



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**, Administrator,
State Agency,

Request for Opinion No. 11-53A

Public Officer. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Public Officer requested this 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 ("NRS"). A quorum¹ of the Commission heard this matter on August 11, 2011. Public Officer appeared at the hearing and provided sworn testimony.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and orally advised Public Officer of its decision that the cooling-off provisions of the Ethics Law apply to him.

Public Officer elected to retain confidentiality with respect to this proceeding. Therefore, the Commission publishes this Abstract in lieu of the full opinion.

II. QUESTION PRESENTED

Public Officer asks the Commission whether he is subject to the cooling-off provisions of the Ethics Law such that he would be required to wait for one year after leaving the service of a state agency before he could be employed by an entity which the agency regulates.

¹ The following Commissioners participated in this opinion: Chairman Erik Beyer and Commissioners Gregory Gale, CPA, Magdalena Groover, George M. Keele, Esq., and James Shaw. Commissioner Keith Weaver, Esq., disclosed a conflict of interest and abstained from participating in this matter pursuant to NRS 281A.420.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer serves as the Administrator of State Agency, a state agency that administers a federal program in Nevada. He is contemplating employment with Provider XYZ ("XYZ"), an entity that receives funds pursuant to a provider agreement with State Agency. He questions whether he may accept employment with XYZ within the one-year cooling-off period under these circumstances.

In answering this question, the Commission considers: 1) whether NRS 281A.550(3) applies to Public Officer's circumstances, and 2) if so, whether the Commission should grant him relief from the strict application of the one-year cooling-off period and allow him to pursue employment with XYZ.

B. RELEVANT STATUTES

1) Public Policy

NRS 281A.020(1), provides:

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 Officer is currently employed as the Administrator of State Agency, a position required to be appointed pursuant to state statute. His responsibilities include the exercise of public power, trust and duty, and he is therefore a public officer pursuant to NRS 281A.160 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 would arise between his duties as Administrator of State Agency and his private interests in pursuing employment with an entity which receives payments from State Agency must be considered in light of the cooling off provisions as set forth in NRS Chapter 281A and as interpreted by applicable Commission precedent in similar circumstances.

As of the date of the hearing of this matter, Public Officer has not sought or accepted employment with XYZ or any other Nevada entity which receives funds from State Agency. The Commission therefore expressly finds that he has not under any circumstances committed any violation of the provisions of the Ethics Law. Our opinion is concerned solely with his anticipated future activities.

2) Cooling-Off – Soliciting/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 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.

In order to determine whether the cooling-off provisions of NRS 281A.550(3) apply to Public Officer's circumstances, the Commission must first determine whether XYZ is a business or industry whose activities are governed by regulations adopted by State Agency. The evidence before us supports the conclusion that State Agency regulations do govern XYZ's activities. Public

Officer informed the Commission that State Agency does not license or credential any providers, that its provider agreements are standardized contracts and not individually negotiated, and that Nevada's policies are essentially a restatement of federal law.

While it appears that these factors serve to limit State Agency's regulatory control over providers, State Agency nonetheless has authority to regulate at least a portion of a provider's business. Pursuant to the NRS, State Agency adopts regulations governing the administration of Nevada's services and establishing Nevada's policies and procedures for funding private entities. Public Officer's testimony made it clear that in order to receive funding, providers must comply with the regulations adopted by State Agency. State Agency also has investigatory and auditing authority over all contracted providers and reports any suspected fraud to the Nevada Attorney General's Office.

In addition, despite the limitations on State Agency's authority, it also appears to the Commission that State Agency's regulations substantially impact Nevada's service provider industry. Public Officer indicated that virtually all of the state's providers serve Nevada citizens and that State Agency has entered into several similar provider agreements. With respect to XYZ in particular, the regulations affect a sizeable portion of its business given that 25% of XYZ's total revenues are attributable to funding received from State Agency.

Based on these circumstances, the Commission concludes that State Agency regulates Nevada providers, including XYZ. NRS 281A.550(3) therefore applies to Public Officer as a State Agency employee.

The Commission next considers whether Public Officer is subject to the one-year cooling-off period based on the character of his duties or activities as State Agency Administrator. NRS 281A.550(3) precludes Public Officer from accepting employment with XYZ if his principal duties at State Agency include the formulation of policy contained in the regulations governing XYZ's business (NRS 281A.550(3)(a)) or if, within the immediately preceding year, he directly performed activities or controlled or influenced a decision which significantly affected XYZ's business (NRS 281A.550(3)(b)).

Public Officer testified that one of his principal duties as State Agency Administrator is the formulation of policies and regulations governing the funding. He also testified, however, that he spent very little time on regulations that specifically affect providers such as XYZ and, as a result, he did not view these policy-making functions as one of his primary duties. Because the Commission concludes that subsection (b) of NRS 281A.550(3) applies to Public Officer's circumstances, we need not and do not decide whether Public Officer's duties fall under the purview of subsection (a) of the statute.

The facts Public Officer presented to the Commission make clear that he did directly perform activities or control or influence a decision which significantly affected XYZ's business within the last 12 months. Public Officer explained to the Commission that State Agency acts as a third-party administrator with respect to funding. Specifically, State Agency requires providers to submit claims for funding; State Agency then reviews these claims for compliance with State Agency regulations and determines whether reimbursement is proper. We infer from this practice, that Public Officer, as Administrator, controlled or influenced State Agency's decisions with respect to all Agency funding, including those claims submitted by XYZ.

In addition, Public Officer testified that his authority includes the discretion to expedite payments to providers and that, with respect to XYZ in particular, Public Officer exercised his discretion within the last 12 months by adjusting State Agency's schedule for payment of certain benefits to XYZ. This revised schedule substantially affected XYZ's business by advancing the payments from quarterly to monthly. The Commission therefore concludes, based on NRS 281A.550(3)(b), that Public Officer is subject to the cooling-off provisions and that the Ethics Law precludes him from soliciting or accepting employment from XYZ for one year after terminating his employment with State Agency.

**3) Cooling-Off –
Soliciting/Accepting
Employment
(Exception)**

The Ethics Law provides for an exception from the one-year cooling-off provision of NRS 281A.550(3) in certain circumstances. Under NRS 281A.550(6), the Commission may grant relief from the strict application of NRS 281A.550(3) if it determines that such relief is not contrary to the best interests of the public, the ethical integrity of the State government, or the Ethics Law.

NRS 281A.550(6) provides:

6. A current or former public officer or employee may request that the Commission apply the relevant facts in that person's case to the provisions of subsection 3 or 5, as applicable, and determine whether relief from the strict application of those provisions is proper. If the Commission determines that relief from the strict application of the provisions of subsection 3 or 5, as applicable, is not contrary to:

(a) The best interests of the public;

(b) The continued ethical integrity of the State Government or political subdivision, as applicable; and

(c) The provisions of this chapter,

- it may issue an opinion to that effect and grant such relief. The opinion of the Commission in such a case is final and subject to judicial review pursuant to NRS 233B.130, except that a proceeding regarding this review must be held in closed court without admittance of persons other than those

necessary to the proceeding, unless this right to confidential proceedings is waived by the current or former public officer or employee.

Having established that NRS 281A.550(3) does apply to Public Officer's circumstances, the Commission finally determines whether to grant Public Officer relief from the strict application of the one-year cooling-off period. On the record before us, we decline to grant Public Officer an exception.

It appears to the Commission that it would not be in the best interests of the public to allow Public Officer to leave his public position and immediately accept employment with XYZ. Public Officer's significant control and influence over both providers and the allocation of funds weigh against such an exception. His government position imbues him with a fair amount of discretion over providers, and even greater discretion with respect to providers such as XYZ. In these circumstances, his immediate employment by a regulated provider would create an unacceptable appearance of a conflict of interest.

Further, if Public Officer were to accept employment with XYZ, it appears that his duties as its Executive Director would require him, at the very least, to counsel XYZ on issues that were pending before State Agency during his tenure. NRS 281A.410(1)(b) would prohibit Public Officer, for one year after leaving State Agency, from representing or counseling XYZ upon any issue which was under consideration by the

agency during his public employment. It thus appears to the Commission that if Public Officer were to accept the Agency Administrator position, he could not avoid violating NRS 281A.410(1)(b) during his first year of private employment with XYZ.

Accordingly, we conclude that granting Public Officer relief from the strict application of NRS 281A.550(3) is not warranted. Public Officer's immediate employment with XYZ is contrary to the best interests of the public and the counseling and representation restrictions of NRS 281A.410(1)(b). Consequently, under NRS 281A.550(6)(a) and (c), we decline to grant Public Officer an exception from the cooling-off period. He is therefore precluded from soliciting or accepting employment from XYZ for one year after termination of his service with State Agency.

IV. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officer was a "public officer," as defined by 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. XYZ is a business whose activities are governed by regulations adopted by State Agency, therefore the provisions of NRS 281A.550(3) apply to Public Officer's circumstances.

4. During the year immediately preceding the Commission's hearing, Public Officer directly performed activities or controlled or influenced decisions which significantly affected XYZ's business; therefore, under NRS 281A.550(3)(b), Public Officer shall not solicit or accept employment from XYZ for one year after termination of his employment with State Agency.
5. Relief from the strict application of NRS 281A.550(3) to Public Officer would be contrary to the best interests of the public under NRS 281A.550(6)(a) and also contrary to the Ethics Law, specifically NRS 281A.410(1)(b), under NRS 281A.550(6)(b). We therefore deny Public Officer an exception from the cooling-off provision.
6. As of the date of the Commission hearing, Public Officer has not solicited or accepted employment with XYZ, or any other entity regulated by State Agency and has therefore committed no violation of the Ethics Law.

Dated this 15th day of August, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman