



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 Officer, Former Administrator,
Department of State Government,
State of Nevada,

Request for Opinion No. 12-53A

Former Public Officer. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Former Administrator (“Public Officer”) of a Nevada State Department (“Department”) 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 and Public Officer appeared in person and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding whether he was required to satisfy the one-year cooling-off period after his termination from service as the Administrator before accepting employment with an entity which contracted with Department to provide professional services during his tenure.

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 he is relieved from the strict application of the one-year cooling-off period following his retirement from State service. The Commission now renders this formal written Opinion stating its findings of fact and conclusions of law.

¹ The following Commissioners participated in this opinion: Chairman Erik Beyer, Vice Chairman Paul Lambole and Commissioners John Carpenter, Timothy Cory, Gregory Gale and James Shaw.

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

The facts in this matter were obtained from documentary and testimonial evidence provided by Public Officer. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact set forth below accept as true those facts Public Officer presented. 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. 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 Department before he could be employed by an entity which contracts regularly with Department to provide professional services.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer recently resigned as an Administrator within Department, a state agency that administers and regulates an important industry in Nevada. He is contemplating immediate employment with a private firm ("Private Entity") which has regularly contracted with Department to provide professional services for various Department projects. As Administrator, Public Officer had significant authority and control regarding the contracts that Department awarded to professional services firms, including contracts to Private Entity. He also had a direct role in developing and approving the policies and regulations of Department. His role as Director also provided him with significant exposure and networking contacts with several state and national entities and organizations, private and governmental, to steer the direction of Department policy. His leadership roles and responsibilities within these organizations introduced Nevada to advanced policies and educated the country on the specific issues affecting the related industry Nevada. He questions whether he may accept employment with Private Entity², within the one-year cooling-off period, claiming that such employment and/or consultation services will benefit Nevada.

In answering this question, the Commission considers: 1) whether NRS 281A.550(3) and (5) apply to Public Officer's circumstances, and 2) if so, whether the

² Although Public Officer's original request sought advice regarding his ability to accept employment from any other related private firms that previously conducted business with Department, he offered no specific facts regarding any other company and the Commission declined to offer advice regarding speculative offers of employment. This opinion is therefore limited to Public Entity and Public Officer is welcome to return to the Commission for advice governing any other entities from which he seeks to accept employment to determine whether the circumstances warrant the same decision as applicable to Public Entity.

Commission should grant him relief from the strict application of the one-year cooling-off period and allow him to pursue employment with Private Entity. The Commission also addresses the applicability of NRS 281A.410 governing the one-year prohibition on representing or counseling a private entity on matters that were under consideration by Department during Public Officer's tenure. The Commission is particularly concerned with cases of this nature where a public officer's connections and influence within the State make him an attractive candidate for entities that have contracts and other significant relationships with the State, whether regulatory or otherwise.

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.

The Ethics Law promotes the appropriate separation between public duties and private interests. As a former Administrator of Department, Public Officer has continuous responsibilities to the public that he must separate from his private interests for one year. Public Officer was formerly employed as an Administrator within Department. His responsibilities included the exercise of public power, trust and duty, and he was therefore a public officer pursuant to NRS 281A.160. Pursuant to NRS 281A.180, 281A.410 and 281A.550, the Ethics Law governs the conduct of former public officers in the context of cooling-off requirements to ensure that former public officers do not use former information, relationships, or experiences acquired from their public service and belonging to the public to benefit them in a private capacity. Based on the record evidence in this case, Public Officer appears to have conducted himself appropriately to avoid conflicts during his tenure as an Administrator and the question before the Commission involves his anticipated conduct in the future as a former public officer.

2. Cooling-Off Provisions

The "cooling-off" requirements of the Ethics Law seek also to prohibit the appearance of *quid pro quo*, or "revolving door," scenario, wherein a public officer secures favors in the public sector with the intention that the favor be returned privately. "One 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 regulated. 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*, Comm'n Opinion No. 00-44 (2000). See also *In re Roggensack*, Comm'n Opinion No. 06-60 (2006) and *In re Public Employee*, Comm'n Opinion No. 11-51A (2012). The same principles apply to the provisions of NRS 281A.550(5) governing entities which contract with the public: the public trust becomes compromised with concerns that certain private entities will be promised various governmental contracts in return for private employment opportunities or other favors.

Moreover, there are two sides to the employment street. Although the provisions of the Ethics Law focus on Nevada public officers and employees, the Commission cautions potential employers to avoid conduct that may unnecessarily or inappropriately tempt Nevada public officers or employees by prospects or offers of employment that more serve the employers' interests than the employee's interest in seeking to gain present or future favor for the State, or that otherwise may cause a prospective employee to overlook applicable ethics provisions while employed or in accepting employment.

In Public Officer's context, the Ethics Law seeks to prohibit and protect against the possibility that Private Entity could have been awarded a substantial contract or other favorable decision by Department, over which Public Officer had significant control and influence, in return for a lucrative job offer in the private sector. The Commission does not suggest or imply that Public Officer or Private Entity acted in any such manner; however, the "cooling-off" provisions of the Ethics Law are intended to prohibit and discourage such circumstances and appearances of impropriety, and otherwise protect the public from the improper use of public resources. Nevertheless, based on the circumstances provided herein, the Commission is satisfied that there has been no *quid pro quo* or improper "revolving door" circumstance and Public Officer's private work for Private Entity will not involve Nevada-specific projects or issues that were otherwise under consideration by Department during his tenure, but will nonetheless serve Nevada's best interests.

Public Officer asserted that if he were to wait one year or otherwise decline this opportunity, his networking contacts as well as his present knowledge, qualifications and primary interest in national policy issues in the relevant industry would be rendered useless. To the contrary, Public Officer's résumé and employment background recited in his testimony evidence significant skills and qualifications in the industry that could provide him many national opportunities in that field that do not involve entities which maintain significant, continuing relationships with the State of Nevada, such as Private Entity. The Commission has no doubt that Public Officer's skills and qualifications make him an attractive candidate for employment in the industry at the national level, and not with such dire prospects as believed. A concern, however, in this case, is not whether Public Officer can well serve the national industry, and by extension, the interests of Nevada, but that he intends to do so for an entity with strong and continuing ties to the State of Nevada over which he had significant influence in his public role.

The fact that Public Officer will serve Private Entity's interests from its national headquarters outside of Nevada supports a view that both its national and Nevada interests are being addressed. Furthermore, Private Entity may likely have pursued Public Officer for this position based on its experience with him through his Department affiliation, a resource that belongs to the State without a showing that it would not otherwise be contrary to the State's interests. This case falls in favor of the public officer pursuing the private work, but the Commission nonetheless cautions that the Ethics Law prohibits, for one year, any attempt by a public officer (or former public officer) to cash-in on former public service by seeking or obtaining private employment opportunities with entities that maintain significant relationships with the State, notwithstanding the public officer's talent or qualifications in the field.

a. 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 Officer from soliciting or accepting employment from entities whose activities are regulated by Department 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 Department'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 Officer's duties and responsibilities included the formulation of policies contained in the regulations governing Private Entity's business and industry activities, at least with regard to those specific industry activities in Nevada (NRS 281A.550(3)(a)), and he performed activities and controlled and influenced audits, decisions, investigations and other

actions which significantly affected Private Entity (NRS 281A.550(3)(b)). As an Administrator, Public Officer had direct responsibility over most Department business, policies, decisions and activities, including all aspects of awarding contracts to private professional firms.

Although not conclusive, Public Officer testified that he did not believe he obtained trade secrets of any direct business competitors of Private Entity because the Department followed open processes and all private firms had access to the same best practices in the industry (NRS 281A.550(3)(c)). Although the qualification bids of such professionals were kept confidential until the selection and contract were awarded, all information became open to the public after the selection and there were ultimately no secrets about the bid or contract. Nevertheless, NRS 281A.550(3) requires only that one of the conditions set forth in the statute be satisfied and we conclude that Public Officer's duties as an Administrator clearly make NRS 281A.550(3)(a) and (b) applicable and relevant to the consideration of his request.

Given his position of ultimate authority and approval governing significant aspects of Private Entity's activities in Nevada, including his significant involvement in the procedures outlined for selection and approval of professional firms pursuant to quality-based bids, the provisions of NRS 281A.550(3) would prohibit Public Officer from accepting employment from Private Entity within one year of his termination from service with Department. However, as discussed in detail below, the Commission grants Public Officer relief from the strict application of this provision based on his specific circumstances and given the best interests of the State.

b. Accepting Employment From Former Contractors

NRS 281A.550(5) provides:

5. Except as otherwise provided in subsection 6, a former public officer or employee of the State or a political subdivision, except a clerical employee, shall not solicit or accept employment from a person to whom a contract for supplies, materials, equipment or services was awarded by the State or political subdivision, as applicable, for 1 year after the termination of the officer's or employee's service or period of employment, if:

- (a) The amount of the contract exceeded \$25,000;
- (b) The contract was awarded within the 12-month period immediately preceding the termination of the officer's or employee's service or period of employment; and
- (c) The position held by the former public officer or employee at the time the contract was awarded allowed the former public officer or employee to affect or influence the awarding of the contract.

Public Officer testified that Department regularly contracts with Private Entity as one of several professional firms with experience and expertise in the industry, and in particular the industry needs for Nevada. Specifically, Public Officer recalled at least one substantial contract that was awarded to Private Entity within the last 12 months in an amount over \$25,000 to assist with a significant Nevada project. As Administrator, Public Officer had direct control and influence in awarding all contracts

for professional services; he approved the decision to seek private professional services and had ultimate authority and control in the selection process. While such professional contracts are awarded on a quality-based selection process which follows a rigid formal policy, Public Officer reviewed and approved initial requests for proposals and approved the final selection.

We note that Public Officer was very forthcoming concerning his duties, responsibilities and roles as Administrator and recognized that these provisions applied to his circumstances. We appreciate his concern regarding the applicability of the Ethics Law and agree that his circumstances satisfy the provisions of NRS 281A.550(5) that would prohibit him from accepting employment with Private Entity within one year of his termination from service with Department. However, as noted above and discussed in detail below, the Commission grants Public Officer relief from the strict application of this provision in the best interests of the public.

c. Relief from Strict Application of Employment Prohibitions

The Ethics Law provides for an exception from the one-year cooling-off provisions of NRS 281A.550(3) and (5) under certain circumstances. Pursuant to NRS 281A.550(6), the Commission may grant relief from the strict application of NRS 281A.550(3) and (5) 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) and (5) apply to Public Officer's circumstances, we consider whether to grant Public Officer relief from the strict application of the one-year cooling-off period. On the record before us, we grant Public Officer such an exception. The record supports a finding that Public Officer satisfies the criteria for an exception under NRS 281A.550(6); the strict application of NRS 281A.550(3) and (5) would not be contrary to the best interests of the public, the ethical integrity of state government or the provisions of the Ethics Law.

Public Officer had significant control and influence over the awarding of outside professional contracts. His government position demanded a fair amount of discretion regarding professional service providers, and even greater discretion with respect to which Department projects qualified for outside resources. Furthermore, Public Officer was primarily responsible for overall State industry policy. However, Public Officer also provided compelling information that his long career in the industry at the State level included participation, influence and development of relationships with Federal and private organizations concerning state and national industry policy. His continued work in the field may benefit the State of Nevada through Public Officer's continued ability to advise and educate Federal and private entities regarding Nevada's needs and policies regarding industry matters.

Under these circumstances, his immediate employment by a contracting/regulated entity would not create a conflict of interest. Accordingly, we conclude that granting Public Officer relief from the strict application of NRS 281A.550(3) is warranted. Public Officer's immediate employment with Private Entity is not contrary to the best interests of the public, the continued ethical integrity of State Government, and/or the provisions of NRS 281A. Accordingly, under NRS 281A.550(6)(a), (b) and (c), we grant Public Officer an exception from the cooling-off period. He is therefore authorized to accept employment from Private Entity within one year after termination of his service from Department.

"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." *In re Public Officer*, Commission Opinion No. 11-96A (2012). Public Officer's expertise in matters relating to industry policy may serve the public in many ways, whether serving as a public administrator regarding statewide industry policy or a private liaison between various private industry organizations and governments that research and promote policy matters within the industry affecting the State of Nevada. As a private liaison between Private Entity and the various state and national governments and organizations, Public Officer testified that the expertise and contacts he acquired from serving Department would ultimately benefit Nevada.

He will be able to bring his knowledge of Nevada's industry-related issues to the forefront of state and national policy and contribute Nevada's needs and experiences to those debates and considerations. Public Officer testified that timing is critical with the quickly evolving issues affecting industry policies. He offered concerns that if he did not accept the current opportunity, his expertise and association with the various groups and players may be lost or forgotten. Although the Commission believes that Public Officer would be able to explore opportunities with entities not otherwise affiliated with Nevada, the Commission finds that there has been no evidence of any *quid pro quo* with Private Entity and the public's interests

would be best served by encouraging Public Officer's continued involvement in state and national industry policy that will benefit the State of Nevada.

Because there is no evidence to suggest that Public Officer used his public position, relationships or information to compromise his public duties to seek a private position with Private Entity, and his future work would be in the best interests of the public and consistent with the continued ethical integrity of State Government, Public Officer is relieved from the strict application of the "cooling-off" requirements of NRS 281A.550(3) and (5). Therefore, the one-year "cooling-off" requirement does not apply to Public Officer for purposes of soliciting or accepting employment from Private Entity.

d. 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 Officer's circumstances, he is nevertheless prohibited, for one year, from representing or counseling Private Entity upon any issue that was under consideration by Department during his tenure pursuant to NRS 281A.410(1)(b). See *In re Public Employee*, Comm'n Opinion No. 11-96A (2012).

If he accepts a position with Private Entity, Public Officer affirmed his commitment to preclude himself from working on any matters affecting Nevada or Department that were under his consideration as the Administrator for at least one year. In fact, Public Officer anticipates working outside of state and not on any Nevada-specific issues in his role for Public Entity. His private employment will involve public and government relations and policy development on a national level. Nevertheless, Public Officer is reminded that if he accepts employment, he is prohibited from advising Private Entity with regard to any issue that was under consideration by Department during his tenure as Administrator for one year after the termination of his public service.

IV. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officer was a “former public employee,” as defined by NRS 281A.150 and 281A.180 and “former public officer” as defined by NRS 281A.160 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 Officer may accept employment with Private Entity within one year after his termination from public service with Department without violating NRS 281A.550(3) or NRS 281A.550(5). Although Public Officer’s duties did include policy formation, significant control over matters affecting the relevant industry, and Private Entity contracted with Department within the immediately preceding 12 months to provide professional services, relief from the strict application of NRS 281A.550(3) and (5) is granted pursuant to NRS 281A.550(6) because Public Officer’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.
4. Although Public Officer may accept employment, he may not, for one year after leaving Department, represent or counsel (advise) Private Entity for compensation regarding any specific issue that was under consideration by Department during his tenure pursuant to NRS 281A.410(1)(b).

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

The Following Commissioners Participated in this Opinion:

Dated this 31st day of January, 2013.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Paul Lamboley
Paul Lamboley
Vice-Chairman

By: /s/ Gregory Gale
Gregory Gale
Commissioner

By: /s/ John Carpenter
John Carpenter
Commissioner

By: /s/ James Shaw
James Shaw
Commissioner