



## 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**, Chief,  
State Agency, State of Nevada,

Request for Opinion No. **15-35A**

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Public Employee. /

#### ABSTRACT OPINION

#### I. STATEMENT OF THE CASE

A Public Employee of a Nevada State Agency ("Agency") requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(2), regarding the propriety of Public 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 quorum<sup>1</sup> of the Commission heard this matter on September 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 is seeking private employment as a consultant in four areas of private employment, one of which implicates industry partners who are affiliated with the Agency.

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 grants relief from the strict application of those prohibitions based upon the Commission's determination that certain relief from the strict application of the provisions of NRS 281A.550(3) is not contrary to 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 provided from the strict application of NRS 281A.550(3), Public Employee is required to comply with the requirements of NRS 281A.550(5) and NRS 281A.410(1)(b).

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

<sup>1</sup> The following Commissioners participated in this Opinion: Chair Lamboley, Vice-Chair Gale and Commissioners Carpenter, Cory, Groover, Lau and Shaw. Commissioner Weaver disclosed a conflict relating to his representation of clients who participate in programs at issue and abstained.

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

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**

Public Employee questions whether the "cooling-off" provisions of the Ethics Law set forth in NRS 281A.550(3) and (5) apply to Public Employee and, if so, whether Public Employee is prohibited by the provisions of NRS 281A.550(3) and (5), for one year after Public Employee's separation from service at a Division within the Agency, from providing consulting services, including to providers of certain services, some of which Public Employee has acquired contacts and built relationships by virtue of Public Employee's public job duties. If the prohibitions set forth in NRS 281A.550(3) and (5) apply, Public Employee seeks relief from the strict application of those provisions under NRS 281A.550(6). Public Employee also seeks clarification on whether the requirements of NRS 281A.410(1)(b) apply to Public Employee's circumstances.

## **III. FINDINGS OF FACT**

1. The Nevada State Agency includes a Division governed by provisions contained in state law.
2. The Agency's Director oversees its services related to a number of programs for Nevada citizens funded by Federal and State sources. Programs receiving federal funding must comply with applicable Federal statutes and regulations.
3. The Division's mission includes purchasing and providing certain services to Nevada citizens in the most efficient manner and reviewing certain programs to maximize potential federal revenue.
4. The Administrator of the Division ("Administrator") establishes policies for the administration of the programs, subject to supervisory control by the Director; adopts regulations necessary for the administration of applicable state law and provides the Director with material on which to base proposed legislation.
5. The Division specifically establishes fees to be assessed, establishes regulations and receives transfers and payment of administrative costs pursuant to programs provided to Nevada citizens.
6. In addition to programs and establishment of fees, the Agency has administrative hearings and conducts hearings to review actions taken against providers of services.

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7. The Division is organized by the Administrator into sections and the Administrator appoints the heads, or chiefs, of each section. Public Employee is the Chief of one of the sections reporting directly to the Deputy Administrator, which in turn reports to the Administrator. The Administrator then directly reports to the Director of the Agency.
8. The Class Specification for Public Employee's position performs duties under the general direction of an administrator or deputy administrator and exercises direct control over the policy, system planning, development and monitoring aspects of certain services and programs or major components thereof. The complexity of the programs typically requires a large staff of specialists and other professional staff. Programs administered at this level are multi-million dollar programs or involve the collection and disbursement of millions of dollars resulting in significant fiscal impact to the State. At this level, programs and services are provided to the broadest client base statewide.
9. Public Employee is directly responsible for development, implementation and maintenance of the policies under certain state programs.
10. As part of Public Employee's public duties, Public Employee interacts with providers and their associations and lobbyists. Across the nation, Public Employee interacts with national experts on licensing standards for provider qualifications, including best practice standards.
11. In the past, Public Employee's duties included assisting with writing a Request for Proposal ("RFP") for contractors to provide services relating to a program and related contractor selection. Public Employee's duties include providing recommendations and research on best practices and other matters with regard to related policies and regulations ultimately established by the Administrator.
12. Public Employee is seeking employment with a local nonprofit, assisting in matters which are not regulated by the Agency, consulting with out-of-state companies on certain program requirements not related to Nevada, and is seeking to offer certain services as a consultant for industry partners affiliated with the Division.
13. Potential clients may be regulated by the Division for certification to participate in its programs.
14. Facts testified by Public Employee for consideration in granting relief from the strict application of NRS 281A.550 include:
  - a) Public Employee does not believe Public Employee's circumstances exemplify a revolving-door scenario because Public Employee is a long-term employee who has remained in the same position, serving the public for the past 15 years, and Public Employee has not and is not seeking to switch jobs for personal gain.
  - b) Public Employee is not statutorily responsible for proposing legislation or regulations or participating in the final steps associated with their adoption since those duties are statutorily imposed on the Administrator.

- c) Public Employee and the team Public Employee supervises do not investigate certain activities as these matters are performed by other divisions of the Agency.
- d) Public Employee's education, experience and relationship-building throughout Public Employee's career have solely been focused on leadership and the regulated industry.
- e) Consulting will allow Public Employee to accommodate Public Employee's education schedule.
- f) Public Employee has a breadth of institutional knowledge in which Public Employee will be able to assist community partners in enhancing their businesses.
- g) There is plenty of consulting work outside Nevada's borders. However, due to the issues present in Nevada, and being raised a Nevadan, Public Employee would much rather focus Public Employee's career efforts at home.

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

##### **A. OVERVIEW OF ISSUES**

The Ethics Law promotes the appropriate separation between public duties and private interests. Public Employee is a public employee as that term is defined in NRS 281A.150 and, consequently, Public Employee has continuous responsibilities to the public to comply with the Ethics Law. Pursuant to NRS 281A.550 and 281A.410, 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 industry in a private capacity.

Public Employee questions whether the one-year "cooling-off" requirements would apply to Public Employee because Public Employee does not directly formulate policy contained in the regulations governing the business or industry, but rather, the Administrator is statutorily responsible for these duties. Further, during the immediately preceding year, Public Employee does not believe 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, but for this section, employ Public Employee as a result of Public Employee's governmental service or employment. Public Employee does not possess knowledge of the trade secrets of a direct business competitor. However, due to Public Employee's interaction with a broad array of providers across the state, Public Employee wants to ensure there would not be a conflict in providing these private services when Public Employee leaves state 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 relevant part:**

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

1. If a public officer or employee serves in a state agency of the Executive Department or an agency of any county, city or other political subdivision, the public officer or employee:

\* \* \*

(b) If the public officer or employee leaves the service of the agency, shall not, for 1 year after leaving the service of the agency, represent or counsel for compensation a private person upon any issue which was under consideration by the agency during the public officer's or employee's service. As used in this paragraph, "issue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

### **V. ISSUES/DECISION**

#### **A. Public Employee is subject to the one-year "cooling-off" provisions of the Ethics Law.**

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

The record before the Commission does not demonstrate that Public Employee possessed trade secrets or other proprietary business information of the affected businesses or industry, or their competitors. However, the record does reflect that Public Employee's duties and responsibilities for the Division include exercising control over the policy, system planning, development and monitoring aspects of the largest, most complex and comprehensive services and programs, or major components thereof, which duties implicate the provisions of NRS 281A.550(3)(a) and (b) and NRS 281A.550(5).

The complexity of the programs typically requires a large staff of specialists and other professional staff. Programs administered at this level are multi-million dollar entitlement programs or involve the collection and disbursement of millions of dollars

resulting in significant fiscal impact to the State. At this level, programs and services are provided to the broadest client base statewide. Public Employee and Public Employee's team provide research, advice and recommendations to the Administrator regarding legislative and administrative policies and provisions governing entities in partnership with the Division in providing services. Public Employee reports to the Division's Administrator and Deputy Administrator and Public Employee has direct supervisory responsibility over employees.

In Public Employee's role, Public Employee is an upper-level manager with oversight and input on the regulations and policies adopted by the Division. Public Employee testified that while Public Employee does not have the statutory duty to direct legislation and regulation of the programs under the Division's authority, Public Employee does provide input to both Public Employee's direct supervisor (Deputy Administrator) and the Administrator on the Division's legislation, implementation of various policies and best practices. In that vein, Public Employee formulates and implements policies, procedures and regulations in response to new statutory requirements. Furthermore, Public Employee's testimony demonstrated that the Division maintains an open, transparent and collective process. The Division's operations, whether they be legislative, regulatory, or audit related, are not performed in silos, but are collaborative in nature combining resources and working in an interactive and transparent manner to provide services to the citizens of the State of Nevada.

The record reflects that Public Employee's duties satisfy the requirements of NRS 281A.550(3)(a) pertaining to certain programs and services. Accordingly, in this regard, the provisions of NRS 281A.550(3) would prohibit Public Employee from accepting employment from or consulting for an entity under the Division's regulatory umbrella within one year of Public Employee's separation from public service.

The provisions of NRS 281A.550(5) are also implicated by Public Employee's public duties relating to legislative, policy and regulation recommendations, and Public Employee's role in the preparation of an RFP inviting contractors to provide certain services, including Public Employee's involvement with the contractor selection. The Division provides oversight on this major contract which exceeds \$25,000 in annual payments to the contractor. Although it appears that the original contract award was beyond the 12 month period, contract renewals may implicate the provisions of NRS 281A.550(5). Even though Public Employee has not indicated Public Employee is seeking employment with the contractor, Public Employee is advised not to solicit or accept employment from a person to whom a contract for supplies, materials, equipment or services was awarded by the Agency, as applicable, for one year after the termination of Public Employee's employment.

**B. Pursuant to NRS 281A.550(6), Relief from Strict Application of Employment Prohibitions is Appropriate with Respect to NRS 281A.550(3)**

Having established that NRS 281A.550(3) and (5) apply to Public Employee's circumstances, the Commission considers whether to grant Public Employee relief from the strict application of the one-year "cooling-off" period. Since Public Employee does not specifically seek relief from the provisions of NRS 281A.550(5) and, given the significance of the contract for services, the Commission does not grant relief with respect to NRS 281A.550(5). However, the Commission considered and does grant relief to Public Employee from the strict application of NRS 281A.550(3), as addressed below.

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, including the specific duties and nature of the Division’s regulation to determine whether Public Employee’s private-sector service would be in the best interests of the State. Accordingly, relief was considered and only applies to Public Employee’s listed future private endeavors, which includes seeking employment with a local nonprofit, assisting in certain matters which are not regulated by the Agency, consulting with out-of-state companies on certain program requirements not related to Nevada, and offering certain services as a consultant for industry partners affiliated with the Division.

Granting relief to Public Employee is appropriate because there is no evidence suggesting that Public Employee used or would use Public Employee’s former public position, relationships or information to compromise the public trust to seek a private position as a consultant, and Public Employee’s future work would be in the best interests of the public and consistent with the continued ethical integrity of State Government. See *In re Theobald*, Comm’n Opinion No. 13-44A (2013).

The record includes evidence of lengthy public service in an essential field benefiting the public. Public Employee has held the same position in the Agency for many years and leaving state service is motivated by Public Employee’s desire to further Public Employee’s education rather than switching jobs for personal gain. Public Employee has provided compelling information that Public Employee’s leaving state service does not reflect a revolving door situation and that Public Employee’s continued work in the field in Nevada, though the same jobs are in demand in other jurisdictions, will provide continued benefits to Nevadans. Public Employee has a breadth of institutional knowledge which



will enable Public Employee to assist community partners in enhancing their businesses to the benefit of the public.

Furthermore, Public Employee desires to remain in Nevada's workforce and Public Employee's services may benefit the State through Public Employee's continued ability to advise and educate private entities. The Commission has recognized, in granting relief from the strict application of the "cooling off" provisions in those situations where lengthy public service is evident, that a revolving door situation is not implicated when it is in the best interests of the State to retain talented professionals in Nevada's workforce where the loss of professionals to other jurisdictions is prevalent. See *Id.* and *Abstract Opinion 12-53A*, at pg. 12. Accordingly, on the record presented, the Commission grants Public Employee relief from the strict application of NRS 281A.550(3) with respect to the listed future private endeavors.

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

Although Public Employee has indicated that Public Employee does not desire to represent clients on proposing or considering legislative measures or administrative regulations, Public Employee is 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 Agency or Division during Public Employee's tenure. The provisions of NRS 281A.410(1)(b) are mandatory and the Commission's granting relief from the strict application of NRS 281A.550(3), pursuant to provisions of NRS 281A.550(6), does 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(3).

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).

The Commission therefore concludes, consistent with the provisions of NRS 281A.410(1)(b) and its interpretation above, that Public Employee **may not**, for one year after leaving public service, represent or counsel any clients upon any issue that was under consideration by the Agency or Division during Public Employee's tenure pursuant to NRS 281A.410(1)(b), including regulatory and legislative matters directly related to such issues. See also *In re Public Employee*, Comm'n Opinion No. 11-96A (2012). Public Employee's involvement with formulating policies, drafting regulations, and overall administration of the Division confirm that Public Employee is too intertwined with regulated issues to permit Public Employee to advise (for one year after public service) a private entity on regulatory matters, including the regulations established during Public Employee's tenure. See also, *In re Public Officer*, Comm'n Opinion No. 11-53A (2012) (Public officer and State Division administrator which regulated aspects of industry not granted relief to accept employment with regulated entity given his significant role as policy formulator).

## **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.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Relief from the strict application of NRS 281A.550(3) is granted pursuant to NRS 281A.550(6) because there is no evidence suggesting that Public Employee used or would use Public Employee's former public position, relationships or information to compromise the public trust to seek a private position as a consultant for the regulated industry, and Public Employee's future work would be in the best interests of the public and consistent with the continued ethical integrity of State Government.
4. Although Public Employee does not specifically seek relief from the provisions of NRS 281A.550(5), Public Employee is advised not to 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 one year after the termination of Public Employee's service or period of employment. Based upon this indication and the record before it, the Commission does not grant relief with respect to NRS 281A.550(5).
5. Pursuant to NRS 281A.410(1)(b), Public Employee may not represent or counsel 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 Division or Agency during Public Employee's tenure.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

The following Commissioners participated in this Opinion,<sup>3</sup> with four Commissioners voting in favor of and three Commissioners voting against the relief sought by Public Employee:

Dated this 8<sup>th</sup> day of February, 2016.

NEVADA COMMISSION ON ETHICS

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

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

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

By: /s/ Magdalena Groover  
Magdalena Groover  
Commissioner

By: /s/ Timothy Cory  
Timothy Cory  
Commissioner

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

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

By: ABSTAINED  
Keith A. Weaver  
Commissioner

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<sup>3</sup> As of the issuance of this written opinion, Commissioners Paul H. Lamboley, Gregory J. Gale and Timothy Cory no longer serve on the Commission.