



**STATE OF NEVADA**

**BEFORE THE NEVADA COMMISSION ON ETHICS**

In the Matter of the First-Party Request  
for Advisory Opinion Concerning the  
Conduct of **Subject**, Department Head,  
Division of Public Entity, State of  
Nevada,

Request for Opinion No. **15-48A**

\_\_\_\_\_  
Subject. /

**ABSTRACT OPINION**

**I. STATEMENT OF THE CASE**

A public employee ("Subject") of a division of a Nevada public entity ("Public Entity") who simultaneously serves as a member of a Board or Commission ("Board"), which advises a different division within the Public Entity which employs Subject requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1), regarding the propriety of Subject's present and 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 quorum<sup>1</sup> of the Commission heard this matter on November 10, 2015. Subject appeared in person and provided sworn testimony.

After fully considering Subject's request and analyzing the facts, circumstances and testimony presented by Subject, the Commission deliberated and orally advised Subject of its decision that, under the Ethics Law, there is no appearance of impropriety or impermissible conflict under the circumstances presented by Subject's holding the two positions provided Subject's service as a member of such Board is not restricted by other law or regulation. Further, Subject is advised to be vigilant to comply with the disclosure and abstention requirements of NRS 281A.420 if a future matter arises which would implicate the Ethics Law.

The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.<sup>2</sup>

Subject elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this abstract of the Opinion.

<sup>1</sup> The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Weaver and Commissioners Carpenter, Groover and Shaw.

<sup>2</sup> The individual comments made by any commissioner during the hearing are not binding on the Commission's final opinion.

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

Subject serves as department head of a division ("Division") within Public Entity and was appointed to serve as a member of a Board which advises and regulates matters relating to a separate division of Public Entity.

Subject questions whether continuing to simultaneously serve as an appointed public officer for the Board and remaining a full time public employee for Public Entity would implicate the provisions of the Ethics Law. In other words, can a public employee be appointed to a board which regulates operations of a separate division within the same public entity that employs Subject and properly avoid any perceived appearance of impropriety or conflicts of interest under the Ethics in Government Law?

## **III. FINDINGS OF FACT**

1. Subject was appointed to serve as a member of a board, which position is a public officer pursuant to NRS 281A.160.
2. Within a year following the appointment, Subject accepted a full-time position in a separate division within Public Entity, which position is a public employee pursuant to NRS 281A.150.
3. In the public employee role, Subject reports directly to a manager of Public Entity and is responsible for ensuring compliance with Division standards, completion of the daily tasks of the Division, overseeing administrative staff, including acting as Human Resources liaison for the Division, and providing other support and reporting roles as directed by the manager.
4. The functions of the Division in which Subject serves as a public employee are distinct from the other division within the Public Entity for which Subject serves as a Board Member resulting in the two separate divisions of the Public Entity regulating different matters within the same industry.
5. Due to the connectivity between the two divisions, the official legal counsel for the Board requested Subject seek guidance from the Ethics Commission to determine whether there is an impermissible conflict implicated under the Ethics Law in holding the two positions.
6. Ancillary provisions of state/local law are applicable to Subject's circumstances regarding outside employment by public employees and establish the appointment and qualifications for members of the Board.
7. Subject testified Subject has requested and received permission from the Division to remain a member of the Board provided that such relationship does not present an impermissible conflict under the Ethics Law. Subject represents that the manager supports and approves Subject's continued involvement with the Board. Further,

Subject is aware of and pledges to comply with the applicable provisions of state/local law with regard to conflicts of interest and outside employment.

8. Subject testified that Subject had reached out to the administrative staff of the appointing authority for members of the Board. Although the provisions of the applicable law do not specifically prohibit appointment of a public employee to the Board, Subject is waiting for information with respect to any concern the appointing authority may have with Subject remaining a member of the Board and will comply with such direction once received.

#### **IV. ISSUES AND RELEVANT STATUTES**

##### **A. ISSUES**

Subject seeks advice from the Commission on whether the two positions raise any impermissible conflicts of interest with respect to application of the provisions of the Ethics Law. As a public officer and a public employee, Subject must commit to avoid conflicts between private interests and those of the general public which Subject serves. The Commission has issued opinions on simultaneous service as a public employee while serving as a member of a public entity's governing body and whether such dual public service or employment demonstrates a conflict of interest and appearance of impropriety when it implicates serving two masters under the auspices of being the "boss of yourself" or the "boss of your boss." In reviewing the question presented, the Commission considers whether its prior opinions in this area apply to Subject's circumstances.

##### **B. PUBLIC POLICY OF THE STATE OF NEVADA**

###### **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.

###### **NRS 281A.420, provides:**

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:
  - (a) Regarding which the public officer or employee has accepted a gift or loan;
  - (b) In which the public officer or employee has a significant pecuniary interest; or
  - (c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interests of another person,
    - ↳ without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient to inform the public of the potential effect of the action

or abstention upon the person who provided the gift or loan, upon the public officer's or employee's significant pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

2. The provisions of subsection 1 do not require a public officer to disclose:

(a) Any campaign contributions that the public officer reported in a timely manner pursuant to NRS 294A.120 or 294A.125; or

(b) Any contributions to a legal defense fund that the public officer reported in a timely manner pursuant to NRS 294A.286.

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's significant pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of another person.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of another person, accruing to the other person, is not greater than that accruing to any other member of any general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant

pecuniary interest or commitment in a private capacity to the interests of another person.

5. Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that the public officer will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

6. The provisions of this section do not, under any circumstances:

(a) Prohibit a member of a local legislative body from requesting or introducing a legislative measure; or

(b) Require a member of a local legislative body to take any particular action before or while requesting or introducing a legislative measure.

7. The provisions of this section do not, under any circumstances, apply to State Legislators or allow the Commission to exercise jurisdiction or authority over State Legislators. The responsibility of a State Legislator to make disclosures concerning gifts, loans, interests or commitments and the responsibility of a State Legislator to abstain from voting upon or advocating the passage or failure of a matter are governed by the Standing Rules of the Legislative Department of State Government which are adopted, administered and enforced exclusively by the appropriate bodies of the Legislative Department of State Government pursuant to Section 6 of Article 4 of the Nevada Constitution.

8. As used in this section, “public officer” and “public employee” do not include a State Legislator

## V. DECISION

### A. PRIOR DECISIONS

In *In re Bell*, Comm’n Opinion No. 10-10A (2010) (“*Bell*”), the Commission fully discussed its prior opinions relating to serving as a public employee and member of the Public Entity’s governing body, including those opinions that were issued prior to and after *In re Ancho*, Comm’n Opinion No. 06-26 (2006). In *Bell*, the Commission confirmed that:

The Pre-Ancho Opinions collectively held, in general, that a person may not serve in a position where he is “the boss of himself” or “the boss of his boss.” See *In re Public Employee X*, RFO 98-71A (confidential advisory opinion), *In re Klosowski-King*, RFO 06-05 and *In re Public Employee Y*, RFO 02-01 (confidential advisory opinion). The Commission held in these cases:

[T]he mere opportunity for an employer to effect undue or unwarranted influence over a subordinate in order to advance his own pecuniary interest would create an appearance of impropriety; a hurdle that [Public Officer] would not be able to surpass unless he were to resign his employment . . . [t]he mere act of being the ‘boss of himself’ appears improper. He would be fair game for a host of accusations and complaints.

RFO 98-71 (Similar language is articulated in each of the other Pre-Ancho Opinions).

The Commission also held in a separate Pre-Ancho Opinion that regardless of the number of management levels between an employee and elected official serving on a public governing body, an employee may “very well feel undue pressure to follow instructions by [the] elected official.” *In re Boggs-McDonald*, RFO 04-77.

Based on these cases, the Commission generally advised public employees that while nothing in the Ethics Laws precluded a public employee from seeking such a public office, if the individual was elected or appointed, he must choose between accepting the position or resigning from his employment.

...

After considering the history of opinions stating generally that one may not serve two masters under the auspices of being the “boss of yourself” or the “boss of your boss,” the Commission recently clarified its position. Rather than a general prohibition, the Commission found the specific circumstances concerning the type of employment and public office determinative in finding a conflict of interest or appearance of impropriety. See *Ancho*.

(Emphasis added).

## **B. HOLDING DUAL POSITIONS DOES NOT CREATE IMPERMISSIBLE CONFLICT**

Consistent with its policy to limit its advice in each request for opinion to the facts presented and based upon the facts presented here, the Commission advises that, under the Ethics Law, it does not perceive an impermissible conflict precluding Subject, as a public employee of Public Entity, from acting as a member of the Board, which body regulates a separate division within the same public entity, because the two separate divisions for the most part regulate different matters. The fact that Public Entity provides assistance to Nevada citizens through private entities regulated by the Board might raise disclosure and abstention issues under the Ethics Law. However, Subject’s situation does not rise to the level of an impermissible conflict due to its limited occurrence and the availability of proper disclosures and abstentions under the Ethics Law. The nature of this circumstance, in and of itself, does not demonstrate that the Board would have administrative or regulatory control over, or be the “boss of”, a public entity for which Subject serves as a public employee, its operations or personnel. Therefore, the Commission determines that there is no appearance of impropriety or impermissible conflict between Subject holding these particular positions under the Ethics Law.

Although the Commission does not perceive an impermissible conflict, the Commission advises Subject that, before Subject acts on any future matter as a member of the Board relating to issues which may implicate even an appearance of impropriety, conflict or other statutory duties under the Ethics Law given the dual positions, Subject is advised to seek the advice of Public Entity’s official legal counsel, and to review the Ethics Law and the Commission’s interpretation of the provisions of the Ethics Law, including its opinion *In re Woodbury*, Comm’n Opinion No. 99-56 (1999) regarding disclosures and abstentions. Further, Subject may seek first-party advice from the Commission with respect to Subject’s particular circumstances.

In addition, the Commission recognizes Subject’s endeavors to seek compliance with other provisions of law. Subject is advised that the Commission’s guidance is limited to the Ethics Law and does not specifically extend to rendering advice on compliance with

other applicable statutes; however, the advice of the Commission should not be interpreted as inconsistent with other laws. Accordingly, the Commission generally advises Subject to comply with all other laws applicable to Subject's situation.

## VI. CONCLUSIONS OF LAW

The Commission issues the following Conclusions of Law and confirms that 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:

1. At all times relevant to the hearing of this matter, Subject, as an employee of Public Entity, was a "public employee" as defined by NRS 281A.150.
2. At all times relevant to the hearing of this matter, Subject, as a member of a Board, was a "public officer" as defined by NRS 281A.160.
3. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
4. Under the Ethics Law, there is no appearance of impropriety or impermissible conflict between Subject's simultaneously holding both positions as described herein.
5. Although the Commission does not perceive an impermissible conflict, the Commission advises Subject to be vigilant to comply with the disclosure and abstention requirements of NRS 281A.420. If a future matter arises that would implicate a conflict between Subject's employer and Subject's service on the Board or other statutory duties under the Ethics Law, before Subject participates on the matter, Subject is advised to seek the advice of Public Entity's official legal counsel, and to review the Ethics Law and the Commission's interpretation of the provisions of the Ethics Law, including its opinion *In re Woodbury*, Comm'n Opinion No. 99-56 (1999) on disclosures and abstentions. Further, Subject may seek first-party advice from the Commission with respect to Subject's particular circumstances.

The Following Commissioners Participated in this Opinion:

Dated this 25<sup>th</sup> day of February, 2016.

### NEVADA COMMISSION ON ETHICS

By: /s/ Cheryl A. Lau  
Cheryl A. Lau, Esq.  
Chair

By: /s/ Keith A. Weaver  
Keith A. Weaver, Esq.  
Vice-Chair

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

By: /s/ Magdalena Groover  
Magdalena Groover  
Commissioner

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