



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**,
Administrator, State Regulatory Body,
State of Nevada,

Request for Opinion No. **14-46A**

Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

A Public Employee of a Nevada State Regulatory Body (“Public Body”) 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 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 Employee appeared in person and provided sworn testimony.

Public Employee sought an opinion from the Commission regarding the applicability of the “cooling-off” requirements of the Ethics Law to Public Employee’s circumstances wherein Public Employee is seeking private employment as a consultant for regulatory compliance to entities that were regulated by or had business associations with Public Body.

After fully considering Public Employee’s request and analyzing the facts, circumstances and testimony presented by Public Employee, the Commission deliberated and orally advised Public Employee of its decision that the cooling-off provisions of the Ethics Law applied to Public Employee’s circumstances, and the Commission would not grant relief from the strict application of those prohibitions based upon the lack of specificity of Public Employee’s future employment opportunity. The Commission now renders this final written abstracted Opinion stating its formal findings of fact and conclusions of law.

Public Employee elected to retain confidentiality with respect to the Commission’s proceedings. Therefore, the Commission publishes this Abstract of its Opinion.

¹ The following Commissioners participated in this opinion: Vice Chairman Gale (Presiding Officer) and Commissioners Carpenter, Cory, Groover, Lau, Shaw, and Weaver. Chairman Lamboley was absent from the proceedings and did not participate in this Opinion.

The facts in this matter were obtained from documentary and testimonial evidence provided by Public Employee. 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 Employee 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 Employee questions whether the "cooling-off" provisions of the Ethics Law set forth in NRS 281A.550 and 281A.410 prohibit Public Employee, for one year after Public Employee's separation from State service, from soliciting or accepting employment from a private entity or the industry that is regulated by the Public Body to provide regulatory compliance services for, or otherwise lobby for, an entity which may have clients that are regulated by the Public Body. If the prohibitions apply, Public Employee seeks relief from the strict application of those provisions under NRS 281A.550(6).

III. FINDINGS OF FACT

1. In Public Employee's public capacity, Public Employee has served as an administrator for the Public Body that serves the people of Nevada.
2. The Public Body licenses, certifies or permits various entities, conducts inspections and enforces compliance of statutes and regulations, imposing administrative fines and revoking or suspending licenses, certificates or permits.
3. Public Employee is directly responsible for the fiscal, personnel and information technology functions of the Public Body. Public Employee has administrative oversight over a variety of statewide programs and input regarding regulations and policies adopted by the Public Body, in particular with regard to the regulated entities.
4. Public Employee evaluates organizational performance and operational objectives and provides the information to the head of the Public Body. Public Employee develops and monitors the budget for the Public Body and manages the development of proposed legislation and regulatory initiatives, including drafts of the proposed legislation. Additionally, Public Employee formulates and implements policies, procedures and regulations in response to new statutory requirements.
5. Public Employee's duties include supervising departments and programs. Public Employee serves as a liaison for the Public Body's human resources, finance, and information technology staff and reviews regulations to ensure they comply with statutory authority. Additionally, Public Employee attends public events, and provides media interviews.

6. Public Employee oversees the Public Body's regulatory programs and compliance for its regulated entities. While Public Employee does not draft the laws or regulations, Public Employee coordinates and reviews the drafts and works with the Public Body's legal counsel to ensure that draft regulations meet the needs of the Public and are consistent with the authority granted by the authorizing legislation. Public Employee stewards the drafts of the regulation through various public workshops, the Legislative Counsel Bureau, and legislative hearings.
7. As it relates to enforcement, Public Employee ensures policies and procedures are implemented that provide for consistent application and interpretation of the statutes and regulations. Public Employee provides guidance on training curricula for staff to ensure they have the proper history and context of the regulations.
8. Public Employee does not participate in decisions concerning applications of regulated entities.

Future Employment

9. Public Employee is not seeking employment with any particular regulated entity but is seeking to offer Public Employee's services as a regulatory compliance consultant in the regulated industry. Public Employee's anticipated potential job duties would entail assessing an entity's regulatory risks; reviewing existing policies, procedures, training and objectives and recommending new programs, policies and procedures to ensure compliance with applicable laws and regulations; and preparing formal compliance reports. Public Employee's potential future employers are entities that would already have authorization to operate and would have to maintain their renewals. Public Employee is also considering employment as a lobbyist in Nevada with government affairs firms whose clients may include regulated entities.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Employee is seeking guidance regarding whether the cooling-off provisions prohibit Public Employee from accepting employment with a business or industry that:

1. Has clients who may apply for a authorization from Public Body;
2. Was regulated by the Public Body;
3. Does any business with the Public Body or related Public Bodies;

When asked to clarify or identify the specific types of employment or consulting arrangements contemplated in Public Employee's RFO, Public Employee testified that Public Employee's expertise was regulatory oversight and compliance of entities and Public Employee would ideally like to work for any number of such entities to provide advice regarding licensure and related compliance with the provisions of NRS under the authority of the Public Body. Public Employee also requested advice about whether

Public Employee may serve as a lobbyist for a firm representing entities that are regulated by the Public Body.

In answering these questions, the Commission considers: 1) whether NRS 281A.550(3) and (5) apply to Public Employee's circumstances, and 2) if so, whether the Commission should grant Public Employee relief from the strict application of the one-year cooling-off period under NRS 281A.550(6) and conclude that Public Employee's contemplated future employment is permissible. The Commission also addresses the applicability of NRS 281A.410 governing the one-year prohibition against representing or counseling a private entity on matters that were under consideration by the Public Body during Public Employee's tenure. The Commission has previously expressed its concern regarding "cases of this nature where a public [employee'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." See *In re Public Officer*, Comm'n. Opinion No. 12-53A (2013).

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 a high-level manager with the Public Body, Public Employee has continuous responsibilities to the public that Public Employee must separate from any future private employment 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 or a regulated industry in a private capacity.

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

The record before the Commission reflects that Public Employee's duties and responsibilities for the Public Body included advice and recommendations to Public Body regarding legislative and administrative policies and provisions governing entities regulated by the Public Body. Public Employee reports to the Public Body head, but otherwise has direct responsibility over most Public Body business, policies, decisions and activities, including legislation and compliance.

In Public Employee's role, Public Employee is a high level manager with oversight and input on the regulations and policies adopted by the Public Body. Public Employee supervises department heads and their respective regulatory programs. However, Public Employee testified that while Public Employee does not personally participate in direct regulation of the various entities under the Public Body's umbrella, Public Employee has significant input on how Public Employee's agency implements various policies and Public Employee provides oversight and guidance to the Public Body staff regarding regulations that are drafted for the Public Body. In that vein, Public Employee manages the development of proposed legislation, regulatory initiatives and drafts of the proposed legislation. Additionally, Public Employee formulates and implements policies, procedures and regulations in response to new statutory requirements.

In particular, Public Employee testified that Public Employee's duties regarding the regulations affecting regulated entities included significant involvement and

recommendations in the consideration of the regulations governing the process to acquire approval for a regulated entity from the Public Body, and regulations pertaining to maintaining the licensure through the Public Body. In Public Employee's high-level position, Public Employee offered valuable, first-hand input into the administrative regulations that ultimately govern the processes and procedures utilized by the Public Body regarding licenses of the regulated entities. Public Employee participated in several stakeholder meetings, implemented input by various stakeholders and made recommendations regarding the same to the Public Body head.

The record clearly reflects that Public Employee's duties satisfied the requirements of NRS 281A.550(3)(a) pertaining to the Public Body's regulated entities. Accordingly, the provisions of NRS 281A.550(3) would prohibit Public Employee from soliciting or accepting employment from or consulting for an entity whose activities are regulated by the Public Body, within one year of Public Employee's termination from service with the Public Body.

Moreover, as described below, the general nature of Public Officer's request and the lack of any specific or proposed employment or consulting engagement prevents the Commission from granting Public Employee relief from the strict application of this prohibition.

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 Employee's circumstances, the Commission considers whether to grant Public Employee relief from the strict application of the one-year cooling-off period. On the record presented, the Commission does not grant Public Employee such an exception. The Commission does not issue blanket or generalized waivers based on speculative circumstances. Rather, for a waiver to be meaningful and operate as the exception rather than the rule, the Commission must be able to evaluate the nature and circumstances of a specific employment opportunity, including the specific duties and nature of the Public Body's regulation to determine whether Public Employee's private-sector service would be in the best interests of the State.

Public Employee states that Public Employee's private endeavors to ensure regulatory compliance by entities regulated by the Public Body will decrease the resources needed by the Public Body to enforce compliance, including investigative findings and the legal expenses associated with appeals of investigative findings. However, Public Employee's proposed possible employment opportunities do not provide the Commission with any specific facts or circumstances, and the Commission is unable to provide any specific guidance regarding a possible exemption. The scenarios provided are too broad to reach any conclusions pertaining to a waiver. Without a specific position or consulting agreement, with specific duties, it is not possible to ferret out how the business may be governed by the regulations that have been adopted by the Public Body.

The Commission can only give guidance and recommendations on specific employment engagements Public Employee seeks to perform or specific organizations that Public Employee desires to work for after leaving State service. With specific details, the Commission can ask questions regarding whether or not there is a conflict by working for a specific company or industry and assess and determine the interests of the public to be served.

"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). The only way to determine if Public Employee meets the exception is to have a factual basis to review.

While no evidence suggests that Public Employee will use Public Employee's public position, relationships or information to compromise Public Employee's public duties to seek a private position with an entity regulated by the Public Body, there is also no evidence that Public Employee's future work would be in the best interests of the public and consistent with the continued ethical integrity of State Government. Public Employee's general assertion that Public Employee can assist such regulated facilities through the regulatory process does not establish the best interests of the State. Therefore Public Employee is not relieved from the strict application of the "cooling-off" requirements of NRS 281A.550(3) and the one-year "cooling-off" requirement applies to Public Employee for purposes of soliciting or accepting employment from an entity or industry regulated by the Public Body.

4) Cooling Off – Representing or Counseling

NRS 281A.410(1)(b) provides:

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.

In addition to the broad prohibitions regarding employment or consulting agreements with entities regulated by the Public Body, Public Employee is also prohibited, for one year, from representing or counseling any private person (including business entities) for compensation upon **any issue** that was under consideration by the Public Body during Public Employee's tenure. However, NRS 281A.410(1)(b) specifically excludes the proposal or consideration of legislative measures or administrative regulations **from the types of issues** that are precluded. Therefore, Public Employee could presumably represent or advise a private party (which was not regulated by the Public Body) on issues related to the Public Body's former consideration of legislative measures and administrative regulations during Public Employee's service. However, the Commission recently expressed an important limitation on such representation:

NRS 281A.410(1)(b) was logically intended to preclude a former public officer from participating in a private engagement involving the proposal or consideration of a legislative matter or administrative regulation that was under consideration by the agency during the officer's tenure if the legislative matter or administrative regulation is reasonably related to a separate and distinct regulatory issue (i.e., a specific case, proceeding, application, contract or other determination) that was considered during the regulator's tenure. For example, if the legislative measure or administrative regulation considered by the agency was prompted by a separate agency issue that was under consideration during the public officer's tenure, that measure or regulation is likewise off limits for one year."

The one-year "cooling-off" requirement therefore precludes, for one year, participation on any issue that was under consideration before the former agency, including participation on issues related to a specific case or matters before the Legislature on "legislation" or the agency on "regulations" dealing with that same issue. To construe the exception otherwise would swallow the general prohibition and allow future participation in the same

issue under the guise that the representation/counseling merely involved the consideration of legislation and/or administrative regulations. Such an outcome would enhance the former regulator's active advantage or influence on the same issue in both old and new forums, and defeat the intent to reduce and remove the former regulator's advantage or influence on the same issue for a 12-month period of time.

In re Public Officer, Comm'n Opinion No. 13-09A (2013).

The Commission therefore concludes, consistent with its interpretation above, that Public Employee may not, for one year after leaving public service, represent or counsel any clients upon any issue that was under consideration by the Public Body during Public Employee's tenure pursuant to NRS 281A.410 (1) (b), including regulatory and legislative matters directly related to such issues. *See also In re Public Employee*, Comm'n Opinion No. 11-96A (2012). Public Employee's involvement with formulating policies, drafting of regulations, and overall administration of the Public Body confirm that Public Employee is too intertwined within the regulated industry issues to permit Public Employee to advise, for one year after public service, a private entity on regulatory matters, including the regulations established during Public Employee's tenure. *See also, In re Public Officer*, Comm'n Opinion No. 11-53A (2012) (Public officer and State Division administrator which regulated aspects of medical industry not granted relief to accept employment with regulated entity given his significant role as policy formulator).

V. CONCLUSIONS OF LAW

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. The provisions of NRS 281A.550(3)(a) are applicable to Public Employee's State service and therefore prohibit Public Employee from seeking or accepting employment from any business or industry regulated by the Public Body. The Commission does not grant relief from the strict application of NRS 281A.550(3) pursuant to NRS 281A.550(6).
4. Pursuant to NRS 281A.410, Public Employee may not, for one year after leaving the Public Body, represent or counsel (advise) clients for compensation regarding any issue that was under consideration by the Public Body during Public Employee's tenure.

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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 28th day of August, 2014.

NEVADA COMMISSION ON ETHICS

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

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

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

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

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

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

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