



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

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

Request for Opinion No. **15-76A**

Former Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

A former public employee ("Public Employee") 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 Employee's anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS"). A quorum¹ of the Commission heard this matter. Public Employee appeared and provided sworn testimony.

Public Employee 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 Employee were to accept private employment from a business entity ("Business Entity") that is licensed and/or regulated by the Public Entity within one year after termination of public service.

After fully considering Public Employee's request and analyzing the facts, circumstances and testimony presented by Public Employee, the Commission deliberated and advised Public Employee of its decision that the "cooling-off" provisions are applicable to Public Employee's circumstances. Further, the Commission does not grant Public Employee 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 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 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 Lau, Vice-Chair Keith A. Weaver and Commissioners Magdalena Groover, James Shaw and Dan H. Stewart.

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

II. FINDINGS OF FACTS

1. Public Employee is a former public employee who served as a supervisor/manager of a department (“Department”) within the Public Entity.
2. The Public Entity implements policy enforcing those laws and regulations governing certain regulated businesses through its various departments.
3. Public Employee summarizes the primary function of the Department to include financial oversight and compliance of certain businesses regulated by the Public Entity.
4. Public Employee reports directly to the Administrator of the Department and is primarily responsible for directing and managing the staff of the Department in completing certain assigned and administrative duties.
5. Public Employee seeks to accept private employment from a business entity that is regulated by another department within Public Entity indicating that the Department which employed Public Employee has virtually no role in regulating the Business Entity’s operations.
6. Public Employee’s job duties generally do not involve formulating policy contained in regulations or legislation (“regulations”) governing the businesses whose activities are governed by the Public Entity. Public Employee may have some input with regard to certain regulations in relation to word choice and formatting, which are provided to the Department Administrator, but Public Employee does not have final authority to set policy contained in the regulations.
7. Recently, Public Employee provided input regarding modification of certain regulations governing certain regulated businesses. Public Employee’s role did not include making the ultimate recommendation or policy determination on the proposed regulations, as the group’s recommendation was provided to the Department Administrator.
8. When questioned as to whether other businesses regulated by the Department would be in competition with the Business Entity, Public Employee indicated that he/she did not perceive them as business competitors, although the regulated businesses do compete for customers.
9. During the immediately preceding year, Public Employee asserts he/she has not directly performed activities or controlled or directly influenced an audit, decision, investigation or other action that significantly impacted the Business Entity or the regulated businesses.
10. Public Employee asserts that Public Employee does not possess knowledge of the trade secrets of a direct business competitor of the Business Entity.
11. Public Employee has held preliminary discussions regarding a job opportunity with the Business Entity associated with a management position.

12. In synopsis, Public Employee described the anticipated duties of the proposed job opportunity to include assisting Business Entity with regulatory compliance by another department of Public Entity.
13. Public Employee contends that bringing Public Employee's expertise garnered from long-term public service with the Public Entity to Public Employee's future potential employer would benefit the public by insuring the Business Entity continues to operate in a highly compliant manner with applicable laws and regulations.

III. QUESTIONS PRESENTED

Public Employee 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 given Public Employee's circumstances that the Department employing Public Employee has a limited role in regulating Public Employee's future potential employer and its operations. Specifically, Public Employee desires to accept a management position with a regulated Business Entity.

IV. ISSUE STATEMENT

This case presents an opportunity for the Commission to consider the applicable considerations within the "cooling-off" requirements of the Ethics Law which are related to requests by public officers and employees of the Public Entity who seek relief based upon a multitude of proposed exceptions and/or considerations. In this case, Public Employee asserts that the specific functions of a department of the Public Entity limit the applicability of the "cooling-off" to those limited functions or businesses regulated by that particular department. This ignores the business or industry component referenced in NRS 281A.550(3), and in this case the agency of the Executive Department of State Government regulating the Business Entity is the Public Entity for purposes of applying the law, not its individual 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.

→ 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.

VI. DECISION

A. A supervisor/manager of a department of Public Entity is a public employee under NRS 281A.150 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 or 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 Employee, as the former supervisor/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 Employee’s public service if any of the following criteria are met: (a) Public Employee’s principal public duties included formulating policy contained in regulations governing certain businesses (NRS 281A.550(3)(a)); (b) Within the immediately preceding year, Public Employee directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business or industry which might otherwise employ Public Employee (NRS 281A.550(3)(b)); or (c) Public Employee has obtained trade secrets of a direct business competitor (NRS 281A.550(3)(c)).

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

Public Entity performs policy formulation through its individual departments. Departments of the Public Entity provide recommendations on how best to implement industry-related policies and regulations for businesses regulated by that department. Public Employee’s job duties did not primarily involve the formulation of policies contained in regulations governing the businesses whose activities are governed by the Public Entity. Public Employee testified he/she had input with regard to certain regulations during

the past year, but Public Employee did not have final authority to set policy contained therein.

Each department of the Public Entity that regulates varied businesses establishes associated policy and regulations. The regulations established by the employing Department govern certain businesses, but such regulations do not apply to the Business Entity seeking to employ Public Employee. Nonetheless, NRS 281A.550(3)(a) references “formulating policy contained in regulations governing the “business” or “industry” rather than regulations enforced by a particular department of the Public Entity or specifically applicable to the public officer or employee’s future prospective employer.

With regard to whether Public Employee formulates policy by making recommendations to the Department Administrator, 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.

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

As the former supervisor/manager of the Department, Public Employee directly supervised employees who directly performed compliance matters associated with regulated businesses. Public Employee’s experience and recommendations to the Department Administrator carried significant weight because Public Employee’s principle duties included managing and overseeing employees responsible for interpreting, amending, and enforcing the regulations of the Department, and Public Employee’s recommendations to the Department Administrator were not subject to layers of supervisory review. *See In re Public Employee*, Comm’n Opinion No. 11-50A (2012)(a member of upper management is in the position to formulate and make policy recommendations).

Public Employee indicates that the Department has virtually no role in regulating the Business Entity or any of its direct competitors. Also, Public Employee believes that, during the immediately preceding year, Public Employee had not directly performed activities, or controlled or influenced an audit, decision, investigation or other action that significantly impacted the Business Entity or other regulated businesses. Despite Public Employee’s contentions to the contrary, the provisions of NRS 281A.550(3)(b) and (c), as applicable to the regulated businesses or regulated industry, are not specifically restricted by the regulatory oversight conducted with respect to the prospective employer within the immediately preceding year. Rather, the statutory determination is whether Public Employee directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business *or industry* which might otherwise employ the Public Employee (NRS 281A.550(3)(b)). The facts presented demonstrate that Public Employee, as supervisor/manager for the Department, had control or influence on a number of industry compliance matters in the past year, which potentially had significant effect on the business or industry that might otherwise employ Public Employee.

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. Further, Nevada highly regulates the competitive industry. 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 Employee asserts that bringing Public Employee’s expertise garnered from long-term public service to the Public Entity to Public Employee’s future potential employer would benefit the public by ensuring the Business Entity continues to operate in a highly compliant manner with applicable laws and regulations.

Public Employee is recognized for service to the public as a long-term employee of the Department. Public Employee’s circumstances have 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.

...

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 Entity. 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 may ultimately benefit Nevada through service in the private sector.” *Id.* At p. 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 in question 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).

Additionally, while leaving long-term public service does not necessarily exemplify a “revolving – door scenario,” Public Employee’s experience and knowledge of the regulated businesses cannot be separated as a factor in obtaining future employment. In particular, Public Employee’s future job position’s principle duties of regulatory compliance with Nevada statutes and regulations constitute the type of employment NRS 281A.550(3) restricts for a one year “cooling-off” period.

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 Employee is advised that under NRS 281A.410(1)(b), Public Employee may not represent or counsel a private person on any issue that was under consideration by Public Employee’s former employer, the Public Entity, within the authority of any of its departments, for the one-year period following termination of Public Employee’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 Employee was a public employee as defined by NRS 281A.150.
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 former supervisor/manager of the Department of the 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 NRS 281A.410(1)(b).

4. Under the provisions of NRS 281A.550(3) given the facts and evidence presented, Public Employee 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 Employee'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 Employee may not represent or counsel the Business Entity, or any other private person or entity, for at least one year after the termination of Public Employee's public service, on any issues that were under consideration by the Public Entity, within the authority of any of its departments, during Public Employee's tenure, and Public Employee shall not appear before the Public Entity or lobby any regulators or staff.

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