



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
Division, State Executive Department,
State of Nevada,

Request for Opinion No. 13-29A

Former Public Officer./

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Former Public Officer (“Public Officer”), an administrative officer for a Division of a Nevada State Executive Department (“Division”), requested this confidential advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.440(1) regarding the propriety of Public Officer’s past conduct as it relates to “cooling-off” provisions of 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 April 17, 2013. Public Officer appeared in person in Carson City and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding the applicability of the “cooling-off” requirements of the Ethics Law to Public Officer’s circumstances wherein Public Officer sought and accepted private employment with a consulting firm that provides services to clients who were recipients of funding and other services from Division during Public Officer’s 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 the cooling-off provisions of the Ethics Law applied to Public Officer’s circumstances, but the

¹ The following Commissioners participated in this opinion: Chairman Paul Lambole, Vice Chairman Gregory Gale and Commissioners Timothy Cory, Cheryl Lau, James Shaw and Keith Weaver.

Commission would grant relief from the strict application of those prohibitions. The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.²

Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission 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 questions whether Public Officer's former public service with the Division prohibited Public Officer from soliciting or accepting employment with a private entity that provides consulting services to applicants which seek funding and/or services from the Division under NRS 281A.550(3) and (5), and if so, whether Public Officer could be relieved from the strict application of the statutes under NRS 281A.550(6).

III. FINDINGS OF FACT

1. In Public Officer's public capacity, Public Officer served as an administrative officer ("Administrator") for the Division for approximately 5 years.
2. The Division was created by NRS to assist the State's effort to establish safe, affordable services and/or funding to certain service providers within the State.
3. The Division is designated as the State agency responsible for administering the allocation and distribution of certain federal funds.
4. Pursuant to State law, all of the expenditures made by the Division in furtherance of its mission are considered to be made for public purposes and the Division funds may be borrowed, expended, advanced, loaned or granted.
5. The Division provides services and various forms of funding for the provision of services deemed to be necessary to the health, safety and welfare of the residents of Nevada.

² The Commission applies the 2011 version of NRS Chapter 281A that was in effect at the date of the hearing in this matter and not any amendments to NRS Chapter 281A, as adopted during the 2013 Nevada Legislative Session, which took effect after the date of the hearing but before the date of issuance of this written opinion.

6. The Division adopts regulations governing the distribution and use of services and/or funds, including eligibility for the funding.
7. The Division holds public hearings to establish certain criteria for various services and/or funding. Interested parties may present comments and lobby the Division for a determination of the criteria for specific services and/or funding. After the public hearing, the Division publishes the criteria necessary to receive services and/or funding. Upon receipt of applications, the Division staff assigns a designated number of points for each criterion that is satisfied in the application. The applicant with the highest number of points is awarded the services and/or funding, as available.
8. After an applicant is awarded services and/or funds from the Division, the Division has general compliance oversight of the provision of services and use of funds. If services and/or funds are provided, in whole or in part, with federal money, the Division will report noncompliance to the appropriate federal agency for further action. For State-funded projects, the Division may require cures for noncompliance or otherwise assess various penalties.
9. As Administrator, Public Officer's duties generally included supervision of all staff involved in the review of applications and the provision of services and/or funding sources. Public Officer also supervised the compliance unit of the Division.
10. All of the applications Public Officer administered involved staff's determination and recommendation of eligibility for funds and/or services utilizing predetermined, objective scoring criteria set forth by the Division from public hearings. Public Officer reported all determinations and recommendations to the Public Officer's supervisor for final decision.
11. Public Officer had no discretion, influence or control over the number of points an applicant was awarded. All scoring criteria were objective and the process precluded any Division employee from using his or her position to favor any applicant. Based on the score attributed to the applicant, Public Officer made a recommendation to Public Officer's supervisor who ultimately approved the application, arbitrated appeals of scoring determinations and awarded the funding and/or services.
12. Prior to Public Officer's public service for the Division, Public Officer worked in the industry regulated by the Division and achieved significant educational and professional degrees in the field.
13. During February 2013 Public Officer applied for employment with a private business entity ("Business Entity") as a manager while still employed by the Division. Public Officer later accepted the position while still employed by the Division. Business Entity is a Nevada-based consulting firm that provides

financial consulting and administrative assistance to applicants for funding and/or services from the Division.

14. Business Entity published a competitive employment announcement which was generally available to the public.
15. As a manager for Business Entity, Public Officer is responsible for assisting with all aspects of client development and project management. Public Officer assists clients by preparing applications for funding and/or services from the Division, as well as other conventional public and private sources, and represents Business Entity and/or its clients at project meetings with funders, such as the Division and other interested parties. Additionally, Public Officer responds to requests for proposals/qualifications on behalf of Business Entity, solicits new business and writes various grant applications.
16. Business Entity does not represent clients/developers on issues after they have received the funds and/or services, including compliance requirements.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer recently resigned as the Administrator of the Division, a State agency that administers the provision of certain funds and/or services in Nevada. While still employed by the Division, Public Officer applied for and accepted immediate employment with Business Entity, a private consulting firm that represents clients which regularly applied for and received funding and/or services from the Division during Public Officer's tenure. As the Administrator, Public Officer played a significant role in reviewing and awarding Division funding and/or services to various service providers within the State. However, Public Officer's involvement in any application decisions for Division funding and/or services was limited by objective, public criteria for the various funds and ultimately approved by Public Officer's supervisor.

Public Officer had a duty to evaluate the applications for funding or services and assign points based on objective criteria and make recommendations to Public Officer's supervisor, who was ultimately responsible for any decision regarding services and/or funding. Public Officer also had a role in reviewing and recommending various policies and regulations of the Division to the Department head. Public Officer's public role also provided Public Officer with significant exposure to all state-wide service providers. Public Officer questions whether it was appropriate to accept employment with Business Entity within the one-year "cooling-off" period, claiming that such employment was not with an entity regulated by the Division.

In answering these questions, the Commission considers: 1) whether NRS 281A.550(3) and (5) apply to Public Officer's circumstances, and 2) if so, whether the Commission should grant Public Officer relief from the strict application of the one-year cooling-off period under NRS 281A.550(6) and conclude that Public Officer's immediate employment with Business Entity was proper. 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 the Division during Public Officer's tenure.

As expressed in *In re Public Officer*, Comm'n Opinion No. 12-53A (2013), "the Commission is particularly concerned with cases of this nature where a public officer's connections and influence within the State make him/her an attractive candidate for the entities that have significant relationships with the State, whether regulatory or otherwise." In this case, Public Officer is employed by Business Entity, an entity that was not directly involved with the Division but which provides consulting services to the same clients serviced by Division during Public Officer's tenure.

B. RELEVANT STATUTES AND DISCUSSION OF ISSUES

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 the former Administrator of the Division, Public Officer has continuous responsibilities to the public that Public Officer must separate from Public Officer's private interests for one year. Pursuant to NRS 281A.180, 281A.410 and 281A.550, the Ethics Law governs the conduct of former public officers and employees in the context of cooling-off requirements to ensure that former public officers and employees 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 activities appropriately to avoid conflicts during Public Officer's tenure as the Administrator of the Division. Likewise, although Public Officer's former responsibilities for, relationships with and knowledge regarding the Division and its procedures for awarding funding to private service providers significantly impact Public Officer's current employment position with Business Entity, the Commission

waives the one-year cooling off period because Public Officer's private position is in the best interests of the State.

2) Cooling-Off Provisions

(a) 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 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 an entity or industry whose activities are regulated by the Division for one year after the termination of Public Officer's public service if one of three criteria are met: (1) as a public employee, Public Officer's principal duties included formulating policy contained in the Division's regulations (NRS 281A.550(3)(a)), (2) within the immediately preceding year, Public Officer 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 Public Officer (NRS 281A.550(3)(b)), or (3) Public Officer has obtained trade secrets of a direct business competitor (NRS 281A.550(3)(c)).

The record before the Commission reflects that Public Officer' duties and responsibilities for the Division included recommendations to the Public Officer's supervisor regarding policies contained in the regulations governing the process to acquire services and/or funding from the Division. In Public Officer's high-level position administering various programs, Public Officer offered valuable, first-hand input into the administrative regulations that ultimately governed the processes and procedures utilized by the Division regarding its services and/or funding decisions. However, Public Officer's regulatory recommendations were incidental to Public

Officer's principal duties and Public Officer's supervisor was ultimately responsible for adopting the regulations affecting the Division, which included the process for awarding services and/or funding. Accordingly, Public Officer' principal duties did not include formulating administrative policies within the meaning of NRS 281A.550(3)(a).

Public Officer also performed activities governing applications for services and/or funding from the Division, but Public Officer testified that those activities did not significantly affect any individual applicant or service provider within the industry. Public Officer stated that Public Officer's activities with respect to applications were expressly limited by publicly available, objective criteria for scoring applications and Public Officer had no discretion in the approval of applications based on an applicant's proof of satisfying the criteria. During the public hearing process which determined the criteria for a particular service or funding source, the interested parties would lobby the Division, not Public Officer or any other employee, for the criteria necessary for the services and/or funding.

Although Public Officer had no direct role in determining which criteria would be required for a particular service or funds, Public Officer had significant influence and oversight regarding overall policies of the Division's applications and the supervision and approval of scoring for various applications and recommendations to Public Officer's supervisor. Likewise, Public Officer supervised a compliance unit of the Division which directly affected the industry. Based on the nature of Public Officer's duties, the Commission believes that Public Officer's activities, decisions and other actions, including recommendations, significantly affected various applicants for services and/or funding within the industry, subjecting Public Officer to the provisions of NRS 281A.550(3)(b) even though all final decisions were ultimately rendered by Public Officer's supervisor.

The Commission generally views trade secrets applicable to various regulated entities pursuant to NRS 281A.550(3)(c) to include not only traditional trade secrets in the context of technical formulas, computations, processes or designs, but also any other general confidential or proprietary business information that could provide an entity with a competitive advantage. Public Officer testified that Public Officer did not obtain trade secrets of any direct business competitors of Business Entity's clients, applicants for Division services and/or funding, through Public Officer's review of the applications because the Division followed open public processes and all applicants had access to the same public information regarding qualifications for services and/or funding (NRS 281A.550(3)(c)). However, the record revealed that all applications were kept confidential until the services and/or funding were awarded and therefore the various applications contained confidential, proprietary information of the various applicants at the time decisions were made regarding services and/or funding.

Although there is no affirmative record that Public Officer obtained such information for competitive advantage and Public Officer testified that any information in the applications could not have been utilized to favor one applicant over another given the objective point system, the Commission nevertheless cautions public

officers similarly situated that access to confidential and/or proprietary information concerning business competitors could impose “cooling-off” requirements under the statute.

Although the record is less certain with respect to the application of NRS 281A.550(3)(a)(principal duties to develop policies/administrative regulations) and 281A.550(3)(c)(access to trade secrets), the record clearly reflects that Public Officer’s duties satisfied the requirements of NRS 281A.550(3)(b), significant influence over various applications for Division services and/or funding, including Public Officer’s involvement in the procedures outlined for selection and recommendation of services and/or funding for certain applicants and Public Officer’s supervision of the compliance unit of the Division. Accordingly, the provisions of NRS 281A.550(3) would prohibit Public Officer from accepting employment from Business Entity within one year of Public Officer’s termination from service with the Division. However, as discussed in detail below, the Commission grants Public Officer relief from the strict application of this provision based on Public Officer’s specific circumstances and given the best interests of the State.

(b) Cooling-Off – Contracts

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 Business Entity, the entity from which Public Officer accepted employment, has never entered into a contract with the Division. Rather, the individual applicants enter into contracts with the Division. Accordingly, the prohibitions set forth in NRS 281A.550(5) are not applicable to Public Officer’s circumstances.

3) 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) applies to Public Officer's circumstances, the Commission considers whether to grant Public Officer relief from the strict application of the one-year cooling-off period. On the record presented, the Commission grants Public Officer such an exception. The record supports a finding that Public Officer satisfies the criteria for an exception under NRS 281A.550(6); relief from 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.

In Public Officer's current position with Business Entity, Public Officer has the opportunity to utilize Public Officer's extensive education, knowledge and experience to contribute to the effective and affordable provision of necessary services for the health, safety and welfare of persons within Nevada, albeit in the private sector. Public Officer's role for Business Entity is one step removed from direct employment with the service providers and no evidence was presented or suggested to indicate that Public Officer used Public Officer's former public status or relationships through the Division to secure the position or any unwarranted or unfair advantages for Business Entity or its clients. "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*, Comm'n Opinion No. 11-96A (2012).

In obtaining employment with Business Entity, Public Officer responded to a published job posting circulated within Public Officer's industry, on public notice boards and through the University of Nevada system. Accordingly, Public Officer did

not use Public Officer's public position to seek or secure the private position. Additionally, the evidence reflects that Public Officer brings significant education, skills and experience to the industry which benefits the objectives of the State of Nevada to provide affordable services to its residents. Public Officer's current employment with Business Entity is not only in the public's best interests, but consistent with continued ethical integrity of State government.

Because no evidence suggests that Public Officer used Public Officer's public position, relationships or information to compromise Public Officer's public duties to seek a private position with Business Entity, and Public Officer's 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). Therefore, the one-year "cooling-off" requirement does not apply to Public Officer for purposes of soliciting or accepting employment from Business Entity.

4) 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 Officer's circumstances, Public Officer is nevertheless prohibited, for one year, from representing or counseling Business Entity or its clients upon any issue that was under consideration by the Division during Public Officer's tenure pursuant to NRS 281A.410(1)(b). This is consistent with Commission precedent. See *In re Public Employee*, Comm'n Opinion No. 11-96A (2012).

As we recently summarized and emphatically restated in *In re Public Officer*, Comm'n Opinion No. 12-53A (2013), the "cooling-off" requirements of the Ethics Law are intended to prohibit appearances or circumstances involving *quid pro quos*, or "revolving doors," in which a public officer secures favors in the public sector with the intention that the favor be returned privately. Likewise, the cooling-off provisions are intended to "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.” *Id.* (quoting *In Re Sheldrew*, Comm’n Opinion No. 00-44 (2000)). The integrity of government and the ethical standards of public officers and employees are implicated where a regulator is permitted to accept such employment immediately after concluding his public service. See *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. 11-50A (2012).

In Public Officer’s circumstances, the Ethics Law seeks to prohibit and protect against the possibility that Business Entity, and by extension, its clients, the applicants for services and/or funding, could benefit in the competition for the Division’s services and/or funding by hiring Public Officer who recently oversaw applications for such services and/or funding. Based on the evidence provided herein, the Commission is satisfied that there has been no *quid pro quo* or improper “revolving door” circumstance, and Public Officer’ private work for Business Entity will not inure any client with unwarranted or unfair advantages by virtue of Public Officer’s former position with the Division.

In this case, Public Officer is working for a private entity that did not contract with or apply directly to the Division for funding or other services. Rather, Business Entity is a third-party consultant to clients which seek funding and other services from the Division. Furthermore, the evidence supports an affirmative finding by the Commission that all qualifications and criteria for applications for funding and/or services are controlled by public, objective standards and no employee of the Division has discretion to favor any applicant over another. However, the process of filling out the applications is challenging and understanding the qualifications and criteria is demanding and competitive. Accordingly, those applicants who need assistance with the process retain the services of Business Entity.

It cannot be reasonably concluded that Public Officer’s former role with the Division does not provide some benefit to Business Entity, and by extension, its clients. Nevertheless, the overwhelming evidence supports the conclusion that it was appropriate for Public Officer to accept employment from Business Entity within one year after Public Officer’s termination from service with the Division because Public Officer’s private endeavors are not contrary to the ethical integrity of the State. The Commission nonetheless cautions that the Ethics Law prohibits, for one year, any attempt by Public Officer to use Public Officer’s former public service to retain private employment opportunities with entities that maintain significant relationships with the State.

V. 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. Although the provisions of NRS 281A.550(3)(b) impose the one-year cooling-off requirement for Public Officer's influence over the Division's services and/or funding applications and compliance matters which significantly affected various service providers and the industry served by Business Entity, the Commission grants relief from the strict application of NRS 281A.550(3) 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 State government or the provisions of NRS Chapter 281A.
4. Although Public Officer may accept employment, Public Officer may not, for one year after leaving the Division, represent or counsel (advise) Business Entity or its clients for compensation regarding any specific issue that was under consideration by the Division during Public Officer's 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 and concur in this Opinion, except as noted:

Dated this 13th day of January, 2014.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul Lamboley
Paul Lamboley
Chairman

By: /s/ Cheryl Lau
Cheryl Lau
Commissioner

By: /s/ Gregory Gale
Gregory Gale
Vice-Chairman

By: /s/ James Shaw
James Shaw
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Keith Weaver
Keith Weaver
Commissioner³

³ Commissioner Weaver voted against granting relief from the strict application.