



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**, Member
of Governing Body, Public Entity,
State of Nevada,

Request for Opinion No. **16-14A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer ("Public Officer"), as member of the governing body ("Governing Body") of a Public Entity in the State of Nevada ("Public Entity"), has requested this advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of Public Officer's past, current and/or 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 sought an opinion from the Commission regarding Public Officer's disclosure and abstention obligations as a member of the Governing Body regarding matters that come before the Public Entity that may affect Public Officer's spouse, who is an employee of the Public Entity. Public Officer recognizes there are implications of disclosure and abstention on matters that come before the Governing Body that may benefit Public Officer's own private interests or Public Officer's spouse's pecuniary interests and is seeking advice from the Commission to instruct on whether disclosure and/or abstention are necessary for such matters, including those circumstances that demonstrate that the detriment/benefit to Public Officer's spouse is not more or less than for other staff of the Public Entity.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission advises Public Officer of its decision that Public Officer's anticipated past, present and/or future conduct has potential to implicate the provisions of NRS 281A.020, NRS 281A.400(2), NRS 281A.400(9), and NRS 281A.420. Public Officer has a pecuniary interest in Public Officer's spouse's income and benefit packages under community property laws and by virtue of Public Officer's legal or financial position.

The Commission advises Public Officer of Public Officer's statutory obligations for proper disclosure of Public Officer's private interests and relationships, including the effect on these interests by matters under consideration by the Governing Body, in compliance with the Ethics Law and the issued opinions by the Commission. For reference in this opinion, matters relating to Public Officer's spouse's private interests in

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

employment, salary, benefits, promotions, disciplinary matters, litigation or similar matters are collectively referred to as “Personnel Matters.” Public Officer’s duty to provide a proper disclosure and abstain on matters pertaining to Public Officer’s spouse, including Personnel Matters, in conformance with the Ethics Law and interpretive opinions, shall continue so long as Public Officer serves in a public position with authority over Public Officer’s spouse’s employment.²

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 set forth below accept as true those facts Public Officer presented. Facts and circumstances that differ from those presented to and relied upon by the Commission in this Opinion may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTION PRESENTED

In Public Officer’s capacity as an elected member of the Governing Body, Public Officer seeks guidance concerning Public Officer’s disclosure and abstention obligations under the Ethics Law due to Public Officer’s spouse’s employment with the Public Entity. Public Officer acknowledges the need to properly disclose the full nature and extent of Public Officer’s relationship with Public Officer’s spouse, a person to whom Public Officer has a commitment in a private capacity, on any Personnel Matter or other items that have a material effect on Public Officer or Public Officer’s spouse’s personal or significant pecuniary interests and abstain from any involvement or participation on such matters. Public Officer specifically requests guidance regarding Public Officer’s ability to participate in personnel and budget matters that are general in nature and not specifically related to Public Officer’s spouse.

III. FINDINGS OF FACT

1. Public Officer serves as a member of the Governing Body for the Public Entity.
2. The Public Entity is a political subdivision in the State of Nevada.
3. The Governing Body is responsible for establishing policies that govern administration of the Public Entity and oversees its operations and expenditures. The Governing Body reviews and approves the annual budget for the Public Entity and considers many matters affecting Public Entity employees, including budgetary matters, employment contracts, working conditions, and establishing compensation and benefit packages.
4. Public Officer’s spouse is employed by the Public Entity.
5. Public Officer’s spouse is supervised by the Public Entity’s Administrator (“Administrator”).
6. The Governing Body has the authority to hire and terminate the Administrator. The Governing Body also has the authority and responsibility to evaluate the

² Hypothetically, even divorced spouses may maintain pecuniary interests to one another. Duties under the Ethics Law may continue when the legal relationship of the parties is altered.

Administrator's job performance. The Administrator supervises all administrative activities and operations of the Public Entity in accordance with policies prescribed by the Governing Body.

7. In Public Officer's future tenure as a member of the Governing Body for the Public Entity, Public Officer anticipates that the following matters likely will be discussed and voted on by the Governing Body during public meetings:
 - a. Annual budget, which may include salary increases or pay incentives that would benefit the entire staff, including Public Officer's spouse.
 - b. Annual performance evaluation of the Administrator, who is Public Officer's spouse's supervisor.
 - c. Disciplinary issues related to any staff member, which group includes Public Officer's spouse.
 - d. Job restructuring for all staff that may result in work load changes or increased job duties of staff members, including Public Officer's spouse.
8. Public Officer desires to continue Public Officer's service to Public Officer's community while working within the bounds of the Ethics Law in order to maintain the integrity of the Public Entity and Public Officer.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

A public officer must commit himself/herself to avoid actual and perceived conflicts of interest between his or her public duties and personal interests (NRS 281A.020). The citizens of Nevada have a right to be assured to the fullest possible extent that the private financial dealings of their governmental representatives present no conflict of interest between public resources/duties and private gain/interests. The Ethics Law promotes the appropriate separation between public duties and private interests. The Commission has long maintained the intent of the Ethics Law, currently set forth in NRS Chapter 281A, as follows:

The apparent intent of the provisions of NRS Chapter 281 [now NRS Chapter 281A]...is to prevent public officers and employees from becoming involved in situations generating conflicts between private and public interests so as to preserve and enhance impartiality of public office and faith in the integrity of government. Policy objectives for ethics in government laws in general include:

- Impartiality, fairness and equality of treatment toward those dealing with government.
- Assurance that decisions of public importance will not be influenced by private considerations.
- Maintenance of public confidence in government (wherein enters the matters of appearances).
- Prevention of use of public office for private gain.

A conflict of interest (either actual or potential) is a situation requiring a public officer to serve two masters, presenting a potential; rather than an

actuality, of wrongdoing. The wrongdoing does not have to actually occur in order for a prohibited conflict to exist. A public official may have done no wrong in the ordinary sense of the word, but a conflict of interest may put him in danger of doing wrong. It is avoiding even the potential of doing wrong which is the focus of ethics in government laws.

For this purpose, ethics in government laws identify certain types of conflicts of interest and prohibit conduct by public officials that would allow these conflicts to affect decisions of the public official...

In re Public Officer, Comm'n Opinion No. 99-57 (2000) at p.3, cited by *In re Dressler*, Comm'n Opinion No. 00-12 (2000), *In re Public Officer*, Comm'n Opinion No. 01-14 (2001) and *In re Public Officer*, Comm'n Opinion No. 02-01 (2002).

In this Opinion, the Commission advises on the disclosure and abstention requirements of NRS 281A.420 applicable to Public Officer to ensure that proper separation is maintained between Public Officer's public duties and Public Officer's private interests and commitment in a private capacity to Public Officer's spouse, who is an employee of the Public Entity. The Commission appreciates Public Officer's recognition of these potential conflicts and Public Officer's desire to fully understand the ethics implications under NRS Chapter 281A that apply to Public Officer's situation.

B. RELEVANT STATUTES

1. Duty to Avoid Conflicts of Interest

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. Use of Government Position to Secure or Grant Unwarranted Privileges, Preferences, Exemptions or Advantages, or Improperly Influencing a Subordinate

NRS 281A.400(2) and (9) provide:

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.

...

9. A public officer or employee shall not attempt to benefit the public officer's or employee's personal or financial interest through the influence of a subordinate.

3. “Commitment in a private capacity”

NRS 281A.065 provides:

“Commitment in a private capacity,” with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption or marriage or domestic partnership within the third degree of consanguinity or affinity;
4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subparagraphs 1 to 5, inclusive.

4. Disclosure and Abstention

NRS 281A.420(1), (3) and (4) provide:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

- (a) Regarding which the public officer or employee has accepted a gift or loan;
- (b) In which the public officer or employee has a significant pecuniary interest; or
- (c) Which would reasonably be affected by the public officer’s or employee’s commitment in a private capacity to the interests of another person,

without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer’s or employee’s significant pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer’s or employee’s organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

...

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

- (a) The public officer's acceptance of a gift or loan;
- (b) The public officer's significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of another person, accruing to the other person, is not greater than that accruing to any other member of any general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

V. DECISION

A. A *Per Se* Commitment in a Private Capacity Exists

Pursuant to NRS 281A.065(1), a public officer has a *per se* commitment in a private capacity to the interests of his/her spouse. Under a hypothetical scenario, it is possible that Public Officer's relationship with Public Officer's spouse will at some point in the future no longer qualify as a commitment in a private capacity to the interests of others under NRS 281A.065; however, the relationship with a former spouse³ likely is within the

³ The Commission previously found that a relationship with a former spouse was too attenuated to qualify as a commitment in a private capacity. See *In re Hoefer*, Comm'n Opinion No. 03-05A (2003) ("*Hoefer*"). However, the facts in *Hoefer* indicated that Mr. Hoefer had no pecuniary interest related to his former spouse or a commitment to her in a private capacity because they had been divorced for approximately 15

requirements of NRS 281A.065(6), which encompasses those commitments, interests or relationships that are substantially similar to those described in subsections 1 through 5 of NRS 281A.065. Accordingly, Public Officer should remain cognizant of his/her commitments and the ongoing application of the provisions of the Ethics Laws described herein.

B. Disclosure and Abstention

1. Introduction

The Commission recognizes the public policy attributes of NRS 281A.420(4), which instruct that appropriate weight and proper deference be given to the public policy of this State, which favors the right of a public officer to perform the duties for which the public officer was appointed and to otherwise act upon a matter, provided the public officer has properly disclosed the public officer's commitment in a private capacity to the interests of another person in the manner required.

The Commission has previously discussed the disclosure and abstention standards applicable to spouses in a number of cases involving a school board member's approval/disapproval of matters related to the terms and conditions of employment of a spouse employed by the school district. *In re Public Employee*, Comm'n Opinion No. 10-73A (2010) (citing *In re John Louritt and Keith Roman*, Comm'n Advisory Opinions Nos. 03-43 and 03-44 (2003) (hereafter "School District Opinions")). Although the Commission issued the School District Opinions prior to amendments to the Ethics Law, the foundational reasoning of the opinions remains sound because they were issued to members of the school board who held a pecuniary interest in the salary of their spouses. Further, the School District Opinions remain instructive with respect to disclosure and abstention under the Ethics Law given the current requirements of NRS 281A.400(2) and NRS 281A.420(1) and (3).

In *In re Public Employee*, Comm'n Opinion No. 10-73A, the Commission advised that, at the very least, NRS 281A.420(1) required the school board member to publicly disclose the spouse's employment status when the Governing Body considers issues that concern the spouse and her employment with the school district, particularly matters that directly affect or focus on "the terms and conditions of employment." The Commission also instructed that a school board member whose spouse is employed with the school district must "conduct an abstention analysis under NRS 281A.420(3), and must abstain from acting on matters in which the independence of judgment of a reasonable person in Public Officer's position would be affected." *Id.* at 4. In the School District Opinions, as in this case, the public officers had a pecuniary interest in the salary received by a spouse and held final authority over decisions that affected the spouse's terms and conditions of employment, resulting in the existence of conflicts of interest based upon familial relationships that must be properly disclosed and that required an analysis regarding abstention be conducted.

2. Private Interests/Personnel Matters

The Commission advises that Public Officer must properly disclose the full nature and extent of Public Officer's relationship with Public Officer's spouse as it relates to Personnel Matters. Public Officer is reminded that a disclosure required by the Ethics Law

years, their two children were independent adults and the former spouse was not a member of Mr. Hoefer's household. Additionally, there was no evidence in *Hoefer* that Mr. Hoefer had any financial obligations to or a substantial continuing business relationship with his former spouse.

during a public meeting must occur “at the time the matter is considered.” NRS 281A.420(1). The Ethics Law does not recognize a continuing disclosure or a disclosure by reference. The purpose of disclosure is to provide sufficient information regarding the conflict of interest to inform the public of the nature and extent of the conflict and the potential effect of the action or abstention on the public officer’s private interests, including a commitment in a private capacity to the interests of others. Silence based upon a prior disclosure at a prior meeting fails to inform the public of the nature and extent of the conflict at the meeting where no actual disclosure occurred. (See *In re Buck*, Comm’n Opinion No. 11-63C (2011) (holding that incorporation by reference of her prior disclosure, even though based upon the advice of counsel, did not satisfy the disclosure requirements of NRS 281A.420(1)).

Public Officer has a duty to conduct an abstention analysis under NRS 281A.420(3), and must abstain from acting on matters in which the independence of judgment of a reasonable person in Public Officer’s position would be affected. Specifically, Public Officer is advised that Public Officer clearly has an obligation to abstain when the Governing Body considers Personnel Matters related to Public Officer’s spouse. If, in the future, Public Officer has a question about application of the Ethics Law to matters relating to his/her spouse, Public Officer may seek a first-party advisory opinion from the Commission.

Public Officer is reminded that public officers and employees are accountable to their constituents or their appointing authority and, therefore, the burden is appropriately on the public officer or employee to disclose private commitments and the effect those private commitments can have on the decision-making process and to make a proper determination regarding abstention where a reasonable person’s independence of judgment would be materially affected by those private commitments. *In re Woodbury*, Comm’n Opinion No. 99-56 (1999); *In re Boggs-McDonald*, Comm’n Opinion No. 01-12 (2001).

3. General Public Entity Administrator and Budget Matters

Public Officer questions whether Public Officer may participate in certain important Public Entity functions involving general budget matters and/or the Administrator, including Governing Body supervision and policy direction, provided that such matters do not directly implicate Public Officer’s spouse and associated Personnel Matters, for which Public Officer has been advised to disclose and abstain in this Opinion. With respect to Administrator and general budget matters discussed by the Governing Body at a public meeting, given the requirements of NRS 218A.420, Public Officer is advised that Public Officer must provide the public with a proper disclosure with respect to Public Officer’s private interests, including Public Officer’s spouse; however, abstention does not appear to be required in those circumstances where the matter does not provide Public Officer’s spouse a direct benefit/detriment and provided that the benefit/detriment provided is not lesser or greater than provided to other Public Entity staff members. This analysis will need to be conducted for all Personnel Matters considered by the Governing Body.

It is specifically noted that the stated requirements of NRS 281A.420(4)(b) permitting participation applies only in those circumstances where there has been: (1) A proper disclosure under the Ethics Law; and (2) A reasonable person in the public officer’s situation would not be affected by the significant pecuniary interest or commitment in a private capacity to the interest of others. In particular, the Commission advises Public Officer that Public Officer clearly has an obligation to abstain when the Governing Body considers the terms and conditions of Public Officer’s spouse’s employment, including associated Personnel Matters. So, a review of specific budget matters should be

performed prior to the public meeting in order to ascertain the applicability of the Ethics Law and, if there is a concern, Public Officer is advised to contact the official legal counsel for the Public Entity or seek a first-party advisory opinion from the Commission.

C. Attempting to Influence a Subordinate

According to the Public Entity's organizational chart, the Administrator is hired by the Governing Body. Consequently, Public Officer sits in a position, as a member of the Governing Body, which would permit Public Officer to improperly attempt to influence the Administrator in matters affecting Public Officer's spouse's employment. However, Public Officer has not presented any past, present or future conduct that implicates NRS 281A.400(9). Nevertheless, Public Officer is reminded that Public Officer remain cognizant of Public Officer's duty to honor the public trust and act impartially and in the best interests of the public by avoiding conflicts with any private interests, in particular regarding Public Officer's conduct with respect to the Administrator that may affect Public Officer's spouse's employment. See NRS 281A.020.

D. A *Per Se* Conflict Exists Warranting Vigilance to Avoid Use of Government Position to Secure Unwarranted Preferences

Public Officer appropriately recognizes that, given Public Officer's position on the Governing Body, Public Officer has a *per se* conflict of interest between Public Officer's private commitment to Public Officer's spouse and Public Officer's public duties, which means that a public officer in Public Officer's situation reasonably would be materially affected by Public Officer's significant pecuniary interest or commitment in a private capacity to the interests of Public Officer's spouse and family. Consequently, Public Officer must remain vigilant to avoid this conflict and to fulfill Public Officer's duties to the public. In doing so, Public Officer desires to adhere to the requirements of NRS 281A.400(2) and avoid using Public Officer's position as a public officer to secure or grant unwarranted privileges, preferences, exemptions or advantages to Public Officer's spouse or tangentially to the family.

In regard to Public Officer's general question on future matters coming before the Governing Body, Public Officer is advised to review the agenda item and consider the effect on Public Officer's own private interests and/or the private interests of Public Officer's spouse, including Personnel Matters. If it implicates the *per se* conflict discussed in this Opinion, or if the independent judgment of a reasonable person would be affected by such private interests, the disclosure and/or abstention requirements of NRS 281A.420 are implicated and must be complied with by Public Officer. "The Ethics Law protects the public through appropriate disclosure and abstention provisions when a public officer has a private interest in a public matter regarding which she has some authority or influence." *In re Public Officer*, Comm'n Opinion No. 12-15A (2012) at pg. 5. If a specific matter creates ambiguity or a question, Public Officer may consult the official legal advisor for the Public Entity or return to the Commission for a specific opinion on a precise factual matter.

VI. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Public Officer was a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.

3. Considering Public Officer's official duties as a member of the Governing Body, including authority over decisions related to Personnel Matters associated with Public Officer's spouse, Public Officer has a *per se* conflict of interest between Public Officer's private commitment to Public Officer's spouse and Public Officer's public duties as a member of the Governing Body.
4. Pursuant to NRS 281A.420(1), Public Officer must disclose the full nature and extent of Public Officer's relationship with Public Officer's spouse and the associated effect of any actions to be taken by Public Officer in Public Officer's official capacity on Public Officer's spouse's private interests, including Personnel Matters. Such a disclosure must be made at the time the matter is heard at each public meeting.
5. Pursuant to NRS 281A.420(3), Public Officer must also abstain from participating in or acting on any Personnel Matters or other matters affecting Public Officer's spouse.
6. Public Officer's duty to properly disclose and maintain abstention in conformance with the Ethics Law and interpretive opinions shall continue so long as Public Officer serves in a public position with authority over Public Officer's spouse.
7. With the exception of matters affecting Public Officer's spouse that require disclosure and abstention under the Ethics Law, the Commission concludes that Public Officer is not prohibited from participating in discussion and voting regarding the Administrator or the general budget for the Public Entity provided such matters do not provide a benefit/detriment to Public Officer's spouse that is greater or lesser than that of other staff of the Public Entity.

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 30th day of June, 2016.

NEVADA COMMISSION ON ETHICS

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

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

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

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

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

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