



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request
for Advisory Opinion Concerning the
Conduct of **Former Public Employee**,
Former Supervisor, State Regulatory
Body, State of Nevada,

Request for Opinion No. **15-71A**

Former Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

A former public employee ("Public Employee"), previously employed by a Nevada State Regulatory Body ("Public Body"), requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.550(6), 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 on December 16, 2015. 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 had previously accepted private employment from a business entity ("Business Entity") that is licensed and/or regulated by the Public Body within one year of Public Employee's separation from public service as a supervisor for a program at the Public Body. Public Employee also sought an opinion with respect to the applicability of NRS 281A.400(10) to Public Employee's circumstances; however, the jurisdiction of the Commission established under the Ethics Law with respect to former employees does not extend to providing direct advice on past conduct as a public employee.

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 are applicable to Public Employee's circumstances. However, the Commission does not grant relief from the strict application of those prohibitions based upon the Commission's determination that relief from the strict application of the provisions of NRS 281A.550(3) is not in the best interests of the public; the continued ethical integrity of the State Government; and the provisions of the Ethics Law. In addition, the Commission instructs that although relief is not provided from the

¹ The following Commissioners participated in this Opinion: Chair Lau, and Commissioners Carpenter, Groover, Gruenewald and Stewart. Vice Chair Weaver disclosed a conflict indicating that in his private capacity he represented clients associated with industry programs currently pending before the Public Body. Accordingly, Commissioner Weaver abstained from participating and voting on this matter pursuant to the requirements of NRS 281A.420.

strict application of NRS 281A.550(3), Public Employee is required to comply with all the requirements of NRS 281A.550 and NRS 281A.410(1)(b).

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

Public Employee elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this Abstract of the 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. QUESTIONS PRESENTED/JURISDICTION

Pursuant to the provisions of NRS 281A.550(6), either a current or former public officer or public employee may request that the Commission apply the relevant facts in that person's case to the provisions of NRS 281A.550, which prohibits certain employment for one year after the conclusion of public service, except where relief from the strict application of those provisions is proper.

Public Employee questions whether the "cooling-off" provisions of the Ethics Law set forth in NRS 281A.550(3) apply to prohibit Public Employee for one year after Public Employee's separation from service as a supervisor for the Public Body to be employed by an industry regulated by the Public Body. If the prohibitions set forth in NRS 281A.550(3) apply, Public Employee seeks relief from the strict application of those provisions under NRS 281A.550(6).

III. FINDINGS OF FACT

1. Public Employee is a former public employee and was employed as a supervisor for a program that has control over business entities regulated and/or licensed by the Public Body.
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. Pursuant to state law, a person who wishes to operate an entity regulated by the Public Body must submit an application for a certificate to the Public Body, which has the ability to grant and/or revoke an entity's certificate. The statutory provisions mandate the Public Body to promulgate regulations to carry out the requirements of the law.
4. The State of Nevada Department of Administration's Series Class Specification ("Class Specification"), which includes Public Employee's position, details Public Employee's duties to include statewide supervision of the inspection, compliance

² The individual comments made by any Commissioner during the hearing are not binding on the Commission's final opinion.

and audit activities for the program. Public Employee may recommend changes to statutes and regulations and/or analyze and track legislative bills; and represent the program inspection and audit function before boards, committees and stakeholders. Public Employee may also directly supervise staff of subordinate compliance and audit investigators, assist in planning and development of program budget, internal policy and procedure, and the implementation or introduction of State legislation.

5. Public Employee testified that the job duties and essential functions that Public Employee actually performed were more limited or varied from those detailed in the Class Specification as follows:
 - a. **Statewide Supervision** – Even though Public Employee requested full implementation of the supervision duties as listed in the Class Specification, the supervision for one region in the State was taken away from Public Employee.
 - b. **Legislation and Regulations** - Prior to Public Employee's employment, applicable provisions of the Nevada Revised Statutes and Nevada Administrative Code had already been drafted by higher-level personnel at the Public Body who were responsible for legislative review public hearings and workshop development. Public Employee did not provide input into proposed legislation or regulations and did not attend any workshops. Public Employee did work on two policy statements passed up the chain of command to Public Employee's supervisor who rejected them.
 - c. **Detect Violations** - Public Employee was not involved in any analysis of violations of State Law for entities regulated by the Public Body. Public Employee was not privy to the scoring formula for provisional certification and the final scoring process. Public Employee never attended any inspections, and did not have statewide supervisory responsibility.
 - d. **Supervision/Budget Assistance** - Public Employee did not receive any formal in-depth training in budget management to prepare for the position. When asking about the budget process, Public Employee was made aware that the budget was established during the previous year.
6. Public Employee further testified that Public Employee provided general supervision of the inspectors, counseling, employee evaluations, and attended meetings and trainings, as required.
7. Public Employee was released during Public Employee's probationary period.
8. Since legislation and regulations were written by higher-level personnel at the Public Body, Public Employee indicates that Public Employee had no knowledge of the specifics contained within the applicable state laws, except that Public Employee did attend one hearing related thereto as requested.
9. On the day Public Employee separated from public service Public Employee's supervisor read and advised that a state regulation that prohibits certain public employees from having financial interest in or being employed by or volunteering at the entities regulated by the Public Body applied to Public Employee.

10. After leaving public service, Public Employee worked for three months as an independent consultant for an industry that is not regulated by the Public Body.
11. Four months after leaving public service, Public Employee was recruited by a regulated Business Entity.
12. Public Employee was recruited because of Public Employee's credentials and expertise that had been developed in Public Employee's private employment prior to public service, though much of this expertise was also applicable to entities within the industry regulated by the Public Body.
13. Public Employee received information that there was a potential Third-Party RFO being requested by the Public Body alleging Public Employee had violated the Ethics Law; however, Public Employee has not received notice of such an RFO.
14. Public Employee testified that Public Employee had no access during public service to sensitive information which would compromise the State's ability to regulate an entity within the industry regulated by the Public Body and that Public Employee's current circumstances do not implicate NRS 281A.550(5) relating to soliciting or accepting employment from a person to whom a contract for supplies, materials, equipment or services was awarded by the State or political subdivision, within the 12-month period immediately preceding the termination of Public Employee's public service.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

The Ethics Law promotes the appropriate separation between public duties and private interests. In Public Employee's service as a supervisor, Public Employee was a public employee as that term is defined in NRS 281A.150. Pursuant to NRS 281A.550, the Ethics Law governs the conduct of *former* public officers and employees in the context of the "cooling-off" requirements to ensure that *former* public officers and employees do not use former information, relationships, or experiences acquired from their public service, which belong to the public, to benefit them or a regulated business or industry in a private capacity.

Public Employee questions whether the one-year "cooling-off" prohibition set forth in NRS 281A.550(3) is applicable to Public Employee's circumstances, because Public Employee separated from public service prior to the end of the probationary period, and he asserts that: (1) the actual duties performed as a supervisor did not include formulation of policy, enforcement or audit functions; and (2) a Public Employee was recruited by the industry regulated by the Public Body because of Public Employee's professional credentials and expertise with large start-up companies.

Public Employee is not specifically seeking guidance on the application of NRS 281A.550(5), since Public Employee's current circumstances do not implicate soliciting or accepting employment from a person to whom a contract for supplies, materials, equipment or services was awarded by the State or political subdivision, within the 12-month period immediately preceding the termination of Public Employee's public service.

B. RELEVANT STATUTES

1) Declared Nevada Public Policy on Government Ethics

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” – Accepting Employment

NRS 281A.550(3) and (5) provide:

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.

...

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) Exception to “Cooling-Off” Requirements for Employment – Relief from Strict Application

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.

5) Other implicated Ethics Laws

NRS 281A.400, in relevant part, provides:

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

...

10. A public officer or employee shall not seek other employment or contracts through the use of the public officer's or employee's official position.

V. DECISION

A. As a former public employee, the “cooling-off” provisions of NRS 281A.550 apply to Public Employee

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)).

Public Employee contends that Public Employee's public service for the State occurred at the commencement of the regulated program and the Public Body had already formulated and adopted its policy and regulations. Further, the Public Body had not yet actively pursued investigations or audits because the Public Body's licensing of entities had yet to occur. However, NRS 281A.550(3)(a) does not require the principle job duties to have been performed during the time of public service, rather the determination is whether the public employee's principle job duties satisfy the requirements of NRS 281A.550(3)(a). The record before the Commission reflects that Public Employee's duties and responsibilities for the Public Body included supervision of the inspection, compliance and audit activities for the program and Public Employee could be called upon to perform all or some of the duties as described in the class specification for the position. Furthermore, Public Employee was in a position that may recommend changes to statutes and regulations and/or analyze and track legislative bills; and represent the program's inspection and audit function before boards, committees and stakeholders. Public Employee's job duties included detection of violations of State law or regulations pertaining to the program and regulated entities, including receiving and reviewing formal complaints; making determinations regarding possible program violations and jurisdiction within the program and initiating formal investigations, among other supervisory and budget related duties.

Given that Public Employee's job duties and responsibilities for the Public Body satisfy the requirements of NRS 281A.550(3)(a), Public Employee is prohibited for one year after separation from public service, from soliciting or accepting employment from any businesses or industries whose activities are regulated by the Public Body.

B. Relief from Strict Application of Employment Prohibitions

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.*

The Ethics Law provides for an exception from the one-year “cooling-off” provisions of NRS 281A.550(3) under certain limited circumstances. Pursuant to NRS 281A.550(6), the Commission may grant relief from the strict application of NRS 281A.550(3) 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.

“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). *See also In re Public Employee*, Comm’n Opinion No. 13-29A (2013).

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 to determine whether Public Employee’s potential private-sector service would be in the best interests of the State.

Since Public Employee has no current job prospects, the Commission has insufficient information to evaluate relief from the strict application of the “cooling-off” requirements under the provisions of NRS 281A.550(6). 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.

C. Ancillary Statutes and Reservation of Jurisdiction

The Commission does not have the jurisdictional authority to advise Public Employee, as a *former* public employee, regarding Public Employee’s past conduct. Instead, circumstances concerning the past conduct of a public employee alleged to have violated NRS Chapter 281A would be investigated pursuant to a complaint filed on the Commission’s own motion under NRS 281A.440(2)(c) or another person under NRS 281A.440(2)(b). However, the Commission’s efforts at outreach and education caution against initiating complaints against current or former public officers and employees in the context of an advisory opinion. The Commission does not intend to thwart or punish a public officer or employee from seeking educational guidance and advice. At this time, the Commission will not initiate its own complaint, but it may also not prevent a complaint. Nevertheless, the Commission takes this opportunity to seek prevention of violations through education and guidance on the application of the Ethics Law, and in so doing, encourages public officers and employees to seek advisory opinions prior to seeking employment by a regulated industry or taking action on a matter for which an opinion may be sought.

Given the fact that this advisory opinion was sought after Public Employee obtained employment by a business regulated by the Public Body, the Commission reserves its statutory authority and is not specifically opining on Public Employee's prior conduct in seeking employment within the regulated industry. See *In re Howard*, Comm'n Opinion No. 01-36 (2002) (notwithstanding first-party opinion, public is not precluded from bringing ethics complaint) and *In re Rock*, Comm'n Opinion No. 94-53 (1995) (reservation of right to review until time issue is raised).

Further, with regard to Public Employee's question relating to the application of the state regulation that prohibits certain public employees from having financial interest in or being employed by or volunteering at the entities regulated by the Public Body, the Commission advises that the direct enforcement of such regulation is not within its jurisdiction as set forth in NRS Chapter 281A and refers Public Employee to the Public Body or private legal representation to pursue any questions Public Employee has relating to the application of the regulation.

D. NRS 281A.410(1)(b) Prohibits Representing or Counseling Clients on certain Legislative measures and Administrative Regulations

Although the Commission is not specifically rendering an advisory opinion on Public Employee's past or present conduct with respect to other provisions of the Ethics Law, Public Employee is nevertheless reminded that Public Employee 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 Public Body or other agency that Public Employee served in Public Employee's capacity as a supervisor. The provisions of NRS 281A.410(1)(b) are mandatory and even if the Commission were granting relief from the strict application of NRS 281A.550(3), pursuant to provisions of NRS 281A.550(6), it would not operate to provide relief from the application of NRS 281A.410(1)(b); however, the provisions of NRS 281A.410(1)(b) do operate to provide limitations on the relief granted from the strict application of the provisions of NRS 281A.550.

The Commission recently confirmed the following parameters with respect to the provisions of NRS 281A.410(1)(b):

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).

VI. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Employee was a former "public employee," as defined by NRS 281A.150.
2. Pursuant to NRS 281A.550(6), the Commission has authority to apply the relevant facts to the provisions of NRS 281A.550, which prohibits certain employment for one year after the conclusion of public service, including whether relief from the strict application of those provisions is warranted.
3. As a former supervisor for the Public Body's program, Public Employee is subject to the "cooling-off" provisions of the Ethics Law and its restrictions prohibiting, for a period of one year, certain employment, contracts and representations by former public employees or officers in their private capacity as it relates to their prior public service. NRS 281A.550(3) and NRS 281A.410(1)(b).
4. The Commission has not been presented with information to evaluate the nature and circumstances of a specific employment opportunity to determine whether Public Employee's potential private-sector service would be in the best interests of the State and therefore concludes that strict relief from the one year "cooling-off" period is not appropriate under the standards set forth in NRS 281A.550(6).
5. Public Employee's current circumstances do not implicate the provisions of NRS 281A.550(5); prohibiting certain employment for a one year period by an entity which was awarded particular contracts by the State or its political subdivisions, within the previous 12-month period; however, Public Employee is reminded of Public Employee's duty to comply with these provisions as a former public employee.
6. Although Public Employee's current circumstances do not appear to implicate the provisions of NRS 281A.410(1)(b), restricting the representation or counseling of any private persons or entities, for at least one year after the termination of Public Employee's public service, on any issues that were under consideration by the Public Body during Public Employee's tenure, Public Employee is reminded of Public Employee's duty to comply with these provisions as a former public employee.
7. The Commission reserves its jurisdiction, as established by NRS 281A.280, to consider the merits associated with the past conduct of Public Employee and its implications under NRS Chapter 281A should a third-party request for opinion be submitted.

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 3rd day of February, 2016.

NEVADA COMMISSION ON ETHICS

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

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

By: ABSTAIN
Keith A. Weaver, Esq.
Vice-Chair

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ Dan H. Stewart
Dan H. Stewart
Commissioner