



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request  
for Advisory Opinion Concerning the  
Conduct of **Public Employee**, Public  
Agency, State of Nevada,

Request for Opinion No. **15-28A**

Public Employee. /

#### **ABSTRACT OPINION**

#### **I. STATEMENT OF THE CASE**

Public Employee, currently employed by a public agency ("Agency") in the State of Nevada, requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1), regarding the propriety of Public Employee's past, present and 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 quorum<sup>1</sup> of the Commission heard this matter. Public Employee appeared and provided sworn testimony. Also appearing and testifying was a Public Officer who supervises Public Employee at the Agency ("Supervisor").

Public Employee is currently employed by the Agency and plans to retire in the near future. Public Employee questions whether it is permissible under the Ethics Law for Public Employee's private consulting business to enter into a consulting agreement with the Agency after Public Employee retires from public service. Public Employee recognizes the implications of the Ethics Law and sought advice from the official attorney for the Agency, who correctly referred Public Employee to obtain this first-party advisory opinion from the Commission.

After fully considering Public Employee's request and analyzing the facts and circumstances and testimony provided by Public Employee and the Supervisor, and analyzing applicable provisions of the Ethics Law, the Commission deliberated and advises that the public policy of the State dictates that public officers and employees should maintain "the appropriate separation between the roles of persons who are both public servants and private citizens." See NRS 281A.020(2). However, the Commission did not reach a consensus on whether to grant or deny the requested relief from the strict application of NRS 281A.430 or the "cooling-off" provisions of NRS 281A.550. Accordingly, relief was not granted. Nonetheless, the difficulty which the Commission had in reaching a majority vote does not detract from identification of the issues and concerns which serve to provide education.

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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<sup>1</sup> All Commissioners were present and participated in the Opinion. However, the respective terms of office for Chair Lamboley, Vice-Chair Gale and Commissioner Cory expired prior to the issuance of this Abstract Opinion.

This Opinion is limited to the circumstances presented. The facts in this matter were obtained from documentary and testimonial evidence provided by Public Employee and by Supervisor. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact set forth below accept as true those facts as presented by Public Employee and Supervisor.<sup>2</sup> Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this Opinion.

## **II. QUESTION PRESENTED**

Public Employee questions whether the provisions of the Ethics Law prohibits Public Employee from providing private consulting services to the Agency after Public Employee's retirement which are similar in nature to Public Employee's current public duties for the Agency.

## **III. FINDINGS OF FACT**

1. Public Employee is currently an employee for the Agency. Public Employee has served the public for many years and anticipates retiring in the near future.
2. In January 2015, Public Employee, as sole owner and managing member, formed a private consulting business ("Business Entity"). Public Employee is the only employee of the business.
3. Public Employee, through Business Entity, would like to provide consulting services to the Agency after Public Employee's retirement if so permitted under the Ethics Law. Such consulting services would be similar to the official duties that Public Employee currently provides.
4. According to Supervisor:
  - a. It is important for the Agency's future to maintain Public Employee's experience, and Supervisor has asked Public Employee, through Business Entity, to consider a private consulting contract after Public Employee retires to assist the Agency.
  - b. The Agency has no one with the experience to replace Public Employee at this time and Supervisor does not anticipate that the Agency will be able to train an employee in this niche area for approximately four years.
  - c. Supervisor and Public Employee have been talking about the length of the contract, contract responsibilities and fee amount.
5. The proposed contract has not yet been prepared in form and requires approval by Supervisor and the Agency's Governing Body.
6. It is not anticipated that the consulting contract will be open for competitive bidding because Supervisor is seeking a sole source contract for services with Public Employee due to Public Employee's distinct experience and background under applicable law.

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<sup>2</sup> Among the revisions to the Ethics Law, adopted by Assembly Bill 60 in the 2015 Nevada Legislative Session, is that the confidentiality of an opinion is not waived if disclosed to the employer. NRS 281A.440(7).

7. Public Employee contacted the official attorney for the Agency and was advised that Public Employee cannot engage in work as an independent contractor without a waiver of the “cooling-off” provisions of the Ethics Law.
8. If this contract is prohibited by the Ethics Law, Supervisor will consider requesting designation of the position as one of “critical shortage” under NRS 286.523, which allows for the reemployment of retired employees to fill positions for which a critical labor shortage exists as determined by the governing body.<sup>3</sup>

#### **IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES**

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

Public Employee requested advice regarding: (1) past and present conduct as a public employee; and (2) future conduct as a former public employee in retirement.

##### **1. Past and Present Conduct**

Recognizing Public Employee’s pending retirement, Supervisor asked Public Employee to enter into a consulting contract post-retirement to provide the Consulting Services. Public Employee seeks an advisory opinion regarding whether Public Employee’s conduct and preliminary discussions with Supervisor implicate a future contract to provide Consulting Services under the provisions of the Ethics Law.

Public Employee must commit himself/herself to avoid conflicts between Public Employee’s private interests and those of the general public served. Public Employee has a duty to avoid actual and perceived conflicts of interest, and may not use Public Employee’s position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for Public Employee or for any person to whom Public Employee has a commitment in a private capacity to the interests of that person. NRS 281A.020 and NRS 281A.400(1) and (2). Additionally, Public Employee is prohibited from participating as an agent of government in the negotiation or execution of a contract between the government and any business entity which the public employee has a significant pecuniary interest. NRS 281A.400(3). See also NRS 281A.430 (Prohibited contracts and exceptions).

##### **2. Future Conduct**

Public Employee asks the Commission whether the Ethics Law prohibits entering into a contract with the Agency for the Consulting Services after retirement and, if so, whether relief may be granted from the strict application of the relevant statutes.

After retirement, Public Employee will become a former public employee subject to the “cooling-off” provisions of the Ethics Law. The Ethics Law prohibits, for a period of 1 year, certain employment, contracts and representations by a former public employee or officer in his or her private capacity as it relates to former public service. NRS 281A.410(1)(b) and 281A.550(5) and (6) are applicable to government employees. Generally, the “cooling-off” provisions are intended to discourage former public employees from benefitting from their public service in a private capacity.

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<sup>3</sup> This opinion does not prohibit designation of a position by a government as one of critical shortage under NRS 286.523. If employed under critical shortage, the person’s status as a government employee is maintained for the applicable period of time.

## **B. RELEVANT STATUTES**

### **1. Public Trust/Avoiding Conflicts**

#### **NRS 281A.020(1) provides:**

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.020(2)(a) and (b) provide:**

The Legislature finds and declares that:

(a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.

(b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

### **2. Improper Use of Government Position**

#### **NRS 281A.400(1) provides:**

A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

#### **NRS 281A.400(2) provides:**

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.

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### **3. Prohibited Contracts**

#### **NRS 281A.400(3) provides:**

A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and any business entity in which the public officer or employee has a significant pecuniary interest.

#### **NRS 281A.430(1) provides, in relevant part:**

Except as otherwise provided in this section and NRS 281A.530 and 332.800, a public officer or employee shall not bid on or enter into a contract between a governmental agency and any business entity in which the public officer or employee has a significant pecuniary interest.

#### **NRS 281A.430(4) provides:**

Except as otherwise provided in subsection 2, 3 or 5, a public officer or employee may bid on or enter into a contract with an agency if:

- (a) The contracting process is controlled by the rules of open competitive bidding or the rules of open competitive bidding are not employed as a result of the applicability of NRS 332.112 or 332.148;
- (b) The sources of supply are limited;
- (c) The public officer or employee has not taken part in developing the contract plans or specifications; and
- (d) The public officer or employee will not be personally involved in opening, considering or accepting offers.

If a public officer who is authorized to bid on or enter into a contract with an agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose the public officer's interest in the contract and shall not vote on or advocate the approval of the contract.

#### **NRS 281A.430(6) provides:**

The Commission may relieve a public officer or employee from the strict application of the provisions of this section if:

- (a) The public officer or employee requests an opinion from the Commission pursuant to subsection 1 of NRS 281A.440; and
- (b) The Commission determines that such relief is not contrary to:
  - (1) The best interests of the public;
  - (2) The continued ethical integrity of each agency affected by the matter; and
  - (3) The provisions of this chapter.

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#### 4. “Cooling-Off” Requirements for Private Consulting

**NRS 281A.410(1)(b) provides, in relevant part:**

In addition to the requirements of the code of ethical standards:

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.

(Emphasis added).

#### 5. “Cooling-Off” Requirements for Employment

**NRS 281A.550(5) provides:**

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.

**NRS 281A.550(6) provides:**

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.

## **V. COMMISSION DECISION**

### **A. INTRODUCTION**

Nevada's Ethics Law mandates that public officers and employees perform their duties for the benefit of the public and avoid conflicts of interests. The Ethics Law is concerned with situations involving public officers and employees that create appearances of impropriety and conflicts of interest, as well as actual impropriety and conflicts, to promote integrity in public service. NRS 281A.020. The public policy of the State of Nevada instructs that "the increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests," and, as a result, public officers and employees should maintain vigilance in maintaining "the appropriate separation between the roles of persons who are both public servants and private citizens." See NRS 281A.020(2).

### **B. PAST AND PRESENT CONDUCT – USE OF GOVERNMENT POSITION AND PROHIBITED CONTRACTS**

As an employee of the Agency, Public Employee must commit himself or herself to avoid conflicts between the private interests of Public Employee and those of the general public served. In furtherance thereof, Public Employee has a duty to avoid actual and perceived conflicts of interest, and Public Employee may not use a public position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for Public Employee or for any person to whom Public Employee has a commitment in a private capacity to the interests of that person. NRS 281A.020 and NRS 281A.400(1) and (2). "Unwarranted" means without justification or adequate reason. NRS 281A.400(2).

Additionally, Public Employee is prohibited from participating as an agent of government in the negotiation or execution of a contract between the government and any business entity which the public employee has a significant pecuniary interest. NRS 281A.400(3).

Public Employee has confirmed he/she will not enter the contract while employed with the Agency. Therefore, the Commission conducts a limited review and analysis on Public Employee's present conduct for purposes of providing information and education on the Ethics Law. The Commission has considered somewhat similar circumstances in a recently issued opinion. In *In re Spiegel*, Comm'n Opinion No. 15-25A (2015), the Commission instructed:

With regard to NRS 281A.400(2), this statute does not prohibit a public officer from acting in a manner consistent with her personal interests. (See *In re Public Officer*, Comm'n Opinion No. 12-15A (2012)). However, the provisions of NRS 281A.400(2) would prohibit a public officer from using his or her position as a public officer to secure for herself, her corporation, or her husband any privilege, preference, exception or advantage, for which there is no justification or adequate reason.

*Id.* at p. 8.

Another prior opinion is *In re Pirozzi*, Comm'n Opinion No. 10-32A (2010) ("*Pirozzi*"). In *Pirozzi*, a public employee served as a Fire Battalion Chief and, during his employment, developed and administered a software program for use by his employer, for which his employer sought to purchase after Public Employee's retirement. Pirozzi voluntarily provided his services during his personal time and with his own equipment. He was not required as part of his duties to develop the software program and he did not receive any remuneration or special benefit for his services related to the program.

The Commission determined that Pirozzi's past conduct in developing and administering the software program did not violate provisions of the Ethics law because Pirozzi received no benefit in his private capacity by virtue of his public position. *Id.* at p. 3. Further, Pirozzi did not violate the provisions of NRS 281A.400(3) and NRS 281A.430(1) because the terms of the contract for purchase of the software and administrative services were not going to be negotiated or executed until after he retired from service. *Id.*

In *In re Public Officer*, Comm'n Opinion No. 01-16 (2001), the Commission determined that a violation, or at least an appearance of impropriety, of former NRS 281.505 (currently NRS 281A.430) was implicated when the public officer, while serving as a public officer, used information and his position as a public officer to negotiate or execute a contract with the public agency he served, thereby securing or granting to himself and a limited liability company in which he had a "significant pecuniary interest" an unwarranted privilege, preference, exemption or advantage. The Commission confirmed that a 50% equity interest in a limited liability company was a "significant pecuniary interest". *Id.* The Commission recognized that the Ethics Law prohibits a public officer from bidding on or entering into a contract between a governmental agency and any private business in which he has a significant pecuniary interest, unless: (a) the contracting process is controlled by rules of open competitive bidding; (b) the sources of supply are limited; (c) he has not taken part in developing the contract plans or specifications; and (d) he will not be personally involved in opening, considering or accepting offers. *Id.*

Here, Supervisor recognized that Public Employee is going to retire and reached out asking Public Employee to consider a consulting contract with the outlines of responsibilities, compensation and duration. Public Employee has discussed whether it is permissible for Public Employee to enter into the proposed contract with Supervisor, and the official attorney for the Agency. Public Employee's experience has been obtained while on the job completing Public Employee's assigned public duties. The proposed consulting services are relatively similar to a continuation of Public Employee's presently assigned duties for the Agency.

The present facts and circumstances have certain similarities to those present in *Pirozzi*; however, an important distinction between the two matters is that Pirozzi negotiated the contract post-retirement and did not receive any compensation for creating the software and there was no implication that Pirozzi, while serving as a public officer, used information and his position as a public officer to negotiate or execute a contract with the public agency he served, thereby securing or granting to himself and a limited liability company in which he had a "significant pecuniary interest" an unwarranted privilege, preference, exemption or advantage. See *Pirozzi*, *supra* (citations omitted). Accordingly, *Pirozzi* is not instructive.

As sole owner and managing member, and its only employee, Public Employee has a significant pecuniary interest and private business interest in Business Entity, the anticipated party to the contract with the Agency for the consulting services. Public

Employee testified that Public Employee does not intend to enter into a contract with the Agency while employed. As a precautionary measure, however, the Commission advised Public Employee that, if this were the case, Public Employee would be prohibited from bidding on or entering into the proposed contract because certain requirements which allow a public employee to bid on or enter into a contract with a public agency as set forth in NRS 281A.430(4) have not been met in these circumstances.

The specific requirements that have not been met under NRS 281A.430(4) are subsections (a) (competitive bidding) and (b) (supply is limited). The contracting process is not controlled by the rules of open competitive bidding because Supervisor indicates issuance will be through a sole source contract.

With regard to NRS 281A.430(4)(b), other consultants may be available to perform this work; however, based upon the record before the Commission, this is not known because a detailed outreach does not appear to have been conducted. The proposed consulting services, on their face, do not appear to be unique or of limited supply; although, it is recognized that such services may be difficult to locate within the economical price desired in certain geographical areas.

Furthermore, it is questionable whether the requirements of NRS 281A.430(4)(c) and (d) have been satisfied. Public Employee believes Public Employee has not and indicates that Public Employee will not take part in developing contract plans or specifications, and Public Employee will not be personally involved in the opening, considering or accepting of offers. However, it is evident Public Employee has already engaged in contract discussions, including responsibilities, term, renewals and annual payment. Such discussions and negotiations may not continue while Public Employee is a public employee.

Accordingly, since the requirements of NRS 281A.430(4) are conjunctive and have not been met completely, Public Employee would be prohibited from bidding on or entering into the proposed consulting contract while employed in public service unless the Commission determines it is appropriate to relieve Public Employee from the strict application of the provisions of NRS 281A.430 pursuant to NRS 281A.430(6). However, this analysis was not completed because Public Employee did not seek an opinion as to whether Public Employee could be relieved from the strict application of the provisions of NRS 281A.430 pursuant to NRS 281A.430(6), since Public Employee only desires to enter into the contract post-retirement.

### **C. FUTURE CONDUCT – “COOLING-OFF” REQUIREMENTS FOR PRIVATE CONSULTING AND EMPLOYMENT APPLICABLE TO GOVERNMENT EMPLOYEES**

In interpreting the provisions of NRS 281A.550 and NRS 281A.410, the Commission has declared “that service as an independent contractor qualifies as employment within the meaning and context of the ...cooling-off requirements.” *In re Public Officer*, Comm’n Abstract Opinion No. 13-09A (2013), at p. 6. The Commission focused on the “perceived purpose and intent in the Legislature’s adoption of “cooling-off” provisions as well as the relationship and activities undertaken” indicating that the “concepts of ‘cooling-off’ and ‘revolving-door’ are integral to principles of ethics in government.” *Id.*

The Commission recognizes that pursuant to NRS 281A.550(5), a former public officer or employee of the State or a political subdivision, except a clerical employee, is prohibited from accepting employment, from a person to whom a contract for supplies,

materials, equipment or services was awarded by such government entities, for a 1-year period after termination if the following conditions for application of the restriction are present:

- (a) The amount of the contract exceeds \$25,000. The anticipated annual amount of the proposed contract between Public Employee, through Business Entity, and the Agency is \$50,000, which exceeds the designated threshold amount.
- (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.
- (c) Whether 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.

The forgoing conditions, which are set forth in NRS 281A.550(5), must all be present for application of the 1-year "cooling-off" period. Although subsections (a) and (c) are present based upon the submitted facts, subsection (b) is not since the contract is not expected to be officially awarded until after Public Employee's retirement.

Although the provisions NRS 281A.550 all must be present for its application, the Commission did not reach a majority decision indicating whether the future contract is or is not permissible under the Ethics Law for various reasons, including the overarching public policy of the State to maintain appropriate separation between the roles of persons who are both public servants and private citizens as set forth in NRS 281A.020.

Additionally, the Commission instructs that, pursuant to NRS 281A.410, a public officer or employee that serves a state agency of the Executive Department or an agency of any county, city or other political subdivision, 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. The facts provided by Public Employee relate to providing consulting services to a public agency, rather than a private person; however, Public Employee is advised of the requirements of NRS 281A.410 as a precautionary matter, as circumstances may arise where Public Employee is asked to provide consulting services to persons before the agency Public Employee served as a public employee.

## **VI. CONCLUSIONS OF LAW**

1. At all times relevant to the hearing of this matter, Public Employee was a public employee as defined by NRS 281A.150 and NRS 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 requirements set forth in Ethics law apply to Public Employee's circumstances. However, with regard to:

(a) the past or present conduct issues, the Commission does not offer opinion granting or denying relief from the contracting provisions of NRS 281A.430 because Public Employee has confirmed Public Employee will not enter the contract while employed as a public employee for the Agency. Therefore, the Commission conducted only a limited review and analysis on Public Employee's present conduct for purposes of providing information and education on the Ethics Law. The Commission, however, does suggest that Public Employee be mindful of the provisions of NRS 281A.400(1) and (3), and the information and educational guidance set forth herein; and

(b) the future conduct issues, the Commission does not take action to grant or deny Public Employee requested relief associated with the "cooling-off" provisions of NRS 281A.550 because the Commission is evenly divided on the issue and there is no majority among the voting Commissioners to do so. Despite the absence of a grant or denial of requested relief due to the equal split among Commissioners, this advisory discussion is nevertheless provided in furtherance of the Commission's responsive obligation to the Public Employee and, if confidentiality is not waived, also its outreach responsibilities to educate and inform other public officials and employees, as well as the general public.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law 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, with no majority vote to provide relief, and a separate expression by Chair Lamboley:

Dated this 30<sup>th</sup> day of June, 2016.

#### 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, Esq.  
Commissioner

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

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

## **ABSTRACT OF SEPARATE EXPRESSION BY CHAIR LAMBOLEY**

This case has particular significance to the public employee, the public employer, and the employer's official attorney, as well as general significance by abstract or waiver of confidentiality to other public officers, employees and their employers, and not to overlook the interest of the general public and its concern for ethical integrity. The request for opinion poses two specific requests:

(1) A determination on my own behalf whether relief from the strict application of the provisions of NRS Chapter 281A.550(3) or 281A.550(5) ("cooling off" or "revolving door" prohibitions) is proper, citing NRS 281A.550(6); and

(2) The Commission's binding advice concerning the propriety of my own past, present or future conduct in my public position, citing NRS 281A.440(1).

The request acknowledges contacting the agency's attorney who advised that the Public Employee could not engage in work as an "independent contractor" without a waiver of the "cooling off" prohibition under NRS 281A.550(6). Two specific provisions of NRS Chapter 281A that caused concern and prompted the request were noted:

(1) NRS 281A.400(10): Seeking other employment or contract through the use of an official position; and

(2) NRS 281A.430: Engaging in government contract in which public officer or employee has an interest prohibited; exceptions.

Legitimate concern is expressed regarding the impact of Public Employee's conduct at issue in relation to the Ethics Law and public policy of this State, given what appears to be a clear connectivity between Public Employee's admitted past and present conduct in public service duties, with the anticipated future conduct in providing contract consulting services which are in many respects substantially similar, if not virtually identical, to the present public service duties.

The fact that a contract will be executed post-employment does not diminish or remove the ethics concerns of related pre-retirement conduct since it is evident that material terms of the service contract were essentially identified and determined acceptable while the Public Employee was employed. Merely executing the contract post-employment is not a distinguishing feature sufficient to preclude a more complete evaluation of the contract's rationale and genesis. If post-employment execution of a post-employment contract is truly a distinguishing feature, flood-gates would open to an employment future that would allow public officers and employees to avoid ethical concerns merely by delaying the execution of a pre-determined contract for post-employment services until after employment ended.

The request itself and record developed confirm the desire of both the public employee and public employer to effect a seamless transition from present-employment service to post-employment service with continuity of same service at a reduced price and savings to the public employer through a consulting contract. It is fair to say the reason for doing so is the fact the employer truly considers the Public Employee to be an "essential employee" whose services employer wishes to retain and the employee likewise wishes to continue. However, the public employer expressed no desire to

continue employment of Public Employee under a critical shortage designation as that would create staff and budget issues.

Whether there would be conflicts between Public Employee's present public duties and associated private interests in pursuing a private consulting contract after retirement should be considered in light of the provisions set forth in NRS Chapter 281A and as interpreted by applicable Commission precedent in similar circumstances. The past and present conduct relative to establishing a post-employment consulting opportunity via a contract mechanism no doubt triggered the concerns under provisions of NRS 281A.020, 281A.400 and 281A.430. Concerns may also have been triggered because, when employed, the Public Employee was in a position to affect or influence the awarding of the anticipated post-employment consulting contract and the contract would be awarded immediately upon termination or retirement, issues under NRS 281A.550(5) and relief under NRS 281A.550(6).

Public Employee confirmed the lack of prior knowledge of the requirements of the Ethics Law with respect to this situation. Public Employee's desire in seeking an opinion was to assure compliance with the applicable law, perhaps especially so in light of the official attorney's negative advice on the subject. Although the veracity of these statements is not questioned, the similarity between Public Employee's present public service duties and the proposed future contract consulting services with the proposed compensation from two separate sources in the employer's budget, are of concern, and, at a minimum, create an appearance of impropriety.

Even if Public Employee did not use his/her public position to affect or influence the awarding of the contract, the position that the employee now holds would have allowed the Public Employee to do so. Even without actual impropriety, an appearance of impropriety is disconcerting. See NRS 281A.020 and NRS 281A.400. The present employment duties and the future duties of the consulting agreement are virtually indistinguishable. Public Employee has held these assigned duties for many years and, through this public position, has created relationships with the employer and other employees, all of which have benefitted the employee and employer.

Future conduct cannot be separated from past or present conduct for purposes of application of the Ethics Law and the public policy of maintaining appropriate separation between the roles of persons who are both public servants and private citizens set forth in NRS 281A.020. It is elementary when interpreting statutes that multiple legislative provisions "must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." See *Charlie Brown Constr. Co. v., City of Boulder City*, 106 Nev. 497, 502, 797 P.2d 946 (1990). "Legislative intent can be determined by looking at the entire act and construing the statute as a whole in light of its purpose." *Hotel Employees and Restaurant Employees Int'l Union, AFL-CIO v. State ex rel. Nevada Gaming Comm'n*, 103 Nev. 588, 591, 747 P.2d 878 (1994), citing *Collello v. Administrator, Real Estate Division*, 100 Nev. 344, 347, 683 P.2d 15, 16 (1984). "The expressly stated purpose of the statute is a factor to be considered." *Id.* To interpret otherwise would be inconsistent with the public policy identified in the Ethics in Government Law and contrary to precedent governing statutory construction and interpretation of statutes.

The focus for the opinion is NRS 281A.550(5), and it is not questioned that its conditions must all be present for application of the 1-year "cooling-off" period, and, while subsections (a) and (c) are present based upon the submitted facts, subsection (b) is not since the contract is not expected to be awarded within the 12-month period immediately preceding the Public Employee's retirement. Accordingly, the 1-year cooling-off

requirement of NRS 281A.550(5) does not apply to these circumstances as the Opinion states, a position on which Commissioners differ. The opinion should address waiver provisions under NRS 281A.550(6) in the absence of a finding that NRS 281A.550(5) does not apply.

As it relates to the “cooling-off” provisions in NRS 281A.550, the opinion attempts to distinguish the Commission’s prior opinion in *In re Pirozzi*, Comm’n Opinion No. 10-32A (“*Pirozzi*”). A critical reading of that case, however, aptly demonstrates that the underlying statutory policy is to discourage public employees from improperly using or benefitting from their public service when considering post-employment service as independent contractors. While expressly recognizing that, *under limited circumstances*, the ethics law does not prohibit private post-employment endeavors, the approval given in *Pirozzi* was based on facts dissimilar to this case. In *Pirozzi* there was no evidence of negotiation of post-employment contract terms while employed in marked contrast to credible facts of contrary conduct here. The scope of service at issue in *Pirozzi* was limited to only a portion of employment activity, not so here. *Pirozzi* provides appropriate emphasis on policy and is significant, applicable precedent.

The Commission clearly did not take action to allow the contract post-retirement because Commissioners were evenly split; half concluded that the “after employment” execution of the post-employment consulting services contract with material terms essentially determined during employment was a distinction without a difference for purposes of application of Ethics Law, and Public Employee should maintain a greater separation of public duties from private interests.

The Commission did believe that the past and present conduct was not intended to avoid or violate the Ethics Law. However, it appears that the Public Employee’s negotiation with the employer may have had significant influence on the contracting process before the planned retirement and may have had the potential of influencing the contract terms and award post-retirement. To permit negotiation of a future services contract with the governmental entity employer while the public officer or employee is employed would undermine the public policy of the State and the foundation of the Ethics Laws applicable to public officers and employees.

Thus, regarding past or present conduct issues, the Commissioners did not offer opinion on issues arising under NRS Chapter 281A because some believed the confirmation that Public Employee will not enter the contract while employed in public service was sufficient; while others believed Public Employee should now be mindful that if contract discussion do not cease, they may well implicate or violate the Ethics Law such that a third-party could seek an opinion, alleging a potential violation of the provisions of NRS Chapter 281A.

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The Commission was evenly divided on the issues (a) whether NRS 281A.550(5) applies to a service contract entered into after retirement, and (b) whether NRS 281A.410(1) is implicated; four Commissioners believe the statutory provisions do not apply, but four Commissioners believe otherwise because the scope and activity of the proposed contract are too similar to present duties and appear tailor-made, that the issue is not cured by merely waiting to execute the contract until after retirement, that it could be asserted that, while serving the public, greater separation should have been maintained between public duties and private interests, and that relief from strict application under NRS 281A.550(6) would be inappropriate and contrary to the demonstrated and continuing policy of ethical integrity of the employer, as well as provisions of NRS Chapter 281A.

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Chair