



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the
Conduct of **PUBLIC OFFICER**,
Member, State Board,
State of Nevada.

Request for Opinion No. 09-25A

OPINION

Public Officer requested this confidential advisory opinion pursuant to NRS 281A.440(1) regarding the propriety of his future conduct as it relates to the Ethics in Government Law (Ethics Law) set forth in NRS 281A. A quorum¹ of the Nevada Commission on Ethics (Commission) heard this matter on July 9, 2009. Public Officer appeared in person and provided sworn testimony.

Public Officer is a member of a State of Nevada Board (Board) which regulates a certain industry in the State. He has a pecuniary interest in and a commitment in a private capacity to a business entity (and those affiliated with the entity) that is regulated, in part, by the Board. Public Officer questioned whether he was required to disclose and abstain on matters before the Board regarding the business entity in which he has a pecuniary interest and commitment

in a private capacity based upon the status of the disclosure and abstention laws following the 2009 legislative amendments. Further, he sought advice regarding whether such interests would prevent his business entity from pursuing economic opportunities relating to certain projects offered by the State because of his role on the Board.

After fully considering the request for advisory opinion and analyzing all of the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and reached orally advised Public Officer of its decision in the matter. The Commission now renders this written Opinion.

The facts described in this opinion were provided by Public Officer. Facts and circumstances that differ from those presented to and considered by the Commission in this Advisory Opinion may result in a different opinion.

¹ The following Commissioners participated in this opinion: Keele, Gale, Hutchison, Lambole, and Marvel.

I. FINDINGS OF FACT

1. The Nevada Legislature established the Board and vested it with the authority to regulate a certain industry and entities that provide certain services in and to the State.
2. In his public capacity, Public Officer is an appointed member of the Board.
3. In his private capacity, Public Officer is employed by a business entity (Entity) that is regulated, in part, by the Board and occasionally appears before the Board seeking certain economic opportunities offered by the State and approved/regulated by the Board. Public Officer serves as a high level manager and officer of the Entity and recently acquired a very small ownership interest in the Entity. His ownership interest did not affect his status or job duties as a manager and officer of the Entity.
4. Before the Public Officer obtained an ownership interest in the Entity, he was paid an annual salary plus an annual bonus.
5. After obtaining the ownership interest, Public Officer continued to earn an annual salary but ceased earning an annual bonus. Instead, Public Officer earns a percentage share of the total assessed value of the Entity, the potential monetary benefit of which he will not realize until he sells the shares. Public Officer's percentage share of the total assessed value of the Entity could increase or decrease based on the total assessed value of the Entity

on the date on which Public Officer sells his shares of the Entity.

6. The Entity's financial success depends, in part, on services it provides in and to the State and the profitability of such services. As a part of its regular course of business, the Entity submits bids for contracts to the Board to perform certain services administered by the Board on behalf of the State. The Board awards such contracts to the bidder with the most competitive bid. The Board also regulates general industry standards for the business and services conducted by the Entity.
7. Prior to the date of this Opinion, on each matter before the Board regarding the Entity, Public Officer disclosed his relationship with the Entity as an employee, including his pecuniary interest in the financial success of the Entity and the potential effect of that pecuniary interest on any action or inaction he may take to satisfy the statutory duty as a public officer of the Board. In addition to disclosing the employment relationship and pecuniary interest, Public Officer abstained from voting on any matters before the Board involving the Entity.

II. DISCUSSION

Public Officer's request for an advisory opinion seeks advice relating to his duty to disclose and abstain on matters before the Board involving the Entity in light of recent legislation amending NRS 281A and his recently acquired ownership interest in the Entity. Furthermore, the Public Officer requests advice relating to any other ethical

considerations that may be implicated by his dual roles.

This is the first opinion of the Commission interpreting the applicable provisions of NRS 281A as amended by Senate Bill 160 of the 2009 Nevada Legislature, specifically the important ethical requirements of NRS 281A.420(1) (disclosure) and NRS 281A.420(3) (abstention) and related provisions.²

A. Disclosure – NRS 281A.420(1)

Public Officer seeks confirmation that he must disclose his ownership interest and employment status on any matter before the Board involving the Entity in which he has these interests.

NRS 281A.420(1) provides, in relevant part:

[A] public officer . . . **shall not** approve, disapprove, **vote,** abstain from voting or otherwise act **upon a matter:** . . . (a) [r]egarding which he has accepted a gift or loan; (b) [i]n which he has a **pecuniary interest;** or (c) [w]hich would **reasonably be affected by his commitment in a private capacity to the interest of others . . . without disclosing sufficient information** concerning the gift, loan, interest or commitment 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 . . . pecuniary interest, or upon the persons to whom the public officer or employee has a commitment in a private capacity. **Such a disclosure must be made**

² All citations to NRS 281A in this opinion will refer to those sections as amended in 2009.

at the time the matter is considered.

(Emphasis added).

As described above, the requester is a public officer as defined in NRS 281A.160 as an appointed member of the Board governing matters relating to certain services provided in and to the State. Public Officer also serves as an employee, manager, officer and part-owner of a regulated entity, which is a private company with business interests in certain matters in Nevada.

The Public Officer's employment status and ownership interest in the Entity create both a pecuniary interest and a commitment in a private capacity to the interests of others contemplated by NRS 281A.420(1), including the interests of the Entity and its other officers and employees. Therefore, the statute requires that the Public Officer disclose sufficient information regarding his employment and ownership status to inform the public of the effect of such status regarding any matter involving the Entity which comes before the Board.

1. Pecuniary Interest

As an employee, manager, officer and part-owner of the Entity, the Public Officer has significant economic, financial and monetary interests in the nature, number and profitability of business opportunities awarded to the Entity. A financial benefit to the Entity creates and enhances job security and reliable income for its employees and officers. Likewise, the value of Public Officer's ownership interest in the Entity increases as the overall value and profitability of the Entity increases.

Under any reasonable definition of the term “pecuniary interest,” Public Officer has a pecuniary interest as an employee, manager, officer and owner of the Entity contemplated by NRS 281A.420. Consequently, the Ethics Law requires Public Officer to disclose any pecuniary interest he has in any matter before the Board. Any matter which involves or has the potential to affect the Entity necessarily implicates Public Officer’s pecuniary interest.

2. Commitment in Private Capacity

As an employee and part-owner of the Entity, Public Officer also has a “commitment in a private capacity to the interests of” the Entity and its officers and employees. NRS 281A.420(8) defines such a commitment requiring disclosure to include, in relevant part, “a commitment to a person . . . [w]ho employs him . . . [or] [w]ith whom he has a substantial and continuing business relationship”

Public Officer’s recently acquired ownership interest did not change his employment status, but the nature of his ownership interest creates a substantial and continuing business relationship between Public Officer, the Entity and the Entity’s other officers and employees.

NRS 281A.420(1) requires disclosure of a commitment in a private capacity if the matter requiring public action would be reasonably affected by the commitment. In this case, conceivably every matter that comes before the Board which involves the Entity would reasonably be affected by Public Officer’s employment and ownership relationship with the Entity. Therefore, Public Officer must disclose sufficient information regarding his commitment to the Entity’s interests and the potential effect

of the action on any matter before the Board that involves the Entity.

Previously, in each meeting of the Board in which the Entity had any interest or matter before the Board, Public Officer sufficiently informed the public of his interests as an employee and officer of the Entity and disclosed how those interests may have affected his ability to render independent judgment on matters involving the Entity. Public Officer’s pecuniary interest and commitment to the Entity as an employee and officer of the Entity are now heightened by virtue of his ownership interest. Therefore, Public Officer must continue to disclose his interests in the Entity in any future matter it has before the Board.

Each disclosure must include sufficient detail regarding Public Officer’s status as an employee, manager and owner to inform the public of the effect of any action or abstention by him in the matter upon his pecuniary interest as well as the effect of any action upon the Entity and its other officers and employees.

B. Abstention – NRS 281 A.420(3)

Beyond the disclosure requirements, Public Officer seeks advice regarding the requirement for abstention based on new provisions of law which require abstention only under certain circumstances. NRS 281A.420(3) prohibits a public officer from voting upon or advocating the passage or failure 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 . . . his pecuniary interest; or . . . his commitment in a private capacity to the interests of others.” (Emphasis added).

Public Officer has both a pecuniary interest in and a commitment in a private capacity to the interests of the Entity. The statute requires abstention only when the independence of judgment of a reasonable person in the Public Officer's situation would be materially affected by his interest or commitment.

The Legislature has expressly provided guidance to the Commission in determining whether the independence of judgment of a reasonable person in a public officer's position is materially affected based on certain legal presumptions and public policy considerations regarding abstention. The Legislature has also provided for a degree of participation (under certain circumstances) when abstention is appropriate. Based on the facts provided in this matter, despite the presumptions and public policy, Public Officer must abstain in all matters before the Board which affect the Entity.

1. Presumption Against Abstention – NRS 281A.420(4)(a)

In determining whether the independence of judgment of a reasonable person in a public officer's situation would be materially affected by a pecuniary interest or a commitment in a private capacity to the interest of others, the Legislature **presumes** that the independence of judgment of a reasonable person would **not** be materially affected by such interests:

where the resulting benefit or detriment accruing to [the public officer], or if [the public officer] has a commitment in a private capacity to the interests of others, accruing to the other persons, is not greater than that accruing to any other member of the general

business, profession, occupation or group that is affected by the matter.

NRS 281A.420(4)(a).

If the Entity obtained approval to engage in a business opportunity in or for the State, Public Officer would accrue a financial benefit which is certainly greater than that accruing to any other member of the general business or profession who competes for the same business opportunity and is not successful. Therefore, it cannot be presumed that Public Officer's pecuniary interest in and commitment to the interests of the Entity would not materially affect his ability to render independent judgment as a member of the Board regarding whether the Entity properly satisfies all of the qualifications for such business or is otherwise the best Entity for certain projects or services in or for the State. Thus, the presumption of independent judgment cannot be found to apply under these facts.

While no presumption of independence applies to these facts, Public Official is not automatically required to abstain. In addition to the presumption in favor of the independence of judgment for purposes of acting on a matter in which a public officer has a conflict, the Legislature has expressed a policy favoring action by a public officer despite a conflict of interest.

2. Public Policy Against Abstention – NRS 281A.420(4)(b)

In NRS 281A.420(4)(b), the Legislature has announced a public policy against abstention except in cases in which there is a clear conflict such that a public officer cannot act independently. Specifically, the Legislature stated that "the public policy of this State . . . favors the right of a public officer to perform the duties for which he was elected

or appointed and to vote or otherwise act upon a matter, provided he has properly disclosed his acceptance of a gift or loan, his pecuniary interest or his commitment in a private capacity to the interests of others.” Further, the Legislature expressed that “abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer’s constituents of a voice in governmental affairs”

Despite the Legislature’s intention to encourage public officers to act on certain matters in which they may have a conflict, the public officer’s action has express limitations. Pursuant to the new language of NRS 281A.420(4)(b), abstention is required “only in clear cases where the independence of judgment of a reasonable person in the public officer’s situation would be materially affected by his acceptance of a gift or loan, his pecuniary interest or his commitment in a private capacity to the interests of others.” NRS 281A.420(4)(b)(Emphasis added).

Public Officer is an appointed public officer on a Board that makes decisions on matters involving intricate aspects of certain business and industry in and for the State, including certain projects in which the Board develops plans for, solicits and awards contracts as an integral part of a competitive bidding process. In certain circumstances, the Board also oversees performance of such contracts.

The Entity for which Public Officer serves as an employee, officer and part-owner is regulated, in part, by the Board and on occasion bids on certain contracts proposed by the Board. Public Officer’s compensation and financial interests are based on the profitability and success of the Entity. These facts describe precisely the

type of circumstance that the abstention statute, as recently amended, seems to have contemplated as a “clear case where the independence of judgment of a reasonable person in the public officer’s situation would be materially affected by his . . . pecuniary interest or his commitment in a private capacity to the interests of others.”

Therefore, Public Officer’s clear conflict of interest between his role on the Board and his pecuniary interest and commitment to the Entity makes it absolutely essential that Public Officer disclose and abstain in every circumstance in which the Entity comes before the Board.³

C. Participation When Abstention Required – NRS 281A.420(3)

Beyond the abstention requirements discussed above, the Legislature has also expressed concern in NRS 281A.420(3) regarding the duty and expectation of a public officer to participate in the consideration of a matter even when the officer must abstain from action. In certain

³ While this case requires abstention, it may be contrasted to those cases in which public officials seeking “safe harbor” have made a cursory disclosure of a conflict of interest and unnecessarily recused themselves from further participating in the discussion or acting on the matter. The Commission has previously opined that when a public officer gives a cursory disclosure of a conflict, he fails to create the transparency demanded in public settings that provides sufficient detail for the public to make a determination whether the interest or relationship which is being disclosed is going to have a sufficiently reasonable and material effect on his role as a public officer and whether abstention is appropriate. *In re Woodbury*, NCOE Opinion No. 99-56. Disclosure requirements are not necessarily affected by abstention requirements or exceptions. A public officer has an absolute duty to disclose the pecuniary interest or commitment in a private capacity to the interests of others with sufficient information regarding those interests regardless of any need to abstain.

circumstances, the Legislature suggests participation to reconcile the public officer's duty to the office to which he was appointed or elected even when abstention is necessary.

NRS 281A.420(3) expressly provides that a public officer "may otherwise participate in the consideration of a matter with respect to which" abstention was required. Following abstention, the obvious question becomes whether, and, if so, to what extent, participation is subsequently permitted.

The Legislature apparently finds that a public officer's knowledge and experience may bear on public matters. The Legislature's finding is evident here in the statutory background requirements for and among Board members that include significant knowledge of aspects of the subject matter and industry over which the Board has authority.

In that context, the statute contemplates and permits a public officer to consider an element of involvement even when the clearest of conflicts requires the public officer to disclose the conflict and abstain from voting. However, the public officer, in choosing to participate, is appropriately admonished that any involvement should be neutral in content to avoid any influence or affect on any particular outcome. *See In re Kubichek*, RFO No. 97-07.

Notwithstanding the authority to participate in the consideration of a matter, such participation has express statutory and policy limitations that aid in evaluating participation. The Ethics Law has established parameters in which certain relationships or interests create duties other than disclosure and abstention that may prohibit participation when there is a conflict.

D. Improper Use of Position- **NRS 281A.400**

The level of participation by a public officer in a matter in which he has a clear conflict is tempered by legislative mandates outlined in NRS 281A.400. Specifically, NRS 281A.400(2) prohibits a public officer from "[using] his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person."

Under the facts presented in this case, Public Officer may learn information from the Board regarding possible projects or certain policies of the Board regarding the industry as a whole or specific applications or specifications for certain projects that Public Officer could then use as an advantage to the Entity. An advantage to the Entity operates as an advantage to the private interests of Public Officer. This type of activity or participation in discussions by the Board regarding matters which might favorably affect the Entity could lead to a violation of the code of ethical standards for Public Officer.

Notwithstanding disclosure and abstention, an inherent problem may arise for Public Officer by being present and participating in certain matters relating to projects and policy considerations in general. For example, the Board has a significant role in adopting standards for the industry and any project that it is considering, as well as planning both short-term and long-term goals for the industry and individual projects. The Board is also responsible for enacting regulations to implement its plans.

There may be public concern that, even though Public Officer discloses and abstains, participating on the Board, alone, gives the Entity some background or inside information that may allow the Entity to do or plan things that competing entities may not know about or be able to perform. Therefore, Public Officer must consider, in determining whether to continue participating after disclosure and abstention, whether such participation in Board affairs would allow the Entity access to information that may create a real or apparent unfair competitive advantage. This perception may be lessened when Public Officer's participation is conducted in an open and public forum, such as a publicly noticed Board meeting.

**E. Prohibited Contracts –
NRS 281A.430(1)**

NRS 281A.430(1) prohibits a public officer from “[bidding] on or [entering] into a contract between a governmental agency and any business entity in which the public officer or employee has a significant pecuniary interest.” Because the Board has a role in developing certain contracts in and for the State, Public Officer is individually prohibited from entering into a contract between the Entity and the Board. The Commission has jurisdiction only over public officers and employees such that it may prohibit only the conduct of the public officer or employee and not the conduct of a private business that seeks contracts from a public body.

However, because Public Officer is a part-owner of the Entity, regardless of the scope of his holdings, it could be perceived that the Entity contracting with the Board is effectively a contract between Public Officer and the Board. Although the Commission does not have the authority to prohibit the

Entity from engaging in contracts with the Board, the Commission cautions Public Officer to consult the provisions of NRS 281 relating to conduct of public officers outside the scope of the Ethics Law. *See also* NRS 281A.430(2) and (4).


I. CONCLUSIONS OF LAW

- 1) At all times relevant to the hearing of this matter, Public Officer was a “public officer,” as defined in NRS 281A.160.
- 2) Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
- 3) Pursuant to NRS 281A.420(1), as a public officer serving on the Board, Public Officer is required to disclose sufficient information concerning his pecuniary interest in and commitment in a private capacity to the Entity as an employee, manager, officer and owner to inform the public of the potential effect of his action or abstention as a Board member upon his pecuniary interests or the interests of the Entity and its other officers and employees.
- 4) Pursuant to NRS 281A.420(4), it is clear that the independence of judgment of a reasonable person in Public Officer's position on the Board would be materially affected by his pecuniary interest in and his private commitment to the interests of his employer and business association, the Entity. Therefore, Public Officer must abstain in any matter that comes before the Board which affects the Entity.

- 5) Pursuant to NRS 281A.420(3), Public Officer may continue to participate in consideration of matters before the Board involving the Entity if such participation is neutral in content and does not constitute the use of his position on the Board to secure an unwarranted benefit for himself, or a business entity in which he has a significant pecuniary interest or to whom he has a commitment in a private capacity, such as the Entity and its other officers and employees.
- 6) Public Officer is prohibited from entering into a contract with the Board unless such contract satisfies the requirements of NRS 281A.430(4) and the provisions of NRS 281.

Dated this 15th day of Dec, 2011

NEVADA COMMISSION ON ETHICS

By: 
Erik Beyer,
Chairman⁴

⁴ Former Commissioner Keele was the Chairman of the Commission and Presiding Officer during the hearing and oral opinion in this matter and signed the confidential written opinion. His term has expired as of the date of this written abstract opinion.