

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR AN ADVISORY OPINION OF JUDY
SHELDREW, Former Member, Public Utilities Commission of Nevada

This matter came before the Nevada Commission on Ethics (“Commission”) in open session on Thursday, October 19, 2000, for hearing on the advisory opinion request filed with the Commission on September 6, 2000, by Judy M. Sheldrew, a former member of the Public Utilities Commission of Nevada (PUCN), pursuant to Subsections 3 and 4 of NRS 281.236. NRS 281.236 makes no provision for a confidential hearing. Notice of the hearing was properly served and posted in accord with the Nevada Open Meeting Law.

Ms. Sheldrew requests the Commission’s opinion regarding the effect of NRS 281.236 on her ability, as a full-time employee of a law firm that provides legal and policy advice to public and private sector clients involved in regulated industries, to provide “consulting services” to certain of the law firm’s clients.^[1] Ms Sheldrew identifies four specific categories of clients:

- A Entities that are not regulated as public utilities in the State of Nevada and are not required to be licensed by the PUCN.
- B Private and public consumers of utility services produced inside and outside of Nevada (not regulated by the PUCN).
- C Private and public entities not currently licensed or regulated by the PUCN but which may seek a license from the PUCN at some point within the next year.
- D Entities that are affiliated with PUCN-licensed businesses and that are currently licensed to provide certain utility services within Nevada under NRS 704.977 (within federal or other state jurisdictions, but not within the jurisdiction of the PUCN).

None of the Category A-D clients described above fall within the statutory definition of a Nevada “public utility” or subsidiary or parent organization of a Nevada public utility,^[2] and Ms. Sheldrew does not contemplate providing any consulting services to Nevada public utilities or subsidiaries or parent organizations. Ms. Sheldrew, therefore, does not seek an opinion regarding NRS 281.236, Subsection 1.^[3]

Rather, Ms. Sheldrew seeks an opinion from the Commission finding that either the provisions of NRS 281.236, Subsection 3, do not apply to her with regard to providing consulting services to Category A-D entities; or (2) if those provisions do apply, she is entitled to relief from strict application thereof pursuant to the provisions of NRS 281.236, Subsection 4.

Ms. Sheldrew appeared in person, was sworn in as a witness, and testified before the Commission.

The Commission, after full consideration of the request for advisory opinion and all of the facts and circumstances presented by Ms. Sheldrew makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Ms. Sheldrew recently left her position as a member of the PUCN, a position she held since 1993.
2. In her capacity as a member of the PUCN, Ms. Sheldrew participated in supervising and regulating the operation and maintenance of public utilities (including certain water, sewer, telephone, electric and gas companies) in Nevada as defined in NRS 703.150 and, pursuant to NRS 703.151, establishing regulations that would bring about competition in the gas and electric industries within the state of Nevada.

3. As a PUCN member, Ms. Sheldrew voted on action by the PUCN with regard to:

- (a) applications from public utilities with Nevada;
- (b) complaints against public utilities lodged by private companies, other utility service providers and ratepayers;
- (c) requests or applications for certificates of public convenience from competitive telephone companies;
- (d) license applications from alternative sellers of electric services;
- (e) petitions for advisory opinions and declaratory orders;
- (f) proposed regulations governing various requirements of public utilities and alternative sellers operating within Nevada.

4. As a PUCN member, Ms. Sheldrew also served as the hearing officer for assigned dockets. In that capacity, Ms. Sheldrew directed the development of proposed opinions and orders through which her recommendations were presented to the full PUCN for its review and disposition.

5. After leaving her position with PUCN, Ms. Sheldrew became a full-time employee of a Maryland law firm that provides legal and policy advice to public and private sector clients involved in regulated industries. Ms. Sheldrew is not an attorney. She provides policy advice to the law firm's clients; the firm's attorneys provide legal advice to the clients.

6. Ms. Sheldrew does not anticipate providing any consulting services to Nevada public utilities or subsidiaries or parent organizations.

7. As a PUCN member, Ms. Sheldrew had no contact with Category D entities or any direct impact on any such entity's business, nor was she in a position to learn proprietary information that would be valuable to any such entity since businesses of similarly situated entities were not within the PUCN's jurisdiction.

8. The PUCN's limited oversight role of licensed retail sellers in Nevada does not result in the presentation of detailed financial and operational data as it does for public utilities within the state. The PUCN's licensing requirements assure the operational and financial fitness of the licensees without the PUCN determining rates for the services rendered or setting allowable rates of return.

9. While she was a PUCN member, Ms. Sheldrew received no gift or emolument from any person or entity from whom she is now seeking employment.

10. During the course of her term as a PUCN member, Ms. Sheldrew had no occasion to grant unwarranted privileges or preferences to any of the entities for which she now seeks to be a consultant.

11. As a PUCN member, Ms. Sheldrew did not participate in negotiating contracts between the government and any of the entities for which she intends to consult.

12. During the time that she was a public officer, Ms. Sheldrew accepted no salary, retainer, augmentation, expense allowance or other compensation from any of the entities for which she now seeks employment.

13. In the course of her work as a public officer, Ms. Sheldrew acquired no information which would not be available to the public generally which could be used to further the pecuniary interest of any of the entities for which she now seeks employment.

14. At no time during Ms. Sheldrew's term as a PUCN commissioner did she suppress any governmental report or other document because it might have tended to affect unfavorably the pecuniary interest of any of the entities for whom she might be employed.

15. At no time in the course of deciding what she was going to do once she left the PUCN did Ms. Sheldrew use her official position as a PUCN commissioner to contact the entities for whom she now seeks employment in an attempt to seek employment once she left the PUCN.

16. During the last year of her position as a PUCN commissioner, Ms. Sheldrew looked seriously at leaving the PUCN before the expiration of her term. She took the LSAT and applied to law school with the intent of attending law school upon her departure from the PUCN. During that year, Ms. Sheldrew knew Mr. Hempling. Mr. Hempling is an attorney with the law firm where Ms. Sheldrew is now employed. Ms. Sheldrew was hired by Mr. Hempling.

17. Ms. Sheldrew became acquainted with Mr. Hempling while she was a PUCN commissioner. She attended National Association of Regulatory Utility Commissioners seminars where Mr. Hempling made presentations. Mr. Hempling was also a contract consultant with PUCN on matters involving the formulation of retail competition legislation and regulations over which Ms. Sheldrew was the PUCN presiding officer. Ms. Sheldrew was involved in negotiating the consulting contract between Mr. Hempling and PUCN. PUCN entered into the consulting contract with Mr. Hempling in 1995 when the legislative interim committee requested PUCN to conduct an investigation of utility retail competition parallel to the committee's investigation. Mr. Hempling's consulting services to PUCN were terminated by the new PUCN chairman in approximately August or September, 1999.

18. During the time Mr. Hempling consulted with PUCN, neither he nor Ms. Sheldrew contemplated an employment arrangement between them. However, in December, 1999, after Mr. Hempling's consulting contract with PUCN was terminated, he and Ms. Sheldrew engaged in discussions about the possibility of Ms. Sheldrew being employed by Mr. Hempling's law firm if and when she should leave her position with PUCN. Their discussions in that regard discontinued as Mr. Sheldrew continued in her position with PUCN and then resumed in approximately August 2000 when Ms. Sheldrew decided that she would leave her position as PUCN commission member.

19. Although located in Maryland, Mr. Hempling's law firm provides legal and technical consulting services to utility commissions and legislatures throughout the country. Rather than require relocation to Maryland, Mr. Hempling allows some of his employees to remain located in areas of the country where he presently has clients or desires to develop clients. Those employees telecommunicate with the law firm and travel to service the firm's clients. One such employee in a position similar to that of Ms. Sheldrew lives in, and telecommunicates from, California. Ms. Sheldrew intends to live in, and telecommunicate from, Nevada while she is employed by Mr. Hempling. At the present time, Mr. Hempling's law firm has no clients in Nevada and no clients regulated by PUCN. However, Mr. Hempling desires to expand his business to states in the West.

CONCLUSIONS OF LAW

1. Ms. Sheldrew is a former public officer as defined by NRS 281.005 and NRS 281.4365.
2. NRS 281.236, Subsection 4, authorizes the Commission to render an opinion in this matter.

WHEREFORE, on motion duly made, seconded, and approved by unanimous vote, the Commission renders the following Opinion:

OPINION

In pertinent part, NRS 281.236, Subsections 3 and 4, state:

3. In addition to the prohibitions set forth in subsection 1...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.

4. A public officer or employee may request the commission on ethics to apply the relevant facts in his case to the provisions of subsection 3 and determine whether relief from the strict application of the provisions is proper. If the commission on ethics determines that relief from the strict application of the provisions of subsection 3 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,

it may issue an order to that effect and grant such relief. The decision of the commission on ethics in such a case is subject to judicial review.

In the scope of her responsibilities for the PUCN, Ms. Sheldrew's duties included the formulation of policy contained in regulations governing the business or industry regulated by PUCN. NRS 281.236, Subsection 3(a), therefore, precludes Ms. Sheldrew from being employed for one (1) year from her date of termination by such "business or industry."

Therefore, the Commission must consider the three (3) factors enumerated in NRS 281.236, Subsection 4, in determining whether granting Ms. Sheldrew relief from the strict application of the provisions of NRS 281.236, Subsection 3, is proper with respect to the clients in categories A-D defined above. Such relief is "proper" if it 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.

One goal of the Nevada Legislature in enacting subsection 3 of NRS 281.236 was to significantly reduce the temptation for a public officer or employee to compromise public duties in favor of possible employment opportunities within the business or industry which the public officer or employee regulated. Public suspicions arise about the integrity of government and the ethical standards of public officers and employees, if a regulator is permitted to accept such employment immediately after concluding one's public service.

The Commission has previously analyzed the NRS 281.236, Subsection 4, factors for purposes of providing relief from a strict application of the provisions of NRS 281.236, Subsection 3.^[4] In a prior opinion, the Commission determined:

"[I]t's common for people to work in governmental positions and then leave for related employment in the private sector. Such moves from the public to the private sector may work to the benefit of the public. Since the private sector is enriched and made more efficient and effective through the special knowledge and understanding of former government employees, we find that NRS 281.236(4) was intended to facilitate such beneficial moves from the public to private sectors, so long as the moves do not endanger either the public or private sectors and so long as there's nothing otherwise unethical in the way that the employment relationship occurred."^[5]

The Commission understands that utility industry private sector clients may very well be enriched and made more efficient and effective through Ms. Sheldrew's special knowledge and understanding as a former PUCN commission member. And, the Commission finds absolutely nothing otherwise unethical in the way that Ms. Sheldrew's employment relationship with Mr. Hempling's law firm occurred. However, the Commission is troubled by whether this employment relationship may "endanger either the public or private sectors" (as contemplated by NRS 281.236, Subsection 4), with regard to certain of the four client categories identified in Ms. Sheldrew's request for guidance in this matter.

The Commission has made it clear that NRS 281.236, Subsection 3, prohibits such employment where the Nevada employment of public officials might be implicated by the new work or new employer.^[6] Clients that do not have business in Nevada and are not regulated by PUCN (such as those identified in Categories A and B above) are not implicated by the prohibition in NRS 281.236, Subsection 3. However, with respect to clients that do, or may in the

future, provide services regulated by PUCN (such as those identified in Category C) or are affiliated with PUCN-licensed businesses (such as those identified in Category D above), whether a NRS 281.236, Subsection 3, prohibition is implicated depends upon the identity of the specific client and specific facts surrounding the specific PUCN-regulated services provided, or to be provided, or the nature of the affiliation to a PUCN-licensed business.

Therefore, based upon the Commission's review of Ms. Sheldrew's advisory opinion request, and Ms. Sheldrew's testimony before the Commission, the Commission finds that:

1. Ms. Sheldrew's employment by entities described in Categories A and B in her request for guidance does not violate the prohibition of NRS 281.236(3).
2. Whether Ms. Sheldrew's employment by any entity described in Categories C and D violates the prohibition of NRS 281.236(3), and, if so, whether she is entitled to relief from strict application thereof pursuant to the provisions of NRS 281.236(4), must be decided by the Commission on a case-by-case basis after reviewing the specific facts and circumstances of each case. For this purpose, Ms. Sheldrew may bring before this Commission at any time, for an expedited hearing and prompt decision, specific facts and circumstances about a specific Category C or D client and the scope of the proposed engagement to determine the application of NRS 281.236(3) and NRS 281.236(4). Otherwise, any such employment will be at the peril of Ms. Sheldrew, her employer, and the client.

NOTE: THE FOREGOING OPINION APPLIES ONLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES DEFINED HEREIN. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE IN THIS OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION. NO INFERENCES REGARDING THE PROVISIONS OF NEVADA REVISED STATUTES QUOTED AND DISCUSSED IN THIS OPINION MAY BE DRAWN TO APPLY GENERALLY TO ANY OTHER FACTS AND CIRCUMSTANCES.

DATED: December 19, 2000.

NEVADA COMMISSION ON ETHICS

By: /s/ PETER C. BERNHARD, Chairman

[1] Ms. Sheldrew is not an attorney.

[2] See, NRS 704.030, Subsection 4, with respect to client category A; NRS 704.020 with respect to client category B; NRS 704.977, Subsection 9, and NRS 703.030, Subsection 7, with respect to client category C; and NRS 704.030, Subsection 7, with respect to client category D.

[3] NRS 281.236, Subsection 1, is a strict prohibition against a "public utility or parent organization or subsidiary of a public utility" from employing a member of the PUCN for one year after the member's termination of service on the PUCN.

[4] See, Commission Opinions 95-13, 95-61, 98-5, 99-38, 99-51, 99-52, and 00-23.

[5] See, Commission Opinion No. 95-61, dated May 6, 1996.

[6] See, Commission Opinion No. 99-38, dated November 18, 1999.