



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for  
Advisory Opinion Concerning the Conduct of  
**Former Public Employee**, State Agency,  
State of Nevada,

**Request for Opinion No. 09-48A**

\_\_\_\_\_  
Former Public Employee. /

#### ABSTRACT OF OPINION

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

A former public employee ("PUBLIC EMPLOYEE") requested a confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in chapter 281A of the Nevada Revised Statutes. PUBLIC EMPLOYEE appeared before a quorum of the Commission on July 9, 2009, and provided sworn testimony.<sup>1</sup>

At the conclusion of the hearing, and after full consideration of the facts, circumstances, and testimony presented, the Commission orally advised PUBLIC EMPLOYEE of its decision that the Ethics Law prohibits him, for a one-year period following his retirement from public service, from representing or counseling a private party for compensation on any issue pending before the State Agency, including any of the agency's divisions, during his employment with the State Agency.

The Commission rendered a written Opinion to PUBLIC EMPLOYEE. PUBLIC EMPLOYEE elected to retain confidentiality with respect to this proceeding. Therefore, the Commission now publishes this Abstract of the full opinion.

<sup>1</sup> The following Commissioners participated in this opinion: Chairman George M. Keele, and Commissioners Mark A. Hutchison, Esq., Paul D. Lamboley, Esq., John W. Marvel, and John T. Moran, III, Esq.

The facts in this matter were provided in written and oral testimony by PUBLIC EMPLOYEE. The Commission's findings of fact set forth below accept as true those facts presented by PUBLIC EMPLOYEE for the purposes of the advice offered in this Opinion. 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.

## **II. STATEMENT OF ISSUES**

PUBLIC EMPLOYEE recently retired from a State Agency ("AGENCY"). He plans to offer consulting services in Nevada to the industry regulated by his former public employer, and seeks the Commission's guidance concerning any limitations the Ethics Law may place on his ability to represent and counsel private entities. He is specifically concerned about whether he may accept a proposed engagement with a Nevada business ("BUSINESS ENTITY").

PUBLIC EMPLOYEE has asked whether he is subject to the one-year "cooling-off" period under NRS 281A.410(1)(b), which prohibits counseling and representation of private persons for compensation on issues that were considered by AGENCY during his tenure. If the cooling-off period is applicable to him, he asks what activities the statute would allow him to perform during that period.

## **III. FINDINGS OF FACT**

1. PUBLIC EMPLOYEE was employed by AGENCY for 30 years. He retired as a Division head and now plans to provide a variety of consulting services to Nevada businesses regulated by AGENCY.
2. After his retirement, several individuals contacted PUBLIC EMPLOYEE about potential consulting opportunities, including BUSINESS ENTITY. As of the date of the hearing on this matter, PUBLIC EMPLOYEE had not accepted any consulting engagements.
3. During PUBLIC EMPLOYEE's tenure, AGENCY filed a complaint against BUSINESS ENTITY. The complaint resulted from violations discovered by another Division of AGENCY. Neither PUBLIC EMPLOYEE nor the Division in which he worked had any direct or indirect involvement with BUSINESS ENTITY.
4. Shortly before PUBLIC EMPLOYEE's retirement, BUSINESS ENTITY was fined and a condition was imposed on its license. The condition required BUSINESS ENTITY to employ or contract with a compliance officer who must provide quarterly reports to AGENCY concerning any violations found by the officer and the actions taken to remedy such violations.

5. BUSINESS ENTITY's General Manager subsequently contacted PUBLIC EMPLOYEE and requested his services to comply with the license restrictions.
6. The proposed consulting work for BUSINESS ENTITY would require PUBLIC EMPLOYEE to observe procedures, interview employees, and examine documents and accounting records. He would provide the quarterly reports regarding his findings required by the license restrictions. It is also possible that PUBLIC EMPLOYEE would attend meetings with his client and AGENCY personnel, and perhaps appear before AGENCY on his client's behalf.

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

The first question the Commission must consider is whether PUBLIC EMPLOYEE is subject to a one-year cooling-off period under the Ethics Law. The question PUBLIC EMPLOYEE asks is whether NRS 281A.410(1)(b) includes a "grandfather" provision that exempts long-time public employees from its restrictions on counseling and representation of private individuals.

The Ethics Law imposes restrictions on former public employees for a one-year period after leaving public service. There are two separate cooling-off provisions in the NRS. One, NRS 281A.550(3), places limits on employment; the other, NRS 281A.410(1)(b), prohibits

counseling and representation in certain circumstances.

#### **A. Cooling-Off – Employment**

3. In addition to the prohibitions set forth in subsections 1 and 2, and except as otherwise provided in subsections 4 and 6, a former public officer or employee of a board, commission, department, division or other agency of the Executive Department of State Government, except a clerical employee, shall not solicit or accept employment from a business or industry whose activities are governed by regulations adopted by the board, commission, department, division or other agency for 1 year after the termination of the former public officer's or employee's service or period of employment if:

(a) The former public officer's or employee's principal duties included the formulation of policy contained in the regulations governing the business or industry;

(b) During the immediately preceding year, the former public officer or employee 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 the former public officer or employee; or

(c) As a result of the former public officer's or employee's governmental service or employment, the former public officer or employee possesses knowledge of the trade secrets of a direct business competitor.

An exemption from the one-year cooling-off period for employment is allowed for public officers or employees who were working for an agency as of July 23, 1993, the date of enactment of NRS 281A.550(3) (formerly NRS 281.236(3)). This exemption, however, is limited to the prohibitions on employment under NRS 281A.550(3), and does not extend to the cooling-off period for counseling and representation under NRS 281A.410(1)(b). *See In re Wynn*, RFO No. 10-70A (when enacting NRS 281A.410(1)(b), the Legislature did not exempt existing public officers and employees from the one-year prohibition against accepting consulting agreements).

PUBLIC EMPLOYEE was employed by AGENCY for 30 years and was working for AGENCY as of July 23, 1993. He is therefore exempt from the one-year cooling-off period of NRS 281A.550(3).

#### **B. Cooling-Off – Representing or Counseling**

**NRS 281A.410(1)(b) provides, in relevant part:**

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.

#### **1) Applicability of cooling-off period**

NRS 281A.410(1) has no similar exemption to the cooling-off period as provided in NRS 281A.550(3). Accordingly, PUBLIC EMPLOYEE, as a former public employee, is subject to the prohibitions in NRS 281A.410(1) and for a period of one year after terminating his employment with AGENCY, PUBLIC EMPLOYEE cannot represent or counsel for compensation a private person upon any issue which was under consideration by the agency during his service with AGENCY.

#### **2) Consulting services to BUSINESS ENTITY**

The Commission next considers whether NRS 281A.410(1) prohibits PUBLIC EMPLOYEE from accepting the proposed engagement to provide compliance consulting services to BUSINESS ENTITY. PUBLIC EMPLOYEE questions whether BUSINESS ENTITY's licensing issues were under consideration of the particular agency for which he worked. He points out that the restrictions on BUSINESS ENTITY's license

resulted from the activities of another Division of AGENCY, and not those of the Division which he managed. Also, he had no direct or indirect involvement in the matter, and his former Division has no regulatory oversight of BUSINESS ENTITY.

In answering PUBLIC EMPLOYEE's question, the Commission must determine whether AGENCY's various Divisions are separate and distinct agencies. See *In re Jacobson*, RFO No. 07-19A (public employee's work for a separate and distinct agency under the umbrella of single department does not violate NRS 281A.410(1)).

NRS 233B.031 defines the term agency as follows:

"Agency" means an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases.

In a prior decision, the Commission thoroughly examined the statutory authority governing the organization of the Gaming Control Board and determined that the Gaming Control Board's various divisions are not separate and independent entities. See *In re Ferguson*, RFO No. 95-13. Applying this precedent to the agency before us, we similarly determine that a matter handled by any of the various divisions of AGENCY is considered an issue under consideration by AGENCY.

The restrictions imposed by NRS 281A.410(1)(b) are therefore not limited to issues in which PUBLIC EMPLOYEE or his former Division were directly or indirectly involved. It is enough that BUSINESS ENTITY's regulatory violations were discovered during PUBLIC EMPLOYEE's employment with AGENCY. The cooling-off provisions therefore prohibit PUBLIC EMPLOYEE from providing the proposed compliance consulting services to BUSINESS ENTITY.

PUBLIC EMPLOYEE next asks whether NRS 281A.410(1)(b) would nonetheless permit him to assist BUSINESS ENTITY with its compliance issues provided that he limits his services to on-site inspections and filing reports. He asks the Commission whether he would be "representing or counseling" a private person if he does not testify at public hearings before AGENCY.

The Commission has determined that the statute's proscriptions would apply even to these limited services. "Counseling" under NRS 281A.410(1)(b) includes advice given as a result of consultation. PUBLIC EMPLOYEE's activities would include observation of procedures, interviewing employees, and examining documents and accounting records and then reporting on these matters to both BUSINESS ENTITY and AGENCY. Under the conditions imposed on BUSINESS ENTITY's license, the quarterly reports must identify any violations PUBLIC EMPLOYEE finds and the actions taken to remedy the violations. Thus, PUBLIC EMPLOYEE's services would

involve advising BUSINESS ENTITY on regulatory compliance matters. Because such limited services would include counseling BUSINESS ENTITY on an issue under consideration by AGENCY during PUBLIC EMPLOYEE's prior employment, PUBLIC EMPLOYEE's proposal would violate NRS 281A.410(1)(b) even without the public appearances.

### **3) Issues precluded during the cooling-off period<sup>2</sup>**

PUBLIC EMPLOYEE also requests the Commission to advise him regarding what consulting activities would be allowed during the cooling-off period of NRS 281A.410(1)(b). His question focuses on what constitutes a pending "issue" before AGENCY during his tenure.

NRS 281A.410(1)(b) limits the term "issue" as follows:

"[I]ssue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

The Ethics Law does not broadly construe "issue which was under consideration" to include any and all matters that fall within the scope of

the statutory authority granted to AGENCY. Thus, PUBLIC EMPLOYEE is not prohibited from doing any business before his former employer. Rather, the statutory prohibition applies only to specific matters that were pending during the time he was employed. He is therefore free during the cooling-off period to consult on new matters and on any issues that arise after his retirement date.

## **V. CONCLUSIONS OF LAW**

1. At all times relevant to the hearing of this matter, PUBLIC EMPLOYEE was a "public employee," and his contemplated future conduct would make him a "former public employee" as defined by NRS 281A.150 and 281A.180.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Under NRS 281A.410(1)(b), PUBLIC EMPLOYEE is prohibited, for a period of one year after leaving employment with AGENCY, from representing or counseling for compensation a private person upon any issue which was under consideration by AGENCY, including any division of AGENCY, during his employment with AGENCY.

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<sup>2</sup> PUBLIC EMPLOYEE also questioned whether NRS 281A.410(2) supercedes NRS 281A.410(1)(b) because he is a part-time public officer. The Commission declines to render an opinion about that question since there is no concrete factual scenario presented in the record.

Specifically, PUBLIC  
EMPLOYEE is prohibited from  
representing or counseling  
BUSINESS ENTITY on any  
compliance issue that was under  
consideration by AGENCY  
during his service.

Dated this 4th day of June, 2012.

NEVADA COMMISSION ON ETHICS

By:   
Paul H. Lamboley, Esq.  
Vice-Chair<sup>3</sup>

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<sup>3</sup> At the time this written opinion was issued, the presiding officer in this matter, then-Chair Keele, no longer served on the Commission. Therefore, current Vice-Chair Lamboley has signed this opinion on behalf of the participating Commissioners.