



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,
Public Body, Public Entity,
State of Nevada,

Request for Opinion No. **16-58A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer ("Public Officer"), a member of a Public Body for a State of Nevada Public Entity ("Public Entity"), requested this advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of Public Officer'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 on August 17, 2016. Public Officer appeared telephonically and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding the applicability or relief from the strict application of the "cooling-off" requirements under the Ethics Law if Public Officer were to contract with or accept employment from a private entity that represents various clients, some of which may be regulated by the Public Body, upon leaving State service.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and orally advised Public Officer of its decision that Public Officer's anticipated employment with the private entity is not within the scope of conduct regulated by the provisions of NRS 281A.550(3) and the provisions of NRS 281A.550(5) are not relevant to Public Officer's current circumstances. Accordingly, the "cooling-off" prohibition does not apply under these circumstances. However, Public Officer is advised that Public Officer must otherwise comply with the prohibitions set forth in NRS 281A.550 in the context of other employment considerations and NRS 281A.410(1)(b) for any private representation of issues that were under consideration by the Public Body during Public Officer's service with Public Body.

The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.

Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this abstract of the Opinion.

¹ The following Commissioners participated in this opinion: Chair Cheryl Lau and Commissioners Magdalena Groover, Barbara Gruenewald and Dan H. Stewart. Vice-Chair Keith A. Weaver disclosed a conflict of interest and abstained from participating or voting in this matter.

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

II. QUESTION PRESENTED

Public Officer questions whether the "cooling-off" provisions of the Ethics Law set forth in NRS 281A.550 and NRS 281A.410 prohibit Public Officer, for one year after Public Officer's separation from service as a member of Public Body, from soliciting or accepting employment with a private entity that may have clients who are regulated by Public Body. If the prohibitions of NRS 281A.550 apply, Public Officer seeks relief from the strict application of those provisions under NRS 281A.550(6).

III. FINDING OF FACTS

1. Public Officer serves as a member of Public Body.
2. Prior to Public Officer's tenure with Public Body, Public Officer served in various other public positions, including a position which ended within a year prior to the issuance of this opinion.
3. Public Body administers and enforces Nevada laws concerning the regulation of certain businesses and industries.
4. Public Body is charged with enforcing the health and safety standards and adopting regulations for industry entities.
5. Public Body appoints a position that is responsible for: 1) directing the daily operation of Public Body, including the budget, administration, human resources, purchases and acquisitions, and contracts and leases; 2) developing and implementing policies and procedures; 3) overseeing applications; 4) maintaining the hearing calendar of all matters of Public Body; and 5) overseeing compliance of State statutes and regulations pertaining to businesses regulated by Public Body.
6. Public Body conducts hearings to adjudicate certain compliance issues of regulated entities. It also conducts public hearings and workshops on new or revised regulations, and regular meetings to act on matters over which it has regulatory jurisdiction.
7. Public Officer has a role in overseeing staff.
8. Public Officer's duties include:
 - a. Formulating policies contained in regulations governing industry entities;
 - b. Recommending and rendering decisions affecting members of the regulated industry;
 - c. Reviewing proprietary/confidential company information, only on very rare occasions; and

- d. Overseeing the operations of Public Body (e.g., budget, HR, media, legislation, etc.).
9. After Public Officer's tenure with Public Body, Public Officer intends to pursue private employment opportunities outside government employment.
10. Public Officer is not seeking employment with any particular entity, but is seeking to offer Public Officer's professional services as a consultant to private entities which are not regulated by Public Body but which may represent clients that are regulated by Public Body.
11. Public Officer's anticipated primary job duties would include providing representation before federal, state and municipal governmental agencies (excluding the Public Body); rendering advice on issues of governmental process, compliance and regulatory requirements (excluding Public Body process, regulation, etc.); and researching issues and drafting internal and external client communications, informational materials, training presentations, etc. (excluding Public Body issues).

IV. STATEMENT AND DISCUSSION OF RELEVANT STATUTES AND ISSUES

A. OVERVIEW OF ISSUES

The Ethics Law promotes public integrity through the appropriate separation between public duties and private interests by Nevada's public officers and employees. In furtherance of that mission, the Ethics Law imposes a one-year "cooling-off" requirement against former public officers and employees to prevent these government actors from using any proprietary or regulatory information, access or relationships belonging to the public to create competitive disadvantages or other misuse of government information in the private sector regulated by the governmental entity. See *In re Public Officer*, Comm'n Op. No. 14-49A (2014). 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.

In Public Officer's service as a member of Public Body, Public Officer is a public officer as that term is defined in NRS 281A.160. Public Officer seeks guidance on whether the "cooling-off" provisions prohibit Public Officer, within 1 year after the termination of Public Officer's public service, from soliciting or accepting employment with a business or industry whose activities are *not* governed by regulations adopted by Public Body, but whose clients may have activities governed by Public Body's regulations. Specifically, Public Officer contemplates employment with a private entity that may have clients who are regulated by Public Body, as well as clients who are not regulated by Public Body. If employed by one of these entities, Public Officer states that the nature of Public Officer's work for at least one year after leaving Public Body would not include representation or consulting on issues related to Public Body or that involve clients who are regulated by Public Body.

In reviewing this RFO, the Commission considers: 1) whether NRS 281A.550(3) applies to Public Officer's circumstances; and 2) if so, whether the Commission should grant Public Officer's relief from the strict application of the one-year "cooling-off" period under NRS 281A.550(6) and conclude that Public Officer's future employment is

permissible. The Commission also addresses the applicability of NRS 281A.410 governing the one-year prohibition against representing or counseling a private entity on matters that were under consideration by Public Body during Public Officer's tenure.

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. "Cooling-Off" – Accepting Employment

NRS 281A.550(3) and (5) provide:

3. In addition to the prohibitions set forth in subsections 1 and 2, and except as otherwise provided in subsections 4 and 6, a former public officer or employee of a board, commission, department, division or other agency of the Executive Department of State Government, except a clerical employee, shall not solicit or accept employment from a business or industry whose activities are governed by regulations adopted by the board, commission, department, division or other agency for 1 year after the termination of the former public officer's or employee's service or period of employment if:

(a) The former public officer's or employee's principal duties included the formulation of policy contained in the regulations governing the business or industry;

(b) During the immediately preceding year, the former public officer or employee directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business or industry which might, but for this section, employ the former public officer or employee; or

(c) As a result of the former public officer's or employee's governmental service or employment, the former public officer or employee possesses knowledge of the trade secrets of a direct business competitor.

5. Except as otherwise provided in subsection 6, a former public officer or employee of the State or a political subdivision, except a clerical employee, shall not solicit or accept employment from a person to whom a contract for supplies, materials, equipment or services was awarded by the State or political subdivision, as applicable, for 1 year after the termination of the officer's or employee's service or period of employment, if:

(a) The amount of the contract exceeded \$25,000;

(b) The contract was awarded within the 12-month period immediately preceding the termination of the officer's or employee's service or period of employment; and

(c) The position held by the former public officer or employee at the time the contract was awarded allowed the former public officer or employee to affect or influence the awarding of the contract.

3. Exception to “Cooling-Off” Requirements for Employment – Relief from Strict Application

NRS 281A.550(6) provides:

6. A current or former public officer or employee may request that the Commission apply the relevant facts in that person’s case to the provisions of subsection 3 or 5, as applicable, and determine whether relief from the strict application of those provisions is proper. If the Commission determines that relief from the strict application of the provisions of subsection 3 or 5, as applicable, is not contrary to:

- (a) The best interests of the public;
- (b) The continued ethical integrity of the State Government or political subdivision, as applicable; and
- (c) The provisions of this chapter.

→ it may issue an opinion to that effect and grant such relief. The opinion of the Commission in such a case is final and subject to judicial review pursuant to NRS 233B.130, except that a proceeding regarding this review must be held in closed court without admittance of persons other than those necessary to the proceeding, unless this right to confidential proceedings is waived by the current or former public officer or employee.

4. “Cooling-Off” – Representing or Counseling

NRS 281A.410(1)(b) provides, in relevant part:

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

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

* * *

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

V. DECISION

Public Officer accepts that the one-year “cooling-off” provisions of NRS 281A.550(3) and NRS 281A.410(1)(b) apply to Public Officer’s public service prior to Public Officer’s current position, and Public Officer does not request relief from the strict application of the “cooling-off” provisions with respect to such former public positions. Accordingly, this decision addresses the application of “cooling-off” provisions only as they apply to Public Officer’s current position with Public Body.

A. The “cooling-off” provisions of NRS 281A.550(3) apply to Public Officer as a member of Public Body; however, employment with private entities that are not regulated by Public Body are not within the scope of NRS 281A.550(3)

NRS 281A.550(3) prohibits Public Officer from soliciting or accepting employment from an entity or industry whose activities are regulated by Public Body for one year after termination of Public Officer’s public service if one of three criteria is met: (1) as a public officer, Public Officer’s principal duties included formulating policy contained in Public Body’s regulations (NRS 281A.550(3)(a)); (2) 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 Officers (NRS 281A.550(3)(b)); or (3) Public Officer has obtained trade secrets of a direct business competitor (NRS 281A.550(3)(c)).

As a member of Public Body, Public Officer has oversight regarding the operations and management of Public Body, as well as the broader policy considerations of Public Body, including legislation, budget and personnel issues. The record before the Commission reflects that Public Officer’s duties and responsibilities for Public Body have included the formulation of policy contained in Public Body’s regulations governing entities in the regulated industry. Public Officer also recommends and renders decisions affecting members of the industry. Additionally, Public Officer has, on very rare occasions, reviewed proprietary/confidential information of entities in the regulated industry.

The record further establishes that Public Officer’s current duties implicate the provisions of NRS 281A.550(3)(a), (b) and (c) with regard to the businesses and industries regulated by Public Body. Accordingly, NRS 281A.550(3) would prohibit Public Officer from accepting employment from or consulting for an entity under the Public Body’s regulatory umbrella within one year after Public Officer’s separation from public service. Public Officer is likewise prohibited from serving as an independent contractor for any private entity regulated by Public Body. *See In re Public Officer*, Comm’n Op. No. 13-09 (2014) (stating that service as an independent contractor qualifies as employment within the meaning and context of the “cooling-off” requirements of NRS 281A.550).

However, Public Officer’s anticipated employment with the private entities contemplated is not prohibited by NRS 281A.550(3) because such private entities are not “a business or industry whose activities are governed by regulations adopted by the division.” *See In re Public Employee*, Comm’n Op. No. 15-49A (2016). The relationship between Public Entity, Public Body, 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. *Id.*

Public Body does not regulate the private entities with which Public Officer anticipates an employment relationship. Accordingly, Public Officer’s employment with such entities does not directly violate the provisions of NRS 281A.550(3), even though these entities may represent clients with whom Public Officer would otherwise be prohibited from seeking or accepting employment, because they are not businesses whose activities are governed by Public Body regulations. Nevertheless, the Commission appreciates Public Officer’s consideration of the Ethics Law with regard to circumstances under which a future employer may have direct client or business relationships with entities regulated by Public Body and concludes that a separation is appropriate between Public Officer’s contemplated future professional services to a private entity and matters affecting any clients that are regulated by Public Body for one year.

Although Public Officer did not identify the specific employment or consulting arrangement contemplated in Public Officer's RFO because Public Officer has not yet started Public Officer's search for new employment, Public Officer testified that Public Officer's intent and expectation is to decline to provide any professional services to a client of a prospective employer that trigger the interests of Public Body for one year. With regard to these clients, Public Officer must also avoid representing or counseling them on any issue that was under consideration by Public Body, as further discussed herein.

B. The "Cooling-Off" Provisions of NRS 281A.550(5) Are Not Implicated

Public Officer is specifically not seeking guidance on the application of NRS 281A.550(5), as Public Officer does not intend to pursue employment with any person to whom a contract for supplies, materials, equipment or services was awarded by Public Body within the 12-month period immediately preceding the termination of Public Officer's public service. Moreover, during Public Officer's tenure with Public Body, Public Entity did not award a contract in excess of \$25,000. Because these contracts did not exceed the threshold amount indicated in NRS 281A.550(5), Public Officer would not be prohibited from seeking employment with the persons to which the two contracts were awarded. However, if such employment is accepted, Public Officer is advised to avoid the provision of professional representation or other services for one year regarding issues that were under consideration during Public Officer's tenure with Public Body or that otherwise implicate the interests of Public Body.

C. Relief from the Strict Application of Employment Prohibitions

The Ethics Law provides for an exception from the one-year "cooling-off" provisions of NRS 281A.550(3) under certain limited circumstances. Pursuant to NRS 281A.550(6), the Commission may grant relief from the strict application of NRS 281A.550(3) if it determines that such relief is not contrary to the best interests of the public, the ethical integrity of the State government or the Ethics Law.

"The intent of the exemption statute is to facilitate beneficial moves from the public to private sectors so long as the moves do not endanger either the public or private sectors and so long as there is nothing otherwise unethical in the way that the employment relationship occurred." See *In re Public Officer*, Comm'n Op. No. 11-96A (2012); see also *In re Public Employee*, Comm'n Op. No. 13-29A (2013).

Public Officer has provided compelling information that Public Officer's leaving State service does not reflect a revolving door situation and that Public Officer's contemplated work with private entities in Nevada will not implicate the "cooling-off" provisions of NRS 281A.550(3) because it will not involve any work with clients who are regulated by Public Body. However, to the extent Public Officer desires to seek employment with a business or entity whose activities are governed by Public Body's regulations, the Commission does not grant relief to Public Officer from the strict application of the "cooling-off" requirement.

The Commission does not issue blanket or generalized waivers based on speculative circumstances. See *In re Public Employee*, Comm'n Op. No. 15-71A (2016). In this case, for a waiver to be meaningful and operate as the exception rather than the rule, the Commission must be able to evaluate the nature and circumstances of a specific employment opportunity, including the specific duties and nature of Public Body's regulation to determine whether Public Officer's private-sector service would be in the best interests of the State. Therefore, Public Officer is not relieved from the strict

application of the “cooling-off” requirements of NRS 281A.550(3) for the purposes of soliciting or accepting employment from a business or industry regulated by Public Body.

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

Public Officer is advised that under NRS 281A.410(1)(b), Public Officer may not, for the one-year period following separation from Public Officer’s service with Public Body, represent or counsel any private person (including business entities) on any issue that was under consideration by Public Body during Public Officer’s tenure. However, NRS 281A.410(1)(b) specifically excludes the proposal or consideration of legislative measures or administrative regulations from the types of issues that are precluded. Therefore, Public Officer could conceivably represent or advise a private party (which was not regulated by Public Body) on issues related to Public Body’s former consideration of legislative measures and administrative regulations during Public Officer’s service. However, the Commission has expressed an important limitation on such representation:

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 Op. No. 13-09A

The Commission therefore concludes, consistent with its prior opinions, that Public Officer may not, for one year after leaving public service, represent or counsel any private clients upon any issue that was under consideration by Public Body during Public Officer’s tenure pursuant to NRS 281A.410(1)(b), including regulatory and legislative matters directly related to such issues. See *In re Public Employee*, Comm’n Op. No. 11-96A (2012). Public Officer’s involvement with formulating policies related to Public Body’s regulations and overall oversight regarding the administration of Public Body confirm that Public Officer is too intertwined within Public Body’s issues to permit Public Officer to advise (for one year after public service) a private entity on regulatory matters, including any regulations established during Public Officer’s tenure. See *In re Public Officer*, Comm’n Op. No. 11-53A (2012)(Public officer and State Division administrator which

regulated aspects of medical industry not granted relief to accept employment with regulated entity given his significant role as policy formulator).

VI. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public 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 former member of Public Body, 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 officers and 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. Public Officer is advised that employment with private entities that represent various clients, including those which may be regulated by Public Body, does not fall within the scope of the prohibitions delineated in NRS 281A.550(3) because such employment is not with “a business or industry whose activities are governed by regulations adopted by the board.”
5. Relief from the strict application of the “cooling-off” provisions of NRS 281A.550(3) as they relate to employment with a business or industry regulated by Public Body is not appropriate under the standards set forth in NRS 281A.550(6) because the Commission has not been presented with information to evaluate the nature and circumstances of any specific employment opportunity that may be prohibited.
6. Public Officer’s current circumstances do not implicate the provisions of NRS 281A.550(5).
7. Pursuant to NRS 281A.410(1)(b), Public Officer may not represent or counsel a private person or entity for at least one year after the termination of Public Officer’s public service on any issues that were under consideration by Public Body during Public Officer’s tenure, and Public Officer shall not appear before Public Body or lobby any regulators or staff.

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

///

///

///

Pursuant to the requirements of NRS 281A.420(5), the necessary quorum of the Commission to act upon the matter is reduced as though an abstaining member is not a member of the body. The following Commissioners participated in this Opinion.

Dated this 22nd day of September, 2016.

THE NEVADA COMMISSION ETHICS

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

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner

By: ABSTAIN
Keith A. Weaver, Esq.
Vice-Chair

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

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner