



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct of
William Theobald, Former Mortgage Lending
Examiner III, Division of Mortgage Lending,
Department of Business and Industry,
State of Nevada,

Request for Opinion No. 13-44A
CONFIDENTIAL

Former Public Officer. /

CONFIDENTIAL OPINION

I. STATEMENT OF THE CASE

William Theobald ("Theobald"), Former Mortgage Lending Examiner III ("Examiner") for the Division of Mortgage Lending ("Division"), Department of Business and Industry, 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 June 19, 2013. Theobald appeared in person and provided sworn testimony.

Theobald 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 Examiner before accepting employment with an entity regulated by the Division.

After fully considering Theobald's request and analyzing the facts, circumstances and testimony presented by Theobald, the Commission deliberated and orally advised Theobald of its decision that the cooling-off provisions of the Ethics Law applied to his circumstances, but the Commission would grant relief from

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

the strict application of those provisions. The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.²

After the hearing in this matter, Theobald waived confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this Opinion.

The facts in this matter were obtained from documentary and testimonial evidence provided by Theobald. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact set forth below accept as true those facts Theobald 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

Theobald asks the Commission whether he is subject to the cooling-off provisions of NRS 281A.550(3) and (5) such that he would be required to wait for one year after leaving the service of the Division before he could be employed by an entity regulated by the Division, and if so, whether he could be relieved from the strict application of those provisions under NRS 281A.550(6).

III. FINDINGS OF FACT

1. Prior to his position in public service, Theobald was employed for approximately 25 years in the mortgage lending industry as a mortgage loan officer, loan manager and branch manager of a mortgage institution. In his management positions, Theobald supervised mortgage loan officers and verified compliance with state and federal regulations.
2. In approximately January 2002, Theobald began his public employment as an examiner with the Division, examining mortgage lending entities to ensure compliance with state laws and regulations. Theobald was ultimately promoted to serve as a Mortgage Lending Examiner III, supervising the Division's examination staff and coordinating examination activities and procedures to assure compliance with the applicable statutes and regulations.
3. Theobald assigned the examinations of mortgage brokers and mortgage bankers licensed by the Division to junior examiners and reviewed all examination reports completed by the examiners for accuracy and the application of the reported facts to applicable statutes and regulations. Theobald approved the final reports of all examinations.

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 hearing date but before the date of issuance of this written opinion.

4. Examinations included analysis of general ledgers, assets, liabilities, capital and internal controls of the mortgage institution to insure compliance with all federal and state laws and regulations.
5. Any alleged violations/infractions discovered in the examination process were rated on a scale of increasing severity from 1 to 5.
6. Theobald reviewed and verified examination reports finding alleged infractions with a rating of 1 or 2. If verified, the examiner would provide the draft report to the licensee and request a response. After receipt of the response, Theobald made a recommendation to the examiner and approved the final report to the licensee. Violations with a rating of 1 or 2 did not result an administrative action against the licensee, but did require the licensee's correction of the infractions. Theobald did not require approval from the Deputy Commissioner for such decisions.
7. If the examiner's report reflected infractions rating 3 or higher, Theobald met with the examiner and verified the application of the facts to the relevant statutes and regulations, approved a final examination report and made a recommendation to the Deputy Commissioner. If warranted, Theobald formulated recommendations concerning approval of the report and/or an internal request for discipline to the Deputy Commissioner or the Commissioner for any administrative action against the licensee. The Deputy Commissioner or Commissioner finalized the report and made the ultimate decision concerning administrative action.
8. All decisions regarding adverse ratings and administrative actions concerning a mortgage broker or mortgage banker were made at the sole discretion of the Commissioner or Deputy Commissioner.
9. Theobald's duties as an Examiner III included development and improvement of the mortgage lending examination program.
10. Theobald left the service of the Division on or about April 26, 2013.
11. Theobald contemplates private employment within the private mortgage lending industry in the area of compliance. Specifically, Theobald intends to assist mortgage brokers to maintain compliance with all applicable lending statutes and regulations, including those governed by the Division.
12. Theobald would like to secure full-time employment with a local company regulated by the Division to provide training for its mortgage brokers and ensure proper compliance requirements by the entity. However, if such a position is unavailable, Theobald seeks to contract with 3 to 5 firms regulated by the Division on a part-time basis to provide each firm's mortgage brokers with compliance training and oversight.

13. Theobald's particular area of expertise is regulation compliance. Theobald carefully monitors the often-changing statutes and regulations governing mortgage lending institutions to assist mortgage lenders with developing and maintaining compliance procedures.

14. Theobald currently performs consulting work for two local mortgage banking firms focusing on compliance. He does not represent or counsel either of these entities before the Division and does not anticipate such representation in the future.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Theobald recently resigned as an Examiner III for the Division, a state agency that regulates and examines mortgage lending institutions. As an Examiner III for the Division, Theobald assigned and reviewed all examinations of mortgage lending institutions and played a significant role in reviewing and recommending administrative actions against mortgage lenders for noncompliance with applicable state laws. Although he never had final decision-making authority regarding any examination he reviewed which resulted in administrative action, he did have final decision-making power with regard to minor corrective actions to be taken by licensees. All other decisions were vetted through the Deputy Commissioner or Commissioner of the Division.

Theobald had a duty to objectively evaluate all examinations and make recommendations to the Division's Deputy Commissioner or Commissioner, who were ultimately responsible for all decisions regarding administrative actions against the lending institutions. He also had a role in developing the examination program utilized by the Division. Theobald states that his review of examinations did not reveal any trade secrets of any mortgage lenders. Moreover, in the area of compliance, Theobald believes his continued service in the private sector will continue to serve the best interests of the State by ensuring compliance with State laws and regulations governing the mortgage lending industry. He questions whether the one-year "cooling-off" period applies to his circumstances and if so, whether he may be relieved from the strict application.

In answering these questions, the Commission considers: 1) whether NRS 281A.550(3) applies to Theobald's circumstances, and, if so, 2) whether the Commission should grant him relief from the strict application of the one-year cooling-off period and conclude that his immediate employment with a mortgage lending firm to provide compliance consultation is proper under NRS 281A.550(6). 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 Division during Theobald'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, Theobald’s anticipated private employment with a lending entity will relate to compliance matters regarding which Theobald had significant input and influence as an Examiner III.

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 Examiner III, Theobald has continuous responsibilities to the public that he must separate from his private interests for one year. Pursuant to NRS 281A.180, 281A.410 and 281A.550, the Ethics Law governs the conduct of former public employees in the context of cooling-off requirements to ensure that former public 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, Theobald appears to have conducted himself appropriately to avoid conflicts during his tenure as Examiner and the question before the Commission involves his future anticipated conduct in the private mortgage lending industry as a compliance consultant.

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 Theobald from soliciting or accepting employment from an entity or industry whose activities are regulated by the Division for one year after the termination of his public service if **one** of the following three criteria are met: (1) as a public employee, his principal duties included formulating policy contained in the Division'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 Theobald's duties and responsibilities for the Division included recommendations to the Commissioner and Deputy Commissioner regarding legislative and regulatory policies governing the examination program. While he offered valuable input into the procedures and processes affecting the industry as an Examiner III, the Division's Commissioner and Deputy Commissioner were ultimately responsible for the adoption of policies affecting the Division. Theobald acknowledged that but for external delays, he anticipated his recommendations would be followed. Theobald was responsible for initiatives in implementing and adjusting the scope of the process for conducting examinations of mortgage lenders, all activity contemplated in NRS 281A.550(3)(a).

Theobald testified that he directly performed activities governing examinations and compliance of mortgage lending entities in the State, but he did not believe that his activities significantly affected any entity or the industry because his decisions were not final and served only as recommendations to the Deputy Commissioner or Commissioner of the Division. He believed that his role as a supervising examiner did not control or influence any audits, decisions, investigations and other actions which significantly affected a mortgage lending entity or the lending industry because all of his decisions were vetted by the Deputy Commissioner or Commissioner. (NRS 281A.550(3)(b)). The Commission has previously held that decisions or activities of public employees do not constitute control or influence significantly affecting a business or industry where those decisions and actions were conducted under the direction and control of a supervisor. See *In re Public Employee*, Comm'n Opinion No. 11-96A (2012) and *In re Public Employee*, Comm'n Opinion No. 11-51A (2011).

However, Theobald also testified that he had independent discretionary power over incidental infractions and engaged in various decisions and actions that affected the examination process. In particular, Theobald stated that he assigned all

examinations and controlled the content of all final reports for examinations that would be sent to the regulated entities or to the Deputy Commissioner and Commissioner. His responsibility for the Division was significant and he had substantial authority regarding various aspects of the examination process, including recommendations for disciplinary action. Accordingly, Theobald's duties satisfy the requirements of NRS 281A.550(3)(b).

Theobald also testified that he did not believe he obtained trade secrets of any direct business competitors of any mortgage lending entities because most mortgage institutions utilized universal systems and programs to qualify borrowers and process loans (NRS 281A.550(3)(c)). However, the Commission views trade secrets in the context of the Ethics Law as any confidential or proprietary information that may provide a regulated entity with an economic or competitive advantage. *See also, In re Public Employee*, Comm'n Opinion No. 13-29A (2013)(Commission held that access to proprietary/confidential information constituted trade secrets within the meaning of NRS 281A.550(3)(c)). The confidential books, records and finances within the confines of an examination or investigation provided Theobald with the types of proprietary information that mortgage lending institutions utilize to compete in the market, including information respecting the manner in which businesses operate within their respective industries. Accordingly, Theobald had access to and obtained the trade secrets of various mortgage lending business competitors.

There is no record evidence that implicates provisions of NRS 281A.550(5); accordingly, it is not considered applicable.

Given his responsibilities for the Division which included significant involvement in various mortgage lending examinations, the provisions of NRS 281A.550(3) would prohibit Theobald from accepting employment from a mortgage lending entity regulated by the Division within a year of his termination from service with the Division. However, as discussed in detail below, the Commission grants Theobald relief from the strict application of this provision based on his specific circumstances and given the best interests of the State.

(b) 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 Theobald's circumstances, we now grant Theobald relief from the strict application of the statute. Theobald satisfies the criteria for an exception under NRS 281A.550(6); therefore, 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.

"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). See also *In re Public Employee*, Comm'n Opinion No. 13-29A (2013).

Because no evidence suggests that Theobald has used or would use his former public position, relationships or information to compromise the public trust to seek a private position as a compliance consultant with a private mortgage lending entity, and his future work would be in the best interests of the public and consistent with the continued ethical integrity of State Government, Theobald is granted relief from the strict application of the "cooling-off" requirements set forth NRS 281A.550(3). Therefore, the one-year "cooling-off" requirement does not apply to Theobald for purposes of soliciting or accepting employment from a private mortgage lending entity regulated by the Division.

Theobald sought the advice of the Commission before accepting full-time employment from a regulated entity. He also waited to solicit or consider opportunities until after he separated from public service. Likewise, the State is focused and interested in ensuring that mortgage lending institutions are properly complying with Nevada's mortgage lending laws and regulations. If he is denied the opportunity to work in the area of compliance in the private sector, he may very well take his expertise in Nevada-related mortgage lending to other states and deny Nevada institutions and residents the increased benefits of compliance. Nevada's end goal with respect to mortgage lending regulations is public stability and integrity in mortgage and economic standards. See also, *In re Public Employee*, Comm'n Opinion No. 11-96A (2012)(Commission granted relief from strict application of NRS

281A.550(3) to public employee who wished to accept private employment with a facility he inspected as a public employee. His continued work ensuring public safety in the private sector was in the best interests of the State.).

(c) Cooling Off – Representing or Counseling

NRS 281A.410(1)(b) provides, in relevant part:

In addition to the requirements of the code of ethical standards:

1. If a public officer or employee serves in a state agency of the Executive Department or an agency of any county, city or other political subdivision, the public officer or employee:

* * *

(b) If the public officer or employee leaves the service of the agency, shall not, for 1 year after leaving the service of the agency, represent or counsel for compensation a private person upon any issue which was under consideration by the agency during the public officer's or employee's service. As used in this paragraph, "issue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

Although employment is authorized within the one-year cooling-off period based on Theobald's circumstances, he is nevertheless prohibited, for one year, from representing or counseling any entity upon any issue that was under consideration by the Division during his 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) and *In re Public Employee*, Comm'n Opinion No. 13-29A (2013).

As we recently restated in *In re Public Officer*, Comm'n Opinion No. 12-53A (2013) and *In re Public Employee*, Comm'n Opinion No. 13-29A (2013), the "cooling-off" requirements of the Ethics Law are intended to prohibit appearances of *quid pro quo*, 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. *Id.*; See also *In re Sheldrew*, Comm'n Opinion No. 00-44 (2000), *In re Roggensack*, Comm'n Opinion No. 06-60 (2006) and *In Re Public Employee*, Comm'n Opinion No. 11-50A (2012).

In Theobald's circumstances, the Ethics Law seeks to prohibit and protect against the possibility that a private mortgage lending entity could benefit in the realm of private competition or compliance matters by hiring Theobald who recently oversaw State-required examinations for such compliance. Based on the evidence

provided herein, the Commission is satisfied that there has been no *quid pro quo* or improper “revolving door” circumstance and Theobald’s anticipated private work will not inure any lending entity with unwarranted or unfair advantages by virtue of Theobald’s former position with the Division.

In this case, Theobald would be assisting private mortgage lending institutions to ensure compliance standards are satisfied, a goal of public stability and integrity in the mortgage and economic industries. Furthermore, the examinations conducted or reviewed by Theobald which resulted in discipline and/or administrative penalties were subject to control and discretion by his supervisors, the Deputy Commissioner and Commissioner. However, Theobald’s former role with the Division provides potential benefits to the private mortgage lending entities, particularly in the area of compliance with state and federal law. Nevertheless, the evidence supports the Commission’s conclusion that Theobald may accept employment within one year after his termination from service with the Division because his 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 Theobald to use his 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, Theobald was a “public employee,” as defined by NRS 281A.150 or as 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. Theobald may accept employment as a compliance consultant for mortgage lending institutions regulated by the State within one year after his termination from public service with the Division without violating NRS 281A.550(3). Although Theobald’s duties included significant input regarding policy formation for examinations of mortgage lending institutions, significant control over various matters affecting the mortgage lending industry and access to confidential, proprietary trade secrets of business competitors, relief from the strict application of NRS 281A.550(3) is granted pursuant to NRS 281A.550(6) because Theobald’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 Theobald may accept employment, he may not, for one year after leaving the Division, represent or counsel (advise) businesses in the mortgage lending industry for compensation regarding any specific issue that was under consideration by the Division 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 and concur in this Opinion, except as noted:

Dated this 4th day of December, 2013.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul Lamboley
Paul Lamboley
Chairman

By: /s/ Magdalena Groover
Magdalena Groover
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 Weaver³
Commissioner

By: /s/ Cheryl Lau
Cheryl Lau
Commissioner

³ Commissioner Weaver voted against granting relief from the strict application of NRS 281A.550(3).