



## 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**, Compliance Officer,  
State Regulatory Agency,

Request for Opinion No. 11-96A

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

#### **CONFIDENTIAL OPINION**

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

Public Employee 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 quorum<sup>1</sup> of the Commission heard this matter on December 14, 2011. Public Employee appeared at the hearing and provided sworn testimony.

After fully considering Public Employee's request and analyzing the facts, circumstances and testimony he presented, the Commission deliberated and orally advised Public Employee of

its decision to grant him relief from the one-year cooling-off period for employment.

Public Employee 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 Employee serves as a compliance officer for a Nevada State Regulatory Agency ("NSRA"). Public Employee questions whether he may resign from his public employment and pursue private employment by an entity regulated by NSRA without satisfying a one-year cooling-off period.

<sup>1</sup> The following Commissioners participated in this opinion: Chairman Erik Beyer and Commissioners Timothy Cory, Esq., Gregory J. Gale, CPA, Magdalena M. Groover, Paul H. Lamboley, Esq., and Keith A. Weaver, Esq.

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

#### **A. ISSUES**

Public Employee is a compliance officer for NSRA and, as such, performs inspections of certain facilities to ensure compliance with applicable laws and regulations. He has no individual authority to issue a violation or to shut down a facility that he determines is noncompliant, but may recommend that NSRA impose substantial penalties for violations.

Private Company, an entity subject to NSRA's regulatory oversight, owns "XYZ", one of the facilities Public Employee monitors. He has inspected XYZ during the immediately preceding year and recently recommended that Private Company be found in violation of state law.

Public Employee wishes to pursue employment with Private Company in a management capacity. His anticipated duties would include managing XYZ's daily operations and ensuring compliance with regulatory standards. Private Company did not recruit Public Employee and has not offered or promised him employment.

The Ethics Law requires a public employee to hold public office as a public trust for the sole benefit of the people and prohibits, for a period of one year, former public employees from seeking or accepting certain employment, contracts and representations in their private capacity which relate to their former public service. See NRS 281A.550(3) and NRS 281A.410(1)(b). The issue before

the Commission is whether Public Employee is subject to the one-year cooling-off provisions, and, if so, whether he is entitled to relief from the strict application of those provisions under NRS 281A.550(6).

#### **B. RELEVANT STATUTES**

##### **1) Public Policy**

##### **NRS 281A.020(1):**

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 NSRA as a compliance officer, and he is therefore a public employee who must commit himself to avoid conflicts of interest between his private interests (pursuing private employment by a regulated entity) and those of the general public whom he serves.

Whether such a conflict would arise between his duties as an NSRA compliance officer and his private interests in pursuing employment with an entity which NSRA regulates must be considered in light of the "cooling-off" provisions as set forth in NRS 281A and as interpreted by applicable Commission precedent in similar circumstances.

## **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.

NRS 281A.550(3) prohibits Public Employee from soliciting or accepting employment from entities regulated by NSRA for one year after the termination

of his public service if one of three criteria are met: (1) as a public employee, his principal duties included formulating policy contained in NSRA's regulations (NRS 281A.550(3)(a)), (2) within 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 otherwise employ him (NRS 281A.550(3)(b)), or (3) he has obtained trade secrets of a direct business competitor (NRS 281A.550(3)(c)).

The record before the Commission reflects that Public Employee's duties as a compliance officer do not include formulation of policy contained in NSRA's regulations and do not involve trade secrets of any company. Accordingly, NRS 281A.550(3)(a) and (c) are irrelevant here. This Opinion thus focuses on the applicability of NRS 281A.550(3)(b) to Public Employee's situation.

The evidence presented to the Commission showed that Public Employee's primary duty at NSRA is to inspect facilities to determine whether their operations comply with applicable laws and regulations. After performing inspections, he issues a report and recommendation governing compliance to the supervisor of NSRA's enforcement department. With respect to Private Company in particular, the facts presented showed that Public Employee regularly inspected its XYZ facility, that within the last 12 months he inspected XYZ twice, that he determined that the XYZ facility was not in compliance with applicable laws and

regulations, and this determination resulted in the finding of a violation.

Based on these facts, the Commission finds that Public Employee's activities are sufficiently similar to an investigation and that he conducted such activities within the immediately preceding year; his duties therefore fall within the scope of NRS 281A.550(3)(b).

We next determine whether Public Employee's inspections *significantly affect* the business or industry which might employ him. As a compliance officer, Public Employee has substantial influence over a facility's operations despite that he has no individual authority to issue a violation or to shut down a facility. Public Employee does have the authority to recommend both finding a violation and the ultimate penalty to be imposed for the violation, including substantial fines. Further, even though Public Employee cannot order a facility to shut down, in certain circumstances he can advise a non-complying facility to immediately cease operations. Public Employee testified that if the facility ignores his recommendation and continues operating, it could face sizeable fines and penalties.

It therefore appears to the Commission that Public Employee holds a significantly responsible position at NSRA and that his inspections do significantly affect the business or industry in which he seeks employment. Under these circumstances, we conclude that NRS 281A.550(3)(b) applies to Public Employee and therefore prohibits him from seeking or accepting employment from Private Company or another entity regulated by

NSRA for a period of one year from the termination of his public employment.

### **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.

The record supports a finding that Public Employee satisfies the criteria for an exception under NRS 281A.550(6). Accordingly, the Commission grants relief from the one-year cooling-off period of NRS 281A.550(3). The evidence provided suggests that the strict application of NRS 281A.550(3) would not be contrary to the best interests of the public, the ethical integrity of state government or the provisions of the Ethics Law.

As noted, Public Employee's public position authorizes him to exert substantial control over the facilities he inspects. Nonetheless, his recommendation must pass through several layers of authority before a violation ultimately is found and a sanction imposed.

The intent of the exemption statute is to facilitate 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 is nothing otherwise unethical in the way that the employment relationship occurred. *See Matter of the Request for Opinion of Former Public Officer*, No. 95-61 (1996). Public Employee's expertise in certain matters may serve the public in many ways, whether serving as a public regulator or managing private facilities to ensure that they are operated safely. As the manager of a facility regulated by NSRA, Public Employee's duties would not conflict with inspections conducted by NSRA. On the contrary, Public Employee's knowledge and expertise

may ensure that the facility is being operated in accordance with industry standards.

Because there is no evidence to suggest that Public Employee used his public position, relationships or information to compromise his public duties to seek a private position with Private Company, and his future work would be in the best interests of the public and consistent with the continued ethical integrity of State Government, Public Employee is relieved from the strict application of the "cooling-off" requirements of NRS 281A.550(3). Therefore, the one-year "cooling-off" requirement does not apply to Public Employee for purposes of soliciting or accepting employment from Private Company or another entity similarly regulated by NSRA. His resignation from NSRA and subsequent employment by Private Company would not constitute a violation of NRS 281A.550.

#### **A. 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 within the one-year cooling-off period based on Public Employee's circumstances, he nevertheless is prohibited from representing or counseling Private Company, or any other private person, upon any issue that was under consideration by NSRA during his tenure pursuant to NRS 281A.410(1)(b). See *In re Horky*, RFO 05-23 (2005).

If offered a position with Private Company, Public Employee intends to serve in a business management capacity that includes ensuring that XYZ facility complies with government standards and regulations. We note that compliance with government requirements is an issue that is regularly and consistently before NSRA. Although NRS 281A.410(1)(b) does not impose a blanket prohibition against Public Employee representing or counseling Private Company regarding such issues, to the extent Private Company had a specific issue before NSRA during Public Employee's tenure (e.g., the violation found by Public Employee during an investigation of XYZ within the last year), Public Employee would be prohibited from advising Private Company with regard to that issue for one year after the termination of his public service.

Further, the restrictions imposed by NRS 281A.410(1)(b) are not limited to issues in which Public Employee was directly or indirectly involved. Because the Commission has insufficient information concerning other issues involving Private Company that were pending before NSRA, we are unable to determine how such issues could impact Public Employee's future responsibilities with Private Company. Public Employee is therefore advised that should such an issue come to his attention, it is incumbent upon him to undertake an evaluation applying NRS 281A.410(1)(b).

#### IV. 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. Public Employee may accept employment with Private Company within one year after his termination from public service with NSRA without violating NRS 281A.550(3). Although Public Employee's duties included activities or other actions which significantly affected the business (Private Company) or industry, relief from the strict application of NRS 281A.550(3) is granted pursuant to NRS 281A.550(6) because Public Employee's work in the private

industry is not contrary to the best interests of the public, the continued ethical integrity of the state government or political subdivision or the provisions of NRS 281A. Accordingly, Public Employee may solicit or accept employment from Private Company, an entity regulated by NSRA.

4. Although Public Employee may accept employment, he may not represent or counsel (e.g., advise) Private Company for compensation regarding any specific issue that was under consideration by NSRA while he was employed by NSRA pursuant to NRS 281A.410(1)(b).

Dated this 15<sup>th</sup> day of August, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer  
Erik Beyer  
Chairman