



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**, Public Agency,
State of Nevada,

Request for Opinion No. **14-33A**

Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Employee of a Public Agency requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(2), regarding the propriety of Public Employee's anticipated 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 Employee appeared in person at the hearing and provided sworn testimony.

Public Employee sought this opinion regarding the exercise of Public Employee's authority to execute contracts on behalf of the Public Agency. Public Employee will likely be asked to approve a contract with public funding for a Non-Profit Organization controlled by Public Employee's supervisor ("Supervisor"). Public Employee's request for advice pertains solely to Public Employee's own conduct as a public employee, and not the conduct of Supervisor.

After fully considering Public Employee's request and analyzing the facts, circumstances and testimony presented, the Commission deliberated and orally advised that Public Employee has a commitment in a private capacity to the interests of Public Employee's employers, but that "signing off" on the contract and disbursement of funds to the private entity controlled by Supervisor would not necessarily constitute granting unwarranted privileges, preferences, exemptions or advantages to that individual. The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.

The facts were obtained from documentary and testimonial evidence Public Employee provided. The Commission's findings of fact set forth below accept those facts as true. Facts and circumstances that differ from those presented to and relied upon by

¹ The following Commissioners participated in this opinion: Chairman Lamboley, Vice Chairman Gale and Commissioners Cory, Groover, Lau, Shaw, and Weaver. The motion resulting in this opinion passed 5 to 2, with Chairman Lamboley and Commissioner Cory voting Nay, and concurring in part and dissenting in part to the majority Opinion.

the Commission in this Opinion may result in different findings and conclusions than those expressed here.

II. QUESTION PRESENTED

Public Employee questions whether Public Employee's cooperation and compliance with Supervisor's expected directive will constitute a violation of the Ethics Law, specifically using Public Employee's position in government to grant an unwarranted benefit to a person to whom Public Employee has a commitment in a private capacity (i.e., Supervisor) in contravention of NRS 281A.400(2).

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Employee must commit to avoid conflicts between Public Employee's private interests and those of the general public which Public Employee serves. Public Employee also has a duty to avoid actual and perceived conflicts of interest, and may not use Public Employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for Public Employee or for any person to whom Public Employee has a commitment in a private capacity. NRS 281A.400(2).

Stated simply, the factual scenario and issue are as follows:

- Supervisor is an officer of Non-Profit Organization.
- Non-Profit Organization was awarded a contract by Public Agency.
- Public Employee's duties entail signing off on contract awarded to Non-Profit Organization.
- If the Public Employee signs off on the contract, will Public Employee violate the Ethics Law?

This Opinion therefore examines, in light of the facts Public Employee presented:

1. Whether Public Employee's employment relationship with Supervisor establishes a "commitment in a private capacity" with respect to the interests of Supervisor in Non-Profit Organization, as defined in NRS 281A.065 (4); and
2. Whether cooperating with Supervisor's intent to contract and direct funds to Non-Profit Organization will constitute the use of Public Employee's "position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages ...for himself or for any person to whom [he] ... has a commitment in a private capacity...." NRS 281A.400 (2).

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B. RELEVANT STATUTES

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.

NRS 281A.400. General requirements; exceptions.

A code of ethical standards is hereby established to govern the conduct of public officers and employees: ...

2. A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee ... or any person to whom the public officer or employee has a commitment in a private capacity to the interests of that person. As used in this subsection, "unwarranted" means without justification or adequate reason.

NRS 281A.065 "Commitment in a private capacity" defined

"Commitment in a private capacity," with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person

4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee.
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subsections 1 to 5, inclusive.

IV. COMMISSION DECISION

A. INTRODUCTION

Nevada's Ethics Law mandates that public officers and employees hold their public offices for the sole benefit of the public and commit to avoid conflicts of interest. NRS

281A.020. The Ethics Law earnestly urges public officers and employees to avoid appearances of impropriety, as well as to eschew actual impropriety and conflicts to promote and enhance the public trust.

Based on the nature of the relationships presented and their continuing effects on Public Employee, Public Employee is advised that signing the contract and approving disbursement of funds from the Public Agency to the Non-Profit Organization led by Supervisor would not constitute using Public Employee's position in government to grant an unwarranted benefit or advantage to a person to whom Public Employee has a commitment in a private capacity.

B. COMMISSION ANALYSIS

The Legislature has deemed certain specific relationships to implicate conflicts of interest, including relationships with one's employer. NRS 281A.065 (4). Public employees have a commitment in a private capacity to the interest of their public employers. (See *In re Cadwallar*, Comm'n Opinion No. 09-04A (2009)). Here, Public Employee has a commitment in a private capacity to Public Employee's public employer, the Public Agency and Supervisor. However, having a commitment in a private capacity does not automatically create an Ethics issue.

While the Legislature has not expressed that serving on a non-profit organization's board creates a commitment in a private capacity, prior Commission Opinions have found such a commitment. The relationship between a non-profit entity and a public officer does not constitute an employment relationship; however, the Commission has previously determined that a public officer's role as a director of a non-profit entity establishes a non-profit relationship that is substantially similar to a substantial and continuing business relationship. (See *In re Public Officer*, Comm'n Opinion No. 12-04A (2012); *citing to In re Public Employee*, Comm'n Opinion No. 10-66A (2012), *In re Public Officer*, Comm'n Opinion No. 11-84A (2012) and *In re Public Officer*, Comm'n Opinion No. 12-15A (2012)). Therefore, a public officer's volunteer service on a Board of Directors of a non-profit organization constitutes a commitment in a private capacity to the interests of that organization. (See *Ids.*) The Commission concluded that people who volunteer their time and efforts to a nonprofit organization are interested in and committed to the goals of the organization, serve as a fiduciary to the organization, and therefore have a commitment in a private capacity to the interests of the organization and its members. (See *Ids.*) Accordingly, Supervisor has a private fiduciary duty to the Non-Profit Organization as he/she serves as an officer on the Non-Profit Organization's Board of Directors.

The question arises whether Public Employee's commitment in a private capacity to the interests of Supervisor includes the interests related to the Non-Profit Organization.

The Commission has stated that the interests of a person to whom a public officer has a commitment in a private capacity are broadly interpreted. In *In re Crowell*, Comm'n Opinion No. 10-64A (2012), the Commission determined that a public officer had a commitment in a private capacity to the interests of his brother as a blood relative, and to

a colleague with whom he shared a substantial and continuing business relationship, and therefore was required to disclose those relationships when the charitable organizations of which the men served as board members came before him as a voting member of the Carson City Board of Supervisors. Although Crowell had no personal interest in or commitment to the charitable organizations themselves, persons to whom he had a private commitment had meaningful relationships with the organizations seeking the Board's favor, and those interests triggered Crowell's disclosure obligation. Applying the broad scope in *Crowell*, the Commission here concludes that Public Employee has a commitment in a private capacity to the interests of the Public Agency and Supervisor, which includes Supervisor's interest in Non-Profit Organization.

To be clear, by signing the contract, Public Employee would not use Public Employee's position in government to grant an unwarranted privilege, preference, exemption or advantage to Non-Profit Organization or to Supervisor as a result of Public Employee's employment relationship. Public Employee's job duties entail reviewing programs, signing contracts and disbursing funds to various entities, as directed by Supervisor. Here, Public Employee may be tasked with signing the Public Agency Contract to the Non-Profit Organization at the direction of Supervisor.

The Commission finds that the potential conflicts of interest for Supervisor do not create an ethical impasse for Public Employee. In certain aspects, the Ethics Law is quite narrow. The Ethics Law is tied to conduct by an individual public officer or employee and does not radiate outward. In this matter, the potential conflict applies to Supervisor, and does not reach Public Employee. Therefore, even the overarching aspects of NRS 281A.020 are not implicated by Public Employee's own conduct.

In Public Employee's role in Public Agency, Public Employee must serve as the steward of public resources, and abide by proper protocols to approve or disapprove contracts and the funds attached thereto. This Opinion makes no determination regarding the propriety or impropriety of the conduct of others or of Public Employee in the signing of the contract and disbursement of the funds as it may be affected by any law other than NRS 281A.

V. CONCLUSIONS OF LAW

The public judges its government by the way public officers and employees serve in the posts to which they are elected or appointed. The people have a right to expect that every public officer and employee will conduct himself in a manner that enhances public confidence in and respect for the government. Such confidence and respect can best be promoted if public officers and employees uniformly avoid both actual and potential conflicts between their self-interests and the public interest. Assisting public officers and employees to achieve these goals is one of the objectives of the Ethics Law. Therefore the Commission concludes:

1. At all times relevant to the hearing of this matter, Public Employee was a public employee as defined by NRS 281A.150.

2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Pursuant to NRS 281A.065, Public Employee has a commitment in a private capacity to the interests of Supervisor, as Public Employee's employer, which include Supervisor's interests as an officer of Non-Profit Organization.
4. Pursuant to NRS 281A.400(2), Public Employee's contemplated compliance with a request to approve the contract with and disbursement of funds to Non-Profit Organization is not a use of Public Employee's government position to secure an unwarranted advantage to further Supervisor's interests, and therefore such conduct would not violate the Ethics Law, particularly NRS 281A.020 and NRS 281A.400(2).

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.

Dated this 31st day of July, 2014.

For the Majority:

By: /s/ Gregory J. Gale
Gregory J. Gale
Vice Chairman

By: /s/ Keith A. Weaver
Keith A. Weaver
Commissioner

By: /s/ John C. Carpenter
John C. Carpenter
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ Cheryl A. Lau
Cheryl A. Lau
Commissioner

By: /s/ James M. Shaw
James M. Shaw
Commissioner

Chairman Lamboley concurring in part and dissenting in part, with whom Commissioner Cory joins:

I concur with my colleagues in their determination that Public Employee would not violate provisions of NRS Chapter 281A if Supervisor requires Public Employee to sign the Public Agency contract with Non-Profit Organization. However, I do not agree with my colleagues that the request at issue concerns the use of Public Employee's position in government to grant an unwarranted benefit to Public Employee's Supervisor, in contravention of NRS 281A. 400(2).

In my view, the issue stems from Public Employee's concern for Public Employee's duties as a public employee that may require Public Employee to execute a contract which Public Employee believes may violate public policy, and Public Employee's resultant fear for

loss of unclassified employment for refusing to do so. It is Public Employee's private concern for Public Employee's own continued employment, not the interests of Public Employee's Supervisor, which is the commitment in a private capacity. The request in this matter is more akin to a whistleblower complaint under NRS 281.600 et seq., than a Chapter 281A ethical dilemma.

In short, this decision rests on an analysis of NRS 281A.400(2) for Public Employee's use of a public position to secure benefits for other persons, i.e. Public Employee's Supervisor to whom Public Employee arguably has a commitment in a private capacity. The analytical flaw in the majority opinion is that this case presents no "commitment in a private capacity" as that term is reasonably intended to apply to the relationships defined in NRS 281A.065 (4), (5) or (6). To construe the definition otherwise automatically expands the public trust and places every public officer or employee in a position of ethical risk in having a commitment to Public Employee's appointing or hiring authority regardless of position or the conduct at issue. Accordingly, I must dissent.

By: /s/ Paul H. Lamboley
Paul H. Lamboley
Chairman

By: /s/ Timothy Cory
Timothy Cory
Commissioner