



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

Request for Opinion No. **14-49A**

Former Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer and former Administrator of a Nevada State Regulatory Body ("Public Body") requested this confidential advisory opinion ("RFO") from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(2), regarding the propriety of Public Officer'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 rendered an oral opinion. Public Officer appeared in person and provided sworn testimony.

Public Officer sought an opinion from the Commission granting relief from the strict application of the "cooling-off" requirements of the Ethics Law to Public Officer's circumstances wherein Public Officer is seeking to provide consulting services to entities regulated by the Public Body, in particular lobbying services before the State Legislature.

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, and the Commission would not grant relief from the strict application of those prohibitions. Prior to the issuance of a written opinion, Public Officer filed a Motion to Withdraw the RFO and/or Motion for Reconsideration. A quorum² of the Commission heard this matter and Public Officer again appeared in person and provided sworn testimony.

The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.³

Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this Abstract of this Opinion.

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

² The following Commissioners participated in the re-hearing: Chairman Lambolely (with Public Officer's consent), Vice Chairman Gale, and Commissioners Carpenter, Cory, Groover, Lau, Shaw and Weaver. The hearing went forward as a motion for reconsideration.

³ Any individual comment made by a commissioner during the hearing is not binding on the Commission's final decision.

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 the Commission will grant relief from the strict application of the “cooling-off” provisions of the Ethics Law set forth in NRS 281A.550 which prohibit Public Officer, for one year after separation from service as the Administrator of the Public Body, from engaging in contractual agreements to consult private entities regulated by the Public Body. Pursuant to NRS 281A.410, Public Officer affirms Public Officer will not, for one year after Public Officer’s separation from public service, provide such consultation or representation regarding issues that were under consideration by the Public Body during Public Officer’s tenure.

III. FINDINGS OF FACT

1. Public Officer has served as an Administrator of the Public Body that serves the people of Nevada (“Nevada Citizens”).
2. Public Body administers statutory programs and policies set forth in Nevada Revised Statute, relevant to the regulation of programs regarding the health and safety of Nevada Citizens. Public Body accomplishes its mission in cooperation with multiple state agencies to oversee the promotion and enforcement of various laws and regulations.
3. Public Body provides training, assistance, information and regulatory structure to administer its services. Public Body investigates complaints relating to compliance by regulated entities and certain third parties under Nevada law and issues administrative fines and penalties. Public Body also conducts compliance audits of all regulated entities, which can result in fines for non-compliance.
4. The Administrator of the Public Body is responsible for developing and administering its programs, including oversight of all personnel. As the former Administrator of the Public Body, one of Public Officer’s primary duties included oversight and guidance in facilitating the Public Body’s role as a regulator.
5. Statutorily, the Administrator is charged with prescribing regulations for adjudication, forms, and methods for evaluating compliance matters. Nevada Citizens are entitled to certain services provided by the Public Body and to appeal the Public Body’s decisions regarding denial of services.
6. With regard to the Public Body’s other programs, Public Officer provided administrative oversight and policy direction regarding management of health and

safety programs, including inspections of facilities and review of safety standards, training and services for Regulated Entities and Nevada Citizens.

7. Prior to Public Officer's public service with the Public Body, Public Officer had a lengthy career as a professional working in various capacities within the regulated industry. Public Officer still maintains a relevant license. In Public Officer's private capacity, Public Officer performed consulting work for clients to address and resolve issues in the regulated industry.
8. During Public Officer's private sector career, Public Officer maintained a consulting firm specializing in regulatory compliance and strategic planning in the regulated industry.
9. Public Officer seeks to return to Public Officer's private consulting business and provide professional services such as developing legislative recommendations, performing research and analyzing relevant topics. Clients may include regulated persons, regulated industry groups and entities who are seeking to employ Public Officer's services.
10. Upon the Motion for Reconsideration, Public Officer clarified Public Officer's intention to provide consulting services for a specific Private Organization regarding future legislation.
11. Private Organization consists of entities regulated by the Public Body that work together to confer and discuss many questions arising under the relevant laws of Nevada, and lobby before the State Legislature. It represents the industry regulated by the Public Body.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

As the former Administrator of the Public Body, Public Officer seeks relief under NRS 281A.550(6) from the one-year "cooling-off" requirements of the Ethics Law set forth in NRS 281A.550(3) and (5), and clarification regarding the applicability of NRS 281A.410 and the Commission's decision in *In re Public Officer*, Comm'n Opinion No. 13-09A (2013). Public Officer would like to return to Public Officer's private consulting business and provide professional services such as developing legislative recommendations, performing research in related topics in Nevada, assistance with analyzing operations for efficiencies and dealing with complex issues in health and safety matters in the regulated industry. Public Officer's consulting company may contract with entities or industries regulated by the Public Body to provide these services. Upon reconsideration, Public Officer narrowed the entity to which Public Officer would provide consulting services as the Private Organization.

Public Officer accepts the Commission's position in *In re Public Officer*, Comm'n Op. No. 13-09A (2013) that employment includes service as a "consultant" or "independent contractor." Public Officer likewise acknowledges that the provisions of NRS 281A.550(3) apply to Public Officer's former service as the Administrator of the Public Body and, accordingly, Public Officer seeks relief from the strict application of those provisions. Further, Public Officer requests clarification from the Commission regarding whether NRS 281A.410 prohibits Public Officer's intended consulting services, particularly as they relate to lobbying, if Public Officer will not engage in any matters which involve issues that were under consideration during Public Officer's tenure as the former Administrator.

Public Officer believes that Public Officer's immediate service in the private industry would be in the best interests of the public and benefit health and safety in Nevada by making Public Officer's level of expertise available to entities dealing with evolving health and safety issues in the industry, in particular for issues pending in the upcoming Legislative Session, to inform and educate the Nevada Legislature and related agencies in relevant laws and circumstances that will improve relevant policy.

B. RELEVANT STATUTES/COMMISSION PRECEDENT

1. Public Trust/Avoiding Conflicts

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.

2. "Cooling-Off" Requirements for 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(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.

3. Relief from Strict Application of "Cooling-Off" Requirements for Employment

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.

4. “Cooling-Off” Requirements for Private Consulting

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, public officer or employee:

* * *

(b) If a 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 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.

5. Commission Precedent: Independent Contractors/Lobbying

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

In this RFO, the Commission determined that the “cooling-off” requirements regarding employment and consultation applied to a former public officer who sought future private engagements as an independent contractor to provide various lobbying services on behalf of clients who were regulated by the public officer’s former public body. The Commission found that the public officer participated in the formulation of policies set forth in the State’s regulations and participated in activities which directly controlled and influenced decisions and actions affecting the industry. The public officer also had access to and knowledge of proprietary, confidential and sensitive information, technology and trade secrets of various business competitors within the industry.

Nevertheless, the Commission concluded that the public officer could engage in limited private sector services because the proposed engagements and representations did not involve: 1) any “*quid pro quo*” or “revolving-door” implications; 2) issues related to the regulatory oversight by the public body; or 3) issues that were under consideration by the public body during the public officer’s tenure. The Commission cautioned that any future representation or consultation in the arena of legislation or administrative regulations that were proposed or considered during the public officer’s tenure was permissible unless they were inextricably tied to other related issues under consideration by the agency. The Commission also determined that the Public Officer’s proposed services were not contrary to the public trust, the Ethics Law or the best interests of the State of Nevada considering, in part, the public officer’s former extensive private-sector career in the same industry regulated by the former public body.

Specifically, the Commission determined that:

[T]he provisions of NRS [281A.550(3)] prohibiting private employment by a regulated entity [are not] an absolute bar and ... there are permissive activities that can be pursued unrelated to the regulated activity and limited by the prohibitions set forth in NRS 281A.410. ... In this case, the Public Officer seeks to provide consultation and/or representation to various [regulated] entities ... but [Public Officer] does not anticipate providing such services on matters related to the regulatory issues affecting those entities that were under consideration during [his] tenure.

NRS 281A.410(1)(b) temporarily (one year) *prohibits* private representation and counseling regarding issues that were under consideration by the Public Body during the Public Officer's tenure, but *permits* [him] to provide representation and consulting regarding 'proposals or consideration of legislative matters and administrative regulations' on issues related to the regulated industry. Accordingly, a former regulator may not advise a private person on matters that were under consideration by the public body during one's tenure, but could, presumably, represent (lobby on behalf of) or counsel a private person on issues related to the agency's former consideration of legislative measures and administrative regulations during the regulator's tenure. However, ... NRS 281A.410(1)(b) was logically intended to preclude a former regulator 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 regulator'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.

Id.

V. COMMISSION DECISION

The Commission has many times expressed its interpretation of the "cooling-off" requirements of the Ethics Law as prohibiting any actual or perceived "*quid pro quo* or 'revolving door' scenario, wherein a public officer secures favors in the public sector with the intention that the favor be returned privately." See *In re Public Officer*, Comm'n. Opinion No. 12-53A (2013). Moreover, the Commission has been concerned that potential employers may "entice Nevada public officers or employees by prospects or offers of employment that more serve the employers' interests than the employee's interest in seeking to gain present or future favor for the State, or that otherwise may cause a prospective employee to overlook applicable ethics provisions while employed or in accepting employment." *Id.* The "cooling-off" provisions of the Ethics Law are intended to prohibit and discourage such circumstances and appearances of impropriety, and otherwise protect the public from the improper use of public resources. *Id.*

As the former Administrator of the Public body, Public Officer must keep Public Officer's private employment interests separate from Public Officer's former public service for one year, except under certain limited circumstances. 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 private sector entities, in a private capacity. *Id.* The Commission finds this request and the issues presented herein remarkably similar to those considered in *In re Public Officer*, Comm'n Opinion No. 13-09A (2013) and reiterates and reaffirms its position outlined in that opinion as applicable to Public Officer. However, in this case, the Commission finds that Public Officer's anticipated representation will involve issues that are related to the regulatory oversight by the Public Body.

NRS 281A.550(3) prohibits Public Officer 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 Officer's public service if one of three criteria are met: 1) as a public officer, Public Officer'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 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 (confidential, proprietary information) of a direct business competitor of an entity which may employ Public Officer (NRS 281A.550(3)(c)).

Public Officer concedes that the "cooling-off" provisions set forth in NRS 281A.550 are applicable to Public Officer's circumstances and therefore preclude, for one year, Public Officer's proposed future employment in the private sector unless the Commission grants an exception. Public Officer likewise accepts the Commission's position that service as an independent contractor constitutes "employment" as that term is used in NRS 281A.550(3) and acknowledges that Public Officer's former service as the Administrator of the Public Body satisfies each of the criteria set forth in NRS 281A.550(3). However, Public Officer seeks relief under NRS 281A.550(6) from the strict application of the one-year "cooling-off" requirements based on what Public Officer believes would be the best interests of the public for the private sector and Nevada agencies and the Legislature to benefit from Public Officer's expertise in the regulated industry.

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. Having established that NRS 281A.550(3) applies to Public Officer's circumstances, we consider whether to grant Public Officer relief from the strict application of the one-year cooling-off period. On the record presented, the Commission does not grant Public Officer such an exception.

"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). However, the Legislature has spoken clearly through the enactment of the cooling off provisions to prohibit transitions from public to private service in the same industry, except in rare and special circumstances. Although the Commission has great respect and appreciation for Public Officer’s public service and expertise to the State of Nevada in the regulated industry, the Commission finds that Public Officer’s experiences and exposure as a high level Administrator and regulator of industry matters established far too much input into the public policies and regulations as well as competitive proprietary information to allow Public Officer to use those experiences and information in the private sector for one year. Accordingly, based upon the unique circumstances in Public Officer’s case, the Commission does not grant relief from the strict prohibition.

Public Officer states that Public Officer’s private representation of private entities in maneuvering the complex and significantly important scope of the regulated industry and the health and safety matters involved will benefit the public in various ways. Public Officer argues that Public Officer’s long-standing career in the industry as well as Public Officer’s recent service for the Public Body provide intricate understanding of current laws and regulations to ensure continued compliance by the regulated entities for the benefit of Nevada citizens and to develop areas in need of legislative or regulatory amendment. Public Officer will be able to educate and inform the Nevada Legislature and State agencies regarding such matters that serves the best interests of all parties. Public Officer notes that with the Legislature’s biennial sessions, it is critical to have persons with the expertise to review and assist in developing statutes or regulations.

The Commission agrees that Public Officer’s expertise and experience are undoubtedly beneficial to the State of Nevada. Nevertheless, the Commission finds that the ethical integrity of the State would be compromised by Public Officer’s immediate representation of private entities regulated by the Public Body. In particular, a competing business could argue that Public Officer had access to and information regarding proprietary information that could provide competitive advantages for Public Officer’s private clients. In *In re Public Officer*, Comm’n Opinion No. 11-53A (2012), the Commission did not grant relief from the strict application of the cooling-off requirements for a public officer who served as an administrator of a significant State Division regulating certain aspects of the medical industry and sought immediate employment with an entity regulated by the Division.

In addition to the broad prohibitions regarding employment or consulting agreements with entities regulated by the Division, Public Officer 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 Officer’s tenure. While 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, the nature of the legislative and regulatory issues under consideration by the Public Body were too intertwined within the industry to permit Public Officer to advise a private entity on such matters. This applies to the contemplated consulting for the Private Organization.

Public Officer testified that Public Officer would only work on prospective legislation for the Private Organization regarding changes to the law and the impact those proposed changes would have on the industry. However, as the former Administrator of the Public Body, Public Officer had a hand in all aspects of regulation. Public Officer's factual scenario is vastly different than Campbell's situation in *In re Campbell*, Comm'n Opinion Nos. 05-58A and 06-24A.

Campbell was a member of the Nevada Tax Commission for over 20 years. (See *In re Campbell*, Comm'n Opinion No. 05-58A) Her position at the commission was part-time, and Campbell was employed full-time as the Vice President of Finance for MGM Grand Resorts Development. (See *id.*) Upon leaving the Tax Commission, she sought to offer consulting services to businesses in need of guidance in complying with the regulations and administrative rule process of the Nevada Department of Taxation. (See *id.*) The Commission stated that Campbell could provide consulting services on prospective legislative measures and prospective administrative regulations only. The Commission clarified this position in *In re Public Officer*, Comm'n Opinion No. 13-09A (2013), wherein it limited the scope of prospective legislation and regulations to issues that were not reasonably related to other issues that were under consideration during the public officer's tenure. (See *id.*) Campbell was also encouraged to return to the Commission for an opinion regarding the applicability of NRS 281.236 (repealed, cf. 281A.550), which she did in *In re Campbell*, Comm'n Opinion No. 06-24A. In that subsequent matter, the Commission held that because Campbell was planning to consult for a governmental entity, such an action was permitted as the governmental entity was not a "private" client. (See *id.*)

Campbell, as a part-time commissioner, was not as intimately involved in the daily aspects regulating the industry, whereas Public Officer's position with the Public Body impacted and dealt with regulating the industry on a daily basis. Public Officer's duties were too intertwined with all regulatory aspects such that there can be no effective separation between issues that were before Public Officer at the Public Body and future legislation. To permit Public Officer to consult on such issues would provide an unfair advantage to Private Organization in violation of NRS 281A.410.

VI. 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 and 281A.180.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. The provisions of NRS 281A.550(3) apply to any employment activity undertaken through an independent contractual relationship.
4. The "cooling-off" requirements set forth in NRS 281A.550(3) apply to Public Officer's circumstances as the former Administrator of the Public Body, and the Commission

does not grant relief from the strict application of those provisions pursuant to NRS 281A.550(6). Accordingly, Public Officer may not engage in private consulting and representation services with entities regulated by the Public Body, including the Private Organization regarding regulatory matters.

5. Pursuant to NRS 281A.410(1)(b), Public Officer may not represent or counsel any private persons or entities, including regulated entities and the Private Organization, for at least one year after the termination of Public Officer's public service, on any issues that were under consideration by the Public Body during Public Officer's tenure, including representation regarding legislation or administrative regulations as contemplated by Public Officer's request, as long as those matters are reasonably related to any other issues that were under consideration by the Public Body during Public Officer's tenure.

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 13th day of November, 2014.

THE NEVADA COMMISSION ETHICS

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

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

By: /s/ Timothy Cory
Timothy Cory
Commissioner

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

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

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

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

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