



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 EMPLOYEE**, State Agency,
State of Nevada,

Request for Opinion No. 11-50A

Public Employee. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

A 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. A quorum¹ of the Commission heard this matter on July 13, 2011. PUBLIC EMPLOYEE appeared in person and provided sworn testimony.

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

"cooling off" provisions of the Ethics Law do not prohibit him from accepting private employment in the industry regulated by his public agency within one year of terminating his public employment; however, he is prohibited for one year from counseling and/or representing the regulated industry on issues which were before his Agency.

The Commission rendered a written Opinion in this matter to PUBLIC EMPLOYEE. However, PUBLIC EMPLOYEE elected to retain confidentiality with respect to this proceeding pursuant to NRS 281A.440(1). Therefore, the Commission publishes this Abstract of its Opinion.

The facts in this matter were provided in written and oral testimony by PUBLIC EMPLOYEE. The Commission accepts as true those facts presented by PUBLIC EMPLOYEE for the purposes

¹ The following Commissioners participated in this opinion: Chairman Erik Beyer and Commissioners Gregory J. Gale, Magdalena M. Groover, George M. Keele, Esq., Paul H. Lamboley, Esq., James Shaw and Keith A. Weaver, Esq.

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 THE ISSUES

PUBLIC EMPLOYEE serves as an investigator for a State Agency ("AGENCY"). PUBLIC EMPLOYEE questions whether he may resign from his public employment and pursue private employment with a person licensed and/or regulated by the AGENCY without satisfying a one-year cooling-off period. He asks the Commission to determine whether the "cooling-off" provisions of NRS 281A.550 prohibit him from accepting such a position within one year after he leaves employment with the AGENCY.

III. FINDINGS OF FACT

1. In his public capacity, PUBLIC EMPLOYEE serves as an investigator for Agency. PUBLIC EMPLOYEE's duties principally include investigations of applicants for licenses.
2. In his private capacity, PUBLIC EMPLOYEE is interested in pursuing a business career in the private sector within the industry regulated by the AGENCY.
3. During his tenure with the AGENCY, PUBLIC EMPLOYEE investigated the credentials of an applicant ("APPLICANT") for a license.
4. An application for a license, including an investigation of the applicant, is administered by a supervisor within the AGENCY.
5. PUBLIC EMPLOYEE and his supervisor formulate the details of the investigation under the AGENCY's standard plan.
6. PUBLIC EMPLOYEE had no involvement in determining which applicants he would be assigned to investigate.
7. The investigation of APPLICANT was conducted under the AGENCY's standard investigative plan.
8. During the investigation, as is customary, PUBLIC EMPLOYEE met with APPLICANT on several occasions. During a couple of those meetings, the conversation turned to personal matters. At no time did PUBLIC EMPLOYEE seek or mention employment during these conversations.
9. After the investigation concluded, PUBLIC EMPLOYEE presented his findings to his supervisor and the AGENCY stating that no negative or derogatory information concerning APPLICANT was found. As required for any investigative report to the AGENCY, PUBLIC EMPLOYEE's report regarding APPLICANT was reviewed by his supervisor and included only facts and no opinions. After review of the application and investigation, the AGENCY granted APPLICANT a license.
10. At the conclusion of the AGENCY meeting at which the license was granted, APPLICANT and PUBLIC EMPLOYEE exchanged pleasantries

and APPLICANT offered to have PUBLIC EMPLOYEE keep in touch and meet with him in the future.

11. Approximately three months after APPLICANT was granted a license, PUBLIC EMPLOYEE reached out to APPLICANT to seek advice regarding his future career options. APPLICANT expressed interest in hiring PUBLIC EMPLOYEE. However, before discussing any details, APPLICANT and PUBLIC EMPLOYEE agreed that PUBLIC EMPLOYEE should seek an advisory opinion from the Commission concerning the cooling-off provisions set forth in NRS 281A.

IV. DISCUSSION OF ISSUES AND RELEVANT STATUTES

PUBLIC EMPLOYEE is considering leaving employment with the AGENCY to pursue private employment with APPLICANT and asks the Commission to determine whether the "cooling-off" provisions of NRS Chapter 281A prohibit him from accepting such a position within one year of leaving employment with the AGENCY.

By virtue of the expertise or experience public employees obtain from public service in a particular industry, many former public employees pursue employment opportunities in the private sector. The "cooling-off" provisions are intended to discourage former public employees from using opportunity, information, relationships, or experience gathered from their public service to benefit them in a private capacity.

In prior opinions, the Commission has recognized that "[o]ne goal of the

Nevada Legislature in enacting subsection 3 of NRS [281A.550] 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 regulates. 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." *In re Sheldrew*, RFO No. 00-44 (2000). *See also In re Roggensack*, RFO 06-60 (2006).

A. Public Policy

NRS 281A.020

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.

PUBLIC EMPLOYEE is currently employed by a State Agency, and he is therefore a public employee who must commit himself to avoid conflicts of interest between his private interests and those of the general public whom he serves.

Whether such a conflict arises between his public duties as an investigator and his private interests in pursuing employment with a person regulated by the AGENCY must be considered in

light of the "cooling-off" provisions set forth in NRS 281A and as interpreted by applicable Commission precedent in similar circumstances.

B. Cooling Off – Accepting Employment

NRS 281A.550(3) provides:

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 Agency, 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 Agency, 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.

The Ethics Law prohibits, for a period of one year, certain employment, contracts and representations by certain former public employees or officers in their private capacity as it relates to their former public service. Under limited circumstances with no opportunity for abuse, the Ethics Law does not prohibit such private endeavors.

As a former public employee of the AGENCY, PUBLIC EMPLOYEE would be prohibited, for one year after the termination of his public service, from soliciting or accepting employment from any person regulated by the AGENCY or the regulated industry if, as a public employee, his principal duties included formulating policy contained in the AGENCY's regulations, or he directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business or industry which might otherwise employ him, or he has obtained trade secrets of a direct business competitor.

The record reflects that policy decisions or recommendations made by staff regarding the regulations affecting the AGENCY (including the investigations of applicants), were made by PUBLIC EMPLOYEE's supervisors. Even such staff decisions served only as recommendations to the AGENCY, which had the ultimate authority to adopt regulations. In addition, PUBLIC EMPLOYEE's role as an investigator was subject to several layers of supervision within the AGENCY. Further, his investigative duties took place under the direction of supervising staff and in accordance with policies and regulations for investigations adopted by the AGENCY. Accordingly, PUBLIC

EMPLOYEE's duties do not involve the formulation of policy contained in the AGENCY's regulations under NRS 281A.550(3)(a).

PUBLIC EMPLOYEE further testified that his duties as an investigator revealed no trade secrets of any applicant. His investigations did not reveal any proprietary information concerning particular regulated businesses. Thus, NRS 281A.550(3)(c) is inapplicable to PUBLIC EMPLOYEE's circumstances.

While PUBLIC EMPLOYEE's duties included neither the formulation of policy in the regulations of the AGENCY (NRS 281A.550(3)(b)) nor revealed trade secrets of any regulated entity (NRS 281A.550(3)(c)), the Commission considered whether PUBLIC EMPLOYEE's investigation of APPLICANT, or his duties governing any other investigations of applicants or licensees, constituted "directly perform[ing] activities, or control[ing] or influenc[ing] an audit, decision, investigation or other action, which significantly affected the business or industry" which might otherwise employ him (NRS 281A.550(3)(b)). (Emphasis added.)

PUBLIC EMPLOYEE made clear that an investigation of an applicant is conducted pursuant to a standard investigative plan for all such applicants. After an investigation, the investigator prepares a factual report which may not include any opinions of the investigator and must contain only the factual information revealed during the investigation. The AGENCY scrutinizes the information and makes its determination regarding the license.

In further evaluating the effect of his duties and the investigation of APPLICANT, the Commission considered the opinion, *In re Horky*, RFO 05-23 (2005), in which the Commission found that *Horky*, an agent of the Investigations Division of the State Gaming Control Agency, did not violate NRS 281A.550(3) by accepting private employment with a gaming business immediately upon leaving public employment.

Consistent with *Horky*, and based on the facts presented by PUBLIC EMPLOYEE, the Commission finds that PUBLIC EMPLOYEE's duties to investigate the individual applicants for licenses does not constitute the control or influence of an investigation or activity which *significantly affects* a business regulated by the AGENCY pursuant to NRS 281A.550(3)(b).

However, of concern in this case is a distinguishing fact that PUBLIC EMPLOYEE "reached out" to APPLICANT to "seek advice regarding his future career options." The Commission is troubled that PUBLIC EMPLOYEE's actions could be viewed not as "seeking advice," but rather as a subtle way of "soliciting" employment by a public employee interested in looking for employment in the regulated industry.

If PUBLIC EMPLOYEE's conduct was a solicitation, without doubt, such conduct would violate the public trust and create a prohibited conflict. See NRS 281A.400(10) ("A public officer or employee shall not seek other employment or contracts through the use of the public officer's or employee's

official position); *see also In re Frehner*, RFO No. 07-48C (2007).

In the absence of any conflicting evidence, the Commission accepts PUBLIC EMPLOYEE's testimony as true that he was merely seeking general information and advice, and was not soliciting an offer of employment.

The record in this matter, according to the written information and testimony provided by PUBLIC EMPLOYEE, reflects that PUBLIC EMPLOYEE's duties as an investigator do not meet any of the requirements of NRS 281A.550(3). Accordingly, because PUBLIC EMPLOYEE's circumstances do not implicate any of the provisions set forth in paragraphs (a), (b) or (c) of NRS 281A.550(3), the one-year "cooling-off" requirement does not apply to PUBLIC EMPLOYEE for purposes of accepting employment from APPLICANT or any other entity in the industry regulated by the AGENCY.²

C. 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.

Although *employment* is authorized before the one-year cooling-off based on these circumstances, NRS 281A.410(1)(b) nevertheless prohibits PUBLIC OFFICER from representing or counseling APPLICANT or any other private person, upon any issue that was under consideration by the AGENCY during PUBLIC EMPLOYEE's tenure.

The Commission has consistently interpreted NRS 281A.410(1)(b) prohibiting representation or counseling despite authorizing employment pursuant to NRS 281A.550(3). *See In re Horky*, RFO 05-23 (2005). (While Horky was not subject to the employment prohibition of NRS 281A.550(3), Horky's employment activities in the private sector were subject to the restrictions of NRS 281A.410(1) such that he was prohibited from representing or counseling a private person upon an issue under consideration by the Agency during his tenure).

APPLICANT's application and qualifications for a license were "issues" under consideration by the AGENCY while PUBLIC EMPLOYEE was employed. Beyond APPLICANT, PUBLIC EMPLOYEE is further precluded, for one year, from

² Commissioner Weaver voted against this determination.

representing or counseling for compensation any other private person regulated by the AGENCY upon any issue that was under consideration by the AGENCY during PUBLIC EMPLOYEE's public service.

In prior opinions, the Commission elaborated on what actions constitute counseling or representing a private person and what "issues" may be under consideration by a Agency to implicate NRS 281A.410(1)(b). *See In re Public Employee*, RFO No. 09-48A (2012) (issues under consideration would include pending license applications, disciplinary complaints or licensing investigations); and *In re Wynn*, RFO No. 10-70A (2012) (counseling includes advice given as a result of consultation; the term "issue" referenced in NRS 281A.410 includes a case, proceeding, application, contract, or determination).

Consistent with these prior opinions, PUBLIC EMPLOYEE may not advise any private person or entity for compensation, such as APPLICANT, regarding any specific issues that were under consideration by the AGENCY during his tenure. These issues may involve APPLICANT or any other specific matters under consideration by the AGENCY for which APPLICANT may request PUBLIC EMPLOYEE's advice.


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. Based on the language and intent of the "cooling off" provisions set forth in NRS 281A.550(3), PUBLIC EMPLOYEE would not violate the Ethics Law by accepting employment with APPLICANT within one year of his termination from public service with the AGENCY. PUBLIC EMPLOYEE's duties did not involve the formulation of policy contained in the regulations of the AGENCY; he did not directly control or influence a decision or investigation which significantly affected APPLICANT or the regulated industry; and he did not receive any trade secrets of a direct business competitor of APPLICANT.
4. Although PUBLIC EMPLOYEE may accept employment, pursuant to NRS 281A.410(1)(b) he may not advise APPLICANT for compensation regarding any specific issue under consideration by the AGENCY while PUBLIC EMPLOYEE was employed by the AGENCY.

Dated this 21st day of May, 2012.

NEVADA COMMISSION ON ETHICS

By: 
Erik Beyer
Chairman