



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**, Former
Public Employee, Public Entity, State of
Nevada,

Request for Opinion No. **15-49A**

Former Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Employee, a former employee of a public entity in the State of Nevada ("Public Entity"), 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 past and present 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. 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 entered into a consulting agreement for services with a public agency ("Agency") upon Public Employee's separation from public service.

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 consulting agreement entered into with the Agency for services is not within the scope of conduct regulated by the provisions of NRS 281A.550(3) or (5). Accordingly, the "cooling-off" prohibition does not apply under these circumstances. However, Public Employee is reminded that Public Employee must comply with the prohibitions set forth in NRS 281A.550 and the provisions of NRS 281A.410(1)(b) limiting any private representation of issues that were under consideration by Public Entity, Agency or other agency Public Employee represented during Public Employee's government tenure in future circumstances, if applicable.

The Commission rendered a final written Opinion stating its formal findings of fact and conclusions of law. Public Employee elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this Abstract of the Opinion with redactions to protect the confidentiality of these proceedings.

¹ The following Commissioners participated in this Opinion: Chair Lau, Vice-Chair Weaver and Commissioners Carpenter, Groover, and Shaw.

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 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

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) and/or (5) apply to prohibit Public Employee for one year after Public Employee's separation from service as a public employee, from providing private services to the Agency. If either of the prohibitions set forth in NRS 281A.550(3) or (5) apply, Public Employee seeks relief from the strict application of those provisions under NRS 281A.550(6).

III. FINDINGS OF FACT

1. Public Employee served as a public employee with the Public Entity before Public Employee resigned from public service to operate a private business (hereafter "the Private Business").
2. As a public employee for the Public Entity, Public Employee was assigned to provide services to the Agency.
3. After Public Employee was assigned to provide services to the Agency, the Agency inquired about Public Employee's interest in providing private consulting services to it as an independent contractor.
4. Initially, Public Employee turned down the offer and did not pursue the consulting services with the Agency.
5. After further discussion with the Agency, Public Employee accepted the offer. In furtherance thereof, Public Employee established the Private Business.
6. The contract to provide consulting services to the Agency by the Private Business commenced after separation from public service.

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. NRS 281A.020. 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 did not leave public service to “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.”

Rather, Public Employee left public service to provide private consulting services directly to the Agency. Public Employee contends that the consulting agreement is not within the scope of prohibited employment precluded by NRS 281A.550(3). If NRS 281A.550(3) is determined to be applicable to Public Employee’s current circumstances, Public Employee requests relief from the strict application of the law in accordance with the provisions of NRS 281A.550(6), asserting that it is in the best interests of the Agency to maintain services in protection of its interests, and such employment is not contrary to the provisions of the Ethics Law or the continued ethical integrity of State Government.

Also, 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 Public Entity, within the 12-month period immediately preceding the termination of Public Employee’s public service, NRS 281A.550(5) does not apply to the circumstances presented.

B. RELEVANT STATUTES

1) Duty to Avoid Conflicts/Public Trust

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.

V. DECISION

A. As a former public employee of Public Entity, the “cooling-off” provisions of the Ethics Law apply to Public Employee; however, the consulting agreement to provide private services to the Agency is not within the scope of the application of NRS 281A.550(3).

As a former public employee of Public Entity, 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 certain former public employees or officers in their private capacity as it relates to their former public service. NRS 281A.550(3).²

In focusing on the scope of the prohibitions delineated in NRS 281A.550(3), the consulting agreement entered into between the Agency and Public Employee is not prohibited by the statute because the contract was not entered into with “a business or industry whose activities are governed by regulations adopted by the Agency or Public Entity. The relationship between the Public Entity/Agency, as the regulator, and the employing entity, as the business or industry being regulated, is a statutory condition to the application of the one year “cooling-off” requirement. Under present circumstances, the consulting agreement is directly with the Agency rather than with the industry or business it serves to regulate.

The Agency does not regulate the private consulting services provided by Public Employee. Accordingly, Public Employee’s private services to the Agency do not violate the provisions of NRS 281A.550(3). Should circumstances change, Public Employee is reminded Public Employee must continue to comply with the prohibitions set forth in NRS 281A.550, as applicable.

² The Commission encourages public officers and employees seek guidance prior to taking action so greater assistance may be provided in advisory opinions. *In re Woodbeck*, Comm’n Opinion No. 09-71A (2012). In furtherance of education, the Commission instructs that care should be taken to comply with the Ethics Law maintaining proper separation between public duties and future private contracts with the government served. Depending on the circumstances associated with the private government contract, there are implications under the Ethics Law to NRS 281A.020, 281A.400(2), (3) and (10), 281A.410, 281A.430 and NRS 281A.550, without limitation.

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

Although the presented facts do not demonstrate conduct associated with NRS 281A.410(1)(b), 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 Public Entity, Agency or any other agency that Public Employee served in Public Employee's capacity as a public employee. The provisions of NRS 281A.410(1)(b) are mandatory. Even if the Commission were granting relief from the strict application of NRS 281A.550 pursuant to provisions of NRS 281A.550(6), such relief would not operate as an exemption to the application of NRS 281A.410(1)(b).

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) at pgs. 8-9.

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 public employee of Public Entity, 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 (5) and NRS 281A.410(1)(b).
4. Public Employee is advised that the consulting agreement for private services between the Private Business and the Agency does not fall within the scope of the prohibitions delineated in NRS 281A.550(3) because the contract was not entered into with a business or industry whose activities are governed by regulations adopted by the Public Entity or the Agency.
5. Public Employee’s current circumstances do not implicate the provisions of NRS 281A.550(5), prohibiting certain employment for a one-year period from a person which was awarded particular contracts by the State or its political subdivisions, within the previous 12-month period. However, Public Employee is reminded of the duty to comply with these provisions as a former public employee.
6. Public Employee’s current circumstances do not 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 service on any issues that were under consideration by the Public Entity, Agency or any other agency that Public Employee served during Public Employee’s tenure. However, Public Employee is reminded of Public Employee’s duty to comply with these provisions as a former public employee.

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 a majority voting in favor and one Commissioner voting against the relief sought by Public Employee.

Dated this 12th day of July, 2016.

NEVADA COMMISSION ON ETHICS

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

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

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

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

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