



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**, Deputy Chief,
State Agency, State of Nevada,

Request for Opinion No. **14-82A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

A Public Officer of a Nevada State Agency ("Agency"), requested this confidential advisory opinion 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 on December 17, 2014. Public Officer appeared via teleconference and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding the applicability of the "cooling-off" requirements of the Ethics Law to Public Officer's circumstances wherein Public Officer is seeking employment as a manager for a private organization in the industry associated with the Agency.

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 did not apply to Public Officer's circumstances, and therefore the Commission need not reach the decision regarding whether to grant relief from the strict application of those prohibitions.²

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 the Opinion.

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¹ The following Commissioners participated in this opinion: Chairman Lamboley, Vice Chairman Gale and Commissioners Carpenter, Cory, Groover, Lau, and Shaw. Weaver disclosed a conflict of interest and abstained from participating in the proceedings.

² Chairman Lamboley disagreed with this determination. See Dissent.

³ Any individual comments made by Commissioners during the hearing or deliberations are not binding on or part of 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 “cooling-off” provisions of the Ethics Law set forth in NRS 281A.550 and 281A.410 prohibit Public Officer, for one year after Public Officer’s separation from service as the Deputy Chief with the Agency, from soliciting or accepting employment from private organizations that may do business with the Agency. If the prohibitions apply, Public Officer seeks relief from the strict application of those provisions under NRS 281A.550(6).

III. FINDINGS OF FACT

1. Public Officer is employed as the Deputy Chief with a Nevada State Agency.
2. The Agency was created by the Nevada Legislature pursuant to requirements mandated by federal law.
3. The Agency’s purpose is to provide access to certain qualified services and programs for Nevada citizens pursuant to federal law. Many such services and programs are offered through third-party providers.
4. The Agency is overseen by a Nevada State Department (“Department”) which is the regulatory authority in Nevada for the regulated industry, and the Department approves the services and programs consistent with federal law before they may become available to Nevada citizens.
5. The Agency has no authority to approve the qualified programs and services, rather it is responsible for and has authority governing access to such programs and services to the public. If a program or service is approved by the Department, the program or service is made available through the Agency. The Agency has no authority to reject a program or service that has been approved by the Department.
6. There are no contracts between the Agency and the providers. The providers simply coordinate access to their services through the Agency.
7. Public Officer is seeking a manager position with a private industry organization which is a subsidiary to one of the third-party providers which offers approved and qualified programs through the Agency.

8. Public Officer states that the manager position for the private industry organization, or similar entity, does not include work related to any Agency activities, but that Public Officer would utilize the skills and management methodology obtained through a certification program to perform the manager duties.
9. In Public Officer's current position as the Deputy Chief, Public Officer's primary responsibility is establishing the Agency's strategic and programmatic priorities and managing the Agency to ensure it achieves its mission.
10. Additionally, Public Officer is responsible for assisting the Administrator in setting strategic priorities for the Agency and managing agency operations with regard to achieving strategic goals; overseeing staffing allocation, budget development and financial operations for the agency; supporting the Administrator in policy-making in regards to the practical aspects of industry reform impact on the Agency; and representing the Agency at forums and meetings to educate stakeholders and the public about the Agency and state and national industry reform.
11. Public Officer does not directly participate in any policy development or decision-making regarding the programs.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer serves as the Deputy Chief of a Nevada State Agency. Public Officer is seeking guidance regarding whether the cooling-off provisions prohibit Public Officer from accepting employment as a manager with a private industry organization that is affiliated with a third-party provider through the Agency.

In answering this question, the Commission considers: 1) whether NRS 281A.550(3) and (5) apply to Public Officer's circumstances, and 2) if so, whether the Commission should grant Public Officer relief from the strict application of the one-year cooling-off period under NRS 281A.550(6) and conclude that Public Officer's future private 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 Agency during Public Officer's tenure. The Commission has previously expressed its concern regarding "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." *See In re Public Officer*, Comm'n. Opinion No. 12-53A (2013).

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B. RELEVANT STATUTES

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

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” – 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.

V. COMMISSION DECISION

A. Overview of “Cooling Off”

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 a public officer, the “cooling off” provisions of the Ethics Law are applicable to Public Officer. Specifically, the Ethics Law prohibits, for a period of one year, certain employment, contracts and representations by certain former public employees or officers in their private capacity as it relates to their former public service. NRS 281A.550(3) and (5) and NRS 281A.410(1)(b).

By virtue of the expertise or experience public employees obtain from public service in a particular (sometimes regulated) industry, many former public employees seek to pursue employment opportunities in the private sector. The “cooling-off” provisions are intended to discourage former public employees from using opportunity, information, relationships, or experience gathered from their former public service to benefit them in their private capacity. Under limited circumstances where there is no opportunity for abuse, the Ethics Law does not prohibit such private endeavors.

In prior opinions, the Commission has recognized that “[o]ne goal of the Nevada Legislature in enacting subsection 3 of NRS [281A.550] was to significantly 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. Public suspicions arise about the integrity of government and the ethical standards of public officers and employees, if a regulator is permitted to accept such employment immediately after concluding one’s public service.” *In Re Sheldrew*, Comm’n Opinion No. 00-44 (2000). See also *In re Roggensack*, Comm’n Opinion No. 06-60 (2006).

B. “Cooling Off” - Accepting Employment

NRS 281A.550(3) prohibits Public Officer from soliciting or accepting “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 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.

In this matter, the key consideration involves the Agency itself. The Agency is not a regulatory agency but rather provides access for Nevada citizens to obtain certain services and programs, as qualified by the Department. The Agency does not govern the industry; rather, the Department handles all regulation. The Agency only "governs" the Agency's management and operations, not the service and program providers offering qualified programs through the Agency. Whereas regulation of a business or industry triggers the provisions of NRS 281A.550(3), the Agency is not regulating the industry or any industry business, and the Commission concludes that the provisions of NRS 281A.550(3) are not applicable to Public Officer's circumstances.

The Agency is solely responsible for creating access to industry programs and services to the public. The Agency does not interact with the providers in any manner to restrict or regulate the industry or the services or programs themselves. The Department is the regulatory authority in Nevada governing the industry, and assures that the programs presented to the Agency meet the federally mandated requirements.

The Agency has created internal and external policies per the federal requirements as to how the programs will be made available and how the public will have access to the programs through the Agency, including the administrative fee consumers pay when accessing the programs. These policies do not regulate the industry but rather specify how the Agency provides access to the services and programs of the various providers by the public.

The Agency's policies, adopted in part through internal regulations, govern only how the Agency shall provide access to programs and fails to meet the basic minimum threshold of regulating a business or industry. The Agency does not govern the industry, but rather in some respects is governed by it. NRS 281A.550(3) prohibits, for one year, a government employee/officer from changing sides from the regulator to the regulated entity. However, in the case of the Agency, it does not regulate any industry or potential employer. Therefore, the "cooling-off" provisions of NRS 281A.550(3) do not apply in this situation.

Public Officer also confirmed with the Commission that the Agency does not enter into any contracts with any providers. Therefore, the provisions of NRS 281A.550(5) are likewise inapplicable in this matter.

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C. “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.

While NRS 281A.550 does not apply to Public Officer, NRS 281A.410 remains a relevant consideration. Public Officer is reminded that Public Officer is 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 Agency during Public Officer’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 Officer could presumably represent or advise a private party on issues related to the Agency’s former consideration of legislative measures and administrative regulations during Public Officer’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 Officer may not, for one year after leaving public service, represent or counsel any entities or persons upon any issue that was under consideration by the Agency during Public Officer'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).

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 "cooling-off" requirements set forth in NRS 281A.550(3) and (5) do not apply to Public Officer's circumstances as the Deputy Chief of the Agency, and the Commission need not grant relief from the strict application of those provisions. Accordingly, Public Officer may seek employment with entities in the regulated industry in Nevada.
4. Pursuant to NRS 281A.410(1)(b), Public Officer may not represent or counsel any private persons or entities, for at least one year after the termination of Public Officer's public service, on any issues that were under consideration by the Agency 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.

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The Following Commissioners Participated in this Opinion:

Dated this 18th day of May, 2015.

THE NEVADA COMMISSION ETHICS

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

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

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: ABSTAIN
Keith A. Weaver
Commissioner

DISSENT BY CHAIRMAN LAMBOLEY

While the majority of the Commission found that NRS 281A.550(3) does not apply to Public Officer's circumstances, I disagree. "Cooling-off" provisions are to be strictly applied based upon specific facts presented to the Commission. Sufficient evidence was presented to entangle the Agency and Public Officer under NRS 281A.550(3) and the Agency's relationship to the providers who opted to be made accessible through the Agency, including a subsidiary of the entity from which Public Officer seeks private employment. Public Officer is the Chief Deputy of the Agency and Public Officer characterized Public Officer's future employment as that of a manager position for a subsidiary company of one of the third-party providers utilizing the Agency's resources and available to Nevada's citizens. Such a close association between a prior government position and a private employer operating within the Agency structure triggers ethical concerns.

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. Public Officer's circumstances should have been analyzed based upon the relief from strict application.

On the record presented, the Commission should not have granted Public Officer such blanket permission to work in the industry, particularly as the decision was not based upon a specific job or duties from which to rely on such an analysis. Public Officer testified

that the job announcement was unavailable and Public Officer's request was to be able to seek and/or accept "similar" positions with any private industry organization. "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." See *In re Public Employee*, Comm'n Opinion No. 14-46A (2014).

"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 Officer meets the exception is to have a factual basis to review. Therefore, based upon the lack of a specific job position, Public Officer should be subject to the one-year "cooling-off" period, especially if Public Officer accepts a position with a private industry organization who was or is part of the Agency's network.

Dated this 18th day of May, 2015.

THE NEVADA COMMISSION ETHICS

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