



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 Officer**, Manager,
Public Entity, State of Nevada,

Request for Opinion No. **15-75A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

A public officer ("Public Officer"), of a department within a Public Entity ("Public Entity") of the State of Nevada, requested this advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) and NRS 281A.550(6) regarding the propriety of Public Officer's 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 quorum¹ of the Commission heard this matter. Public Officer appeared and provided sworn testimony. Public Officer was represented during the Commission proceedings by legal counsel.

Public Officer sought an opinion from the Commission regarding the applicability and/or relief from the strict application of the "cooling-off" requirements under the Ethics Law if Public Officer were to accept private employment from a business ("Business Entity") that is licensed and/or regulated by the Public Entity within one year after termination of public service.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and advised Public Officer of its decision that the "cooling-off" provisions are applicable to Public Officer's circumstances. Further, the Commission does not grant relief from the strict application of those prohibitions based upon the Commission's determination that relief from the strict application of the provisions of NRS 281A.550(3) is not in the best interest of the public, the continued ethical integrity of the State Government, and the provisions of the Ethics Law.

Public Officer 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 Officer. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact have been in part redacted to protect confidentiality and were determined from the testimony and facts presented in the record of proceedings before the Commission. Facts and circumstances that differ from those presented to and

¹ The following Commissioners participated in this opinion: Chair Cheryl A. Lau, Vice-Chair Keith A. Weaver and Commissioners Magdalena Groover, James M. Shaw and Dan H. Stewart.

relied upon by the Commission may result in different findings and conclusions than those expressed in this Opinion.

II. FINDING OF FACTS

1. Public Officer has a long-term career in public service and is the manager of a department ("Department") of the Public Entity.
2. One of the functions of the Department is enforcement of regulations and compliance of certain Business Entities regulated by Public Entity.
3. Public Officer's responsibilities and duties for the Public Entity include supervision of staff, overseeing administrative and regulatory matters, and development and processing of regulations affecting certain businesses within the Industry.
4. Public Officer seeks to accept a manager position within the non-regulated aspects of a Business Entity that is otherwise regulated by the Public Entity.
5. Public Officer indicates that NRS 281A.550(3) does not apply to the proposed job position with the Business Entity because:
 - a. Public Officer's duties for the Department of the Public Entity do not include formulating policy for the non-regulated aspects of the Business Entity;
 - b. Public Officer did not directly perform activities, or control or influence an audit, decision, investigation or other action, which significantly affected the regulated Business Entity anticipated to employ Public Officer; and/or
 - c. Public Officer does not possess knowledge of the trade secrets of a direct business competitor of the Business Entity.
6. Public Officer indicates that as part of his/her public job duties, he/she only makes recommendations on policy but does not directly institute policy.
7. Although Public Officer is responsible for supervision of employees whose duties include controlling or influencing an audit, decision, investigation or other action which significantly affected the regulated industry during the past year, Public Officer did not directly perform the job duties of subordinates.
8. Through public service, Public Officer has become acquainted with representatives within the regulated industry. One of these individuals inquired whether Public Officer would be interested in a management position in the non-regulated aspects of the business. In furtherance of the inquiry, Public Officer developed a job proposal for the manager position of the non-regulated aspects of the Business Entity.
9. After developing Public Officer's future job proposal, Public Officer met with a representative of the Business Entity and was offered the management position.
10. Public Officer hopes to use Public Officer's professional qualifications in the manager position for the Business Entity. Public Officer is very concerned that if Public Officer was required to wait a year and decline this opportunity, Public Officer would not be presented with such a unique opportunity in the future. Other opportunities are difficult to find since the network of Public Officer's business professionals are limited to the regulated industry. These professionals are familiar with Public Officer's dedication to the job, knowledge and hard work ethic.

11. Public Officer did not provide other factual background or information regarding why relief from the “cooling-off” prohibitions of NRS 281A.550(3) is appropriate under the principles set forth in NRS 281A.550(6).

III. QUESTIONS PRESENTED

Public Officer questions whether the “cooling-off” provisions of NRS 281A.550(3) are applicable and/or whether relief from the strict application of such provisions is appropriate, allowing Public Officer to accept employment as a manager in a non-regulated aspect of the regulated Business Entity.

IV. ISSUE STATEMENT

This case presents an opportunity for the Commission to distinguish the applicable industry considerations within the “cooling-off” requirements of the Ethics Law which are related to requests by public officers and employees of public agencies who seek relief based upon a multitude of proposed exceptions and/or considerations. In this case, Public Officer asserts that the specific functions of any department of the Public Entity limits the applicability of the “cooling-off” singularly to those functions or businesses regulated by the employing department and further, that employment in the non-regulated aspects of the industry is not prohibited. This ignores the industry component referenced in NRS 281A.550(3) and, in this case, the agency of the Executive Department of State Government referenced in the statute is the Public Entity regulating the industry, not its separate departments.

V. 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) provides:

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.

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.

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.

5. Improper Use of Government Position

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

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

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

VI. DECISION

A. A Manager of a department of Public Entity is a public officer under NRS 281A.160 and is therefore subject to the one year "cooling-off" provisions of NRS 281A.550(3).

The "cooling-off" requirements of NRS 281A.550(3) prohibit any actual or perceived *quid pro quo* wherein a public officer/employee secures favors in the public sector for the return of a favor in the private sector. As the Commission has confirmed:

Concepts of "cooling-off" and "revolving-door" are integral to principles of ethics in government. The Nevada legislative history notes several concerns that prompted its adoption: (a) efforts to lobby, persuade, or gain favor of former colleagues in regulatory matters; (b) public investment and training in expertise for regulatory service; (c) return of public confidence for investment and training in expertise; (d) access to proprietary, confidential, sensitive or beneficial internal information or technology regarding competitors in a regulated industry; (e) eliminate the perception or appearance of impropriety in regulated matters; (f) keep, maintain or restore public confidence in public service as well as regulatory structure; and (g) prevent a regulator from using information and public service merely for private gain or profit. See Minutes, Senate Bill No. 329, Senate Committee on Judiciary, April 13, 1987 and Assembly Committee on Government Affairs, May 11, 13 and 20, 1987, 64th Nevada Legislative Session, and Minutes, Assembly Bill No. 90, Assembly Committee on Government Affairs, January 28, 1993 and March 10 and 25, 1993 and Senate Committee on Government Affairs, May 10, 1993 and July 1, 1993, 67th Nevada Legislative Session.

In re Public Officer, Comm'n Opinion No. 13-09A (2013) at p. 11.

Under NRS 281A.550(3), Public Officer, as a manager of the Department, is prohibited from soliciting or accepting employment from an entity or industry whose activities are regulated by the Public Entity for one year after the termination of Public Officer's public service if any one of the following criteria are met: (a) Public Officer's principal duties included formulating policy contained in regulations governing the industry

(NRS 281A.550(3)(a)); (b) within the immediately preceding year, Public Officer directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business or industry which might otherwise employ Public Officer (NRS 281A.550(3)(b)); or (c) Public Officer has obtained trade secrets of a direct business competitor (NRS 281A.550(3)(c)).

1. NRS 281A.550(3)(a) – Policy Formulation

The Public Entity provides recommended amendments to laws and regulations governing the regulated industry. Public Officer asserts that the various departments only make recommendations but do not directly formulate or institute policy. However, in *In re Public Employee*, Comm’n Opinion No. 09-80A (2012), the Commission confirmed that recommendations which impact or influence policy formulation are within the purview of NRS 281A.550(3)(a) even if the agency makes the ultimate decisions. *Id* at p. 2.

Further, as the Manager of the Department of the Public Entity, Public Officer oversees and manages the operations conducted by the Public Entity, including matters within the purview of NRS 281A.550(3)(a). As part of Public Officer’s employment, Public Officer formulates recommended policies based on the experiences of the Public Entity for best practices by the Public Entity. Public Officer’s policy recommendations may be derived from suggestions of subordinates, but Public Officer has the ultimate responsibility to report to the Public Entity’s Board as a Manager of the Department of the Public Entity, and Public Officer’s recommendations as a manager carry significant weight and influence beyond those which may be deemed subject to levels of supervisory review. See *In re Public Employee*, Comm’n Opinion No. 11-50A (2012).

Public Officer seeks to distinguish Public Officer’s involvement in policy formulation as unrelated to the non-regulated aspects of the regulated Business Entity which seeks to employ Public Officer. However, the analysis is flawed under application of NRS 281A.550(3)(a), which references employment by the business *or industry* that is regulated by the Public Entity regardless of the various aspects or operations of the business or industry. Here, Public Officer seeks to work for a business that is directly regulated by the Public Entity. Whether the specific employment falls within the scope of regulations enforced by the Public Entity may be relevant to whether relief is appropriate but not whether the statute applies. Therefore, the Commission determines that Public Officer’s principle duties include policy formulation, which subjects Public Officer’s to the “cooling-off” provisions of NRS 281A.550.

2. NRS 281A.550(3)(b) – Activities affecting Industry

Public Officer indicates that a portion of the operations of the Business Entity are not directly regulated by Public Entity. Therefore if the non-regulated aspects are separated from regulated activities, Public Officer has not directly performed activities or otherwise controlled or influenced an audit, decision or other action which significantly affected the business or industry which might otherwise employ Public Officer. Public Officer also indicates that with respect to the Business Entity, the Public Entity has not directly performed an activity within the parameters of NRS 281A.550(3)(b) during the past year. Nevertheless, Public Officer confirms Public Officer has provided oversight on a number of regulatory or compliance matters listed in NRS 281A.550(3)(b) during the preceding year.

However, the provisions of NRS 281A.550(3)(b) and for that matter NRS 281A.550(3)(c)(addressed below), which reference the regulated business and the

regulated industry, are not so limited or narrow in application as to only apply to those specific businesses regulated by a department. Rather, the statutory determination is whether Public Officer directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business *or industry* which might otherwise employ Public Officer. NRS 281A.550(3)(b) Public Officer, in Public Officer's position as a Manager of the Department of the Public Entity, had control or influence on a number of business and industry compliance matters during the past year which potentially had significant effect on the business or industry that might employ Public Officer.

3. NRS 281A.550(3)(c) – Trade Secrets

The acquisition of trade secrets of direct business competitors is not statutorily limited to the prior year. Instead, NRS 281A.550(3)(c) focuses on information of trade secrets obtained as a result of the entire governmental service of the public employee. The Commission has previously interpreted "trade secrets" in this context to include "general confidential or proprietary business information that could provide an entity with a competitive advantage" and that having such "access to confidential and/or proprietary information concerning business competitors could impose the 'cooling-off' requirements under the statute." *In re Public Officer*, Comm'n Opinion No. 13-29A (2014) at pgs. 7-8.

As a result of Public Employee's years of public service for Public Entity, Public Employee would possess knowledge of confidential or proprietary business information of direct competitors of the Business Entity. See *In re Former Public Employee*, Comm'n Opinion No. 09-48A at p. 3. The Commission determines that businesses regulated by the Public Entity and its departments would be in direct competition with the Business Entity. To rule otherwise would ignore the highly competitive environment associated with and among all types of regulated entities in Nevada.

B. Relief from the "cooling-off" restrictions of NRS 281A.550(3), is not appropriate under the principles set forth in NRS 281A.550(6)

Public Officer asserts that Public Officer's professional qualifications and experience, and history of being a dedicated and hard-working public employee, will benefit the Business Entity and will not conflict with the interests of the public. Public Officer's circumstances have certain similarities to a prior opinion of the Commission, in which it determined that:

Although the Commission has great respect and appreciation for Public Officer's public service and expertise to the State of Nevada in the regulated industry, the Commission finds that Public Officer's experiences and exposure as a high level Administrator and regulator of industry matters established far too much input into the public policies and regulations as well as competitive proprietary information to allow Public Officer to use those experiences and information in the private sector for one year. Accordingly, based upon the unique circumstances in Public Officer's case, the Commission does not grant relief from the strict prohibition.

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The Commission agrees that Public Officer's expertise and experience are undoubtedly beneficial to the State of Nevada. Nevertheless, the Commission finds that the ethical integrity of the State would be compromised by Public Officer's immediate representation of private

entities regulated by the Public Body. In particular, a competing business could argue that Public Officer had access to and information regarding proprietary information that could provide competitive advantages for Public Officer's private clients. In *In re Public Officer*, Comm'n Opinion No. 11-53A (2012), the Commission did not grant relief from the strict application of the "cooling-off" requirements for a public officer who served as an administrator of a significant State Division regulating certain aspects of the medical industry and sought immediate employment with an entity regulated by the Division.

In re Public Officer, Comm'n Opinion No. 14-49A (2014) at p. 9.

Historically, when the Commission has granted relief, the review has included and been subject to heightened scrutiny or sensitivity to assure the Legislature's prohibition is maintained and relief is provided in unique and qualifying circumstances that protect the public trust.

The Commission has "exempted several former public officers from the 'cooling-off' provisions because their skills, training and expertise would benefit the interest of the public" and "[p]ublic officers frequently acquire expertise and contacts from serving in the public capacity that my ultimately benefit Nevada through service in the private sector. *Id.* at 11. Here, the facts did not demonstrate that Public Employee's proposed employment with the Business Entity would be in the best interests of the public, the continued ethical integrity of the State Government or political subdivision, and not in contravention of the Ethics Law.

The regulated industry is primarily a commercial industry rather than an industry dealing with the public welfare where limited professionals and market forces have driven competent professionals from the State and the promotion of such professionals is of significant public interest to the State for purposes of providing for the health, safety and welfare of the public. Without an associated public benefit, the testimony, record and facts do not support relief from the "cooling-off" provisions of the Ethics Law. See *In re Public Employee*, Comm'n Opinion No. 14-46A (2014).

While leaving from long-term public service does not necessarily exemplify a "revolving – door scenario," Public Officer's connections in the industry were obtained as a result of Public Officer's public service. At a minimum, this creates an appearance of impropriety. Public Officer's experience and knowledge of the industry cannot be separated as a factor in obtaining future employment in the industry. Also, Public Officer's use of official position or contacts to seek future employment, including development of job position, implicates provisions of the Ethics Law. See NRS 281A.400(2) and (10). Accordingly, the Commission does not grant relief under the principles set forth in NRS 281A.550(6) from the strict application of the "cooling-off" provisions of NRS 281A.550(3).

C. NRS 281A.410(1)(b) Limitations

There are two separate "cooling-off" provisions under the Ethics Law. NRS 281A.550(3) limits employment while NRS 281A.410(1)(b) limits counseling and representation for compensation. Accordingly, Public Officer is advised that under NRS 281A.410(1)(b), Public Officer may not represent or counsel a private person on any issue that was under consideration by Public Officer's former Public Entity, within the authority of any of its departments, for the one-year period following termination of Public Officer's public service.

VII. CONCLUSIONS OF LAW

Based on the evidentiary record, the Commission makes the following Conclusions of Law:

1. At all times relevant to the hearing of this matter, Public Officer was a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.440(1) and NRS 281A.550(6), the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to the public officer or employee under NRS 281A.460.
3. As a manager of the Department of the Public Entity, Public Officer is subject to the “cooling-off” provisions of the Ethics Law and its restrictions prohibiting, for a period of one year, certain employment, contracts and representations by former public employees or officers in their private capacity as it relates to their prior public service. NRS 281A.550(3) and NRS 281A.410(1)(b).
4. Under the provisions of NRS 281A.550(3) and the facts and evidence presented, Public Officer is specifically prohibited from soliciting or accepting employment with the Business Entity, an entity whose activities are regulated by the Public Entity, for one year after the termination of Public Officer’s public service.
5. Relief from the strict application of the “cooling-off” provisions is not appropriate under the principles set forth in NRS 281A.550(6) because the record does not demonstrate that the future employment would not be contrary to the best interests of the public, continued ethical integrity of State government or the provisions of the Ethics Law.
6. Pursuant to NRS 281A.410(1)(b), Public Officer may not represent or counsel the Business Entity, or any other private person, for at least one year after the termination of Public Officer’s public service, on any issues that were under consideration by the Public Entity, within the authority of any of its departments, during Public Officer’s tenure and shall not appear before the Public Entity’s Board, or lobby any industry regulators or staff.

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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.

Dated this 12th day of July, 2016.

THE NEVADA COMMISSION ETHICS

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

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

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

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

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner