from accepting consulting work from any or all of the four potential client types he intends to pursue as discussed herein. At the time Public Employee submitted his request for advisory opinion, he had not begun consulting for any of the clients referenced in his request.

A hearing on the advisory opinion request was held on August 12, 1999. Public Employee appeared and presented testimony. Public Employee did not waive his statutory confidentiality, so the proceeding was not open to the public. Based on the foregoing, the Commission makes the following Findings of Fact, Conclusions of Law, and Opinion.

FINDINGS OF FACT

1. Public Employee became employed as a manager in a department, division or other agency of the executive branch of government in March 1996.
2. Public Employee's primary duties for the department, division or other agency of the executive branch of government included the preparation of comments and testimony on behalf of the department, division or other agency of the executive branch of government staff, managing other employees, market analysis, including, but not limited to, prospective restructuring of the industries regulated by the department, division or other agency of the executive branch of government, and analysis of the traditional market structure and regulatory regime. Public Employee's duties did not include auditing or directly advising the department, division or other agency of the executive branch of government in its decision-making role.
3. Public Employee's employment with the department, division or other agency of the executive branch of government was suddenly and involuntarily terminated.
4. After his employment with the department, division or other agency of the executive branch of government was terminated, Public Employee decided to open a consulting business catering to the four type of potential clients he described as:
 - a. Potential Client Type 1: Public agencies or public divisions that consume utility services produced in and outside Nevada that are not regulated by the agency;
 - b. Potential Client Type II: Private customers of utility services produced in and outside Nevada that are not regulated by the agency;
 - c. Potential Client Type III: Companies providing services not currently licensed or regulated by the agency but which may become licensed under the agency at some point within the next year; and
 - d. Potential Client Type IV: Companies providing services that are currently regulated by the agency.
5. At the time of the hearing, Public Employee did not provide the Commission with a specific list of clients he

intended to provide consulting services for.

OPINION

The Commission has jurisdiction in this matter pursuant to NRS 281.511(l). Based upon the Findings of Fact, the Commission concludes that Public Employee is a public employee as defined in NRS 281.436.

NRS 281.236(3), the relevant statutory provision in this matter, provides in pertinent part that:

3. In addition to the prohibitions set forth in subsections 1 and 2, a business or industry whose activities are governed by regulations adopted by a department, division or other agency of the executive branch of government shall not, except as otherwise provided in subsection 4, employ a former public officer or employee of the agency, except a clerical employee, for 1 year after the termination of his service or period of employment if:

- (a) His principal duties included the formulation of policy contained in the regulations governing the business or industry;
- (b) During the immediately preceding year he 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 him; or
- (c) As a result of his governmental service or employment, he possesses knowledge of the trade secrets of a direct business competitor.

Pursuant to NRS 281.236(4), the Commission may grant relief from the strict application of the provisions of NRS 281.236(3) if it finds that the former state employee's employment is not contrary to:

- (a) The best interests of the public;
- (b) The continued integrity of state government; and
- (c) The code of ethical standards prescribed in NRS 281.481.

The questions before the Commission are whether NRS 281.236(3) applies to Public Employee's employment, and, if so, whether the Commission should grant Public Employee relief from the strict application of NRS 281.236(3) under the facts and circumstances of this particular matter.

We find that it would not be a violation of NRS 281.236(3) for Public Employee to provide consulting services to potential Client Types I, II, or III listed above, as those entities are not regulated by the department, division or other agency of the executive branch of government. Therefore, Public Employee may provide consulting services to Client Types I, II, and III.

CONCLUSION

The Commission finds that Public Employee's proposed consulting work with Client Types I, II, and III would not be prohibited by NRS 281.236(3) as those entities are not regulated by the department, division or other agency of the executive branch of government. Client Type IV poses another response. If Public Employee did not perform the activities listed in NRS 281.236(b) for potential clients, then that Type IV client would not come under the cooling off period and Public Employee would be able to perform consulting services for them. However, if Public Employee wishes to perform consulting services for companies which he did directly perform activities during the year immediately preceding his termination at the department, division or other agency of the executive branch of government, he must come back to the Commission with a specific client's name so the Commission can evaluate the situation and see if an exception under NRS 281.236(4) should be given.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances. The provisions of the NRS quoted and discussed above must be applied on a case-by-case basis, with results, which may vary depending

on the specific facts and circumstances involved.

DATED: November 18, 1999.

NEVADA COMMISSION ON ETHICS

By: /s/ MARIO G. RECANZONE, Vice Chairman