



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

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

Request for Opinion No. **16-61A**

Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Employee ("Public Employee"), is employed by a Public Entity in the State of Nevada ("Public Entity No. 1") and requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.550(6), regarding the propriety of Public Employee's past, present and 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 and Public Employee appeared in person and provided sworn testimony.

Public Employee sought an opinion from the Commission regarding a potential conflict of interest between Public Employee's public employment and Public Employee's private interests to provide private consulting services under an independent contract to another government entity ("Public Entity No. 2"), an entity for which Public Employee previously provided similar, if not identical, services as those contemplated by the proposed independent contract. Public Employee has obtained permission from the employing government, Public Entity No 1, to provide outside private employment to Public Entity No. 2.

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 an independent contract entered into with Public Entity No. 2, even though consented to by the current public employer, is within the scope of conduct regulated by the provisions of the Ethics Law. Specifically, the independent contract implicates several provisions of NRS 281A.400 and is prohibited by NRS 281A.430(1). The Commission does not grant relief from the contracting prohibition under NRS 281A.430(6) since statutory requirements have not been satisfied. Further, the Commission provides guidance on other provisions of the Ethics Law including the applicable statutory provisions of NRS 281A.410 and 281A.550 if Public Employee's current circumstances change.

The Commission has rendered a final written Opinion stating its formal findings of fact and conclusions of law. Public Employee elected to retain confidentiality with respect to the Commission's proceedings including the final written Opinion. Therefore, the

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

Commission publishes this Abstract Opinion with redactions or summarizations to protect the confidentiality of these proceedings.

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

II. QUESTIONS PRESENTED

Public Employee is seeking advice on whether Public Employee may be relieved from the strict application of NRS 281A.430 to allow the acceptance of a private independent contract with Public Entity No. 2, which outside employment has been approved by the employing government, and whether the provisions of NRS 281A.440(1), (2), (3), (5) and (10) apply to Public Employee's circumstances.

Public Employee also asks whether Public Employee's circumstances implicate: (1) the limitations on representing private persons before a public agency under NRS 281A.410 since the proposed independent contract is with a government entity, not with a private person; and (2) the "cooling-off" provisions of NRS 281A.550(5), applicable to local government public officers/employees, since Public Employee is not separating from Public Employee's public position with Public Entity No. 1.²

III. FINDINGS OF FACT - SUMMARY

1. Public Employee is a full time public employee for Public Entity No. 1, and in that capacity had provided certain services to Public Entity No. 2 in the past, which were similar to services Public Employee currently provides to Public Entity No. 1.
2. A representative of Public Entity No. 2 inquired whether Public Employee was interested in entering into an independent contract for private consulting services, which are the same or substantially similar to the services provided by Public Employee in Public Employee's prior service to Public Entity No. 2, and based on Public Employee's current duties for Public Entity No. 1.
3. Public Employee's current employer, Public Entity No. 1, has no objection to the outside employment of Public Employee by Public Entity No. 2.
4. The proposed independent contract is anticipated to be a consulting services contract.
5. Public Employee does not believe the independent contract services for Public Entity No. 2 would be in conflict with the public duties performed for Public Entity No. 1.

² These ancillary issues are presented but, based upon the facts presented, do not apply to Public Employee's current circumstances. The "cooling-off" provisions of NRS 281A.550(5) applicable to government officers/employees are limited in application to conduct associated with or following separation of public service and do not appear to be implicated by the circumstances as presented. Since both affected entities are public, the limitations of NRS 281A.410 limiting representing a "private person" before public agencies are also inapplicable to this factual scenario.

6. Any public duties associated with Public Employee's work for Public Entity No. 1 that has any potential to involve Public Entity No. 2 will be assigned to someone else and not to Public Employee.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

Several sections of NRS 281A.400 apply to or limit private contracts between a public officer/employee and a government entity, including:

1. NRS 281A.400(1) -- seeking or accepting engagement, economic opportunity, influencing public duties;
2. NRS 281A.400(2) -- using public position to secure unwarranted privilege/advantage;
3. NRS 281A.400(3) -- participation as agent of government on private contract in which one holds a significant pecuniary interest;
4. NRS 281A.400(5) -- use of information obtained through public duties or relationships to further a significant pecuniary interest; and
5. NRS 281A.400(10) -- seeking employment/contracts through use of public position.

Central to each of these provisions is the improper use of a public position to acquire a private or personal gain. The statutory provisions are analyzed based upon the facts presented and are not subject to relief or waiver by the Commission. So, care must be taken by public officers/employees to comply with these provisions and maintain the integrity of public service by avoiding actual conflicts or even an appearance of impropriety by properly separating private interests from public duties. NRS 281A.020.

Further, the Ethics Law prohibits any public officer or employee from entering into contracts in which Public Employee has a significant pecuniary interest with a governmental entity unless the contracting process is governed by open, competitive bidding and the public officer or employee has not participated in the contracting process. NRS 281A.430. NRS 281A.430(6) permits the Commission to grant relief from the strict application of the contracting prohibitions contained in NRS 281A.430 based upon public policy considerations. In determining whether relief is appropriate, the Commission is mindful of the provision of NRS 281A.020, which places an affirmative duty on public officers/employees to commit to avoid conflicts of interest and preserve the public trust.

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) Improper Use of Public Position to Negotiate or Seek Contracts

NRS 281A.400(1), (2), (3), (5) and (10) provide:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

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.

3. A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and any business entity in which the public officer or employee has a significant pecuniary interest.

5. If a public officer or employee acquires, through the public officer's or employee's public duties or relationships, any information which by law or practice is not at the time available to people generally, the public officer or employee shall not use the information to further a significant pecuniary interest of the public officer or employee or any other person or business entity.

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.

3) Prohibited Contracts

NRS 281A.430 provides:

1. Except as otherwise provided in this section and NRS 218A.970 and 332.800, a public officer or employee shall not bid on or enter into a contract between an agency and any business entity in which the public officer or employee has a significant pecuniary interest.

2. A member of any board, commission or similar body who is engaged in the profession, occupation or business regulated by such board, commission or body may, in the ordinary course of Public Employee's or Public Employee's business, bid on or enter into a contract with an agency, except the board, commission or body on which Public Employee or Public Employee is a member, if the member has not taken part in developing the contract plans or specifications and the member will not be personally involved in opening, considering or accepting offers.

3. A full- or part-time faculty member or employee of the Nevada System of Higher Education may bid on or enter into a contract with an

agency, or may benefit financially or otherwise from a contract between an agency and a private entity, if the contract complies with the policies established by the Board of Regents of the University of Nevada pursuant to NRS 396.255.

4. Except as otherwise provided in subsection 2, 3 or 5, a public officer or employee may bid on or enter into a contract with an agency if:

(a) The contracting process is controlled by the rules of open competitive bidding or the rules of open competitive bidding are not employed as a result of the applicability of NRS 332.112 or 332.148;

(b) The sources of supply are limited;

(c) The public officer or employee has not taken part in developing the contract plans or specifications; and

(d) The public officer or employee will not be personally involved in opening, considering or accepting offers.

If a public officer who is authorized to bid on or enter into a contract with an agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose the public officer's interest in the contract and shall not vote on or advocate the approval of the contract.

6. The Commission may relieve a public officer or employee from the strict application of the provisions of this section if:

(a) The public officer or employee requests an opinion from the Commission pursuant to subsection 1 of NRS 281A.440; and

(b) The Commission determines that such relief is not contrary to:

(1) The best interests of the public;

(2) The continued ethical integrity of each agency affected by the matter;

and

(3) The provisions of this chapter.

4) Other Implicated Laws

NRS 281.230 provides, in relevant part:

1. Except as otherwise provided in this section and NRS 218A.970, 281A.530 and 332.800, the following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other significant transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way directly interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada;

(b) Deputies and employees of state, county, municipal, district and township officers; and

(c) Officers and employees of quasi-municipal corporations. . . .

4. A public officer or employee . . . may bid on or enter into a contract with a governmental agency if the contracting process is controlled by rules of open competitive bidding, the sources of supply are limited, the public officer or employee has not taken part in developing the contract plans or

specifications and the public officer or employee will not be personally involved in opening, considering or accepting offers. . . .

5. A person who violates any of the provisions of this section shall be punished as provided in NRS 197.230 and:

(a) Where the commission, personal profit or compensation is \$250 or more, for a category D felony as provided in NRS 193.130.

(b) Where the commission, personal profit or compensation is less than \$250, for a misdemeanor.

V. DECISION

Nevada's Ethics Law mandates that public officers and employees hold public office for the benefit of the public and avoid conflicts of interest. NRS 281A.020. The standards of conduct established by the Ethics Law for public officers and employees assist them to navigate the boundaries of prohibited conduct where conflicts of interest are presented between public duties and personal interests. In particular, the Ethics Law prohibits public officers/employees from entering into certain contracts between government agencies and entities in which they (or certain persons to whom they have private commitments) have significant pecuniary interests. This prohibition seeks to protect the public against potential abuses of power when the public officer/employee serves in a position that has the power or authority to influence a contract, and to ensure that public officers/employees avoid any appearances of impropriety or suggestion that they have a competitive advantage in contracting with the government because of their position in government.

A. DUTY TO AVOID CONFLICTS AND UNWARRANTED PREFERENCES

As a full-time employee of Public Entity No. 1, Public Employee must maintain a commitment to avoid conflicts between Public Employee's private interests and those of the public served. In furtherance thereof, Public Employee has a duty to avoid actual and perceived conflicts of interest, and Public Employee may not use Public Employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself or herself or for any person to whom Public Employee has a commitment in a private capacity. NRS 281A.020 and NRS 281A.400(1) and (2). "Unwarranted" means without justification or adequate reason. NRS 281A.400(2). Additionally, as a public employee, Public Employee is prohibited from participating as an agent of government in the negotiation or execution of a contract between the government and any business entity with which Public Employee has a significant pecuniary interest. NRS 281A.400(3).

In prior Commission opinions, the Commission has reviewed the circumstances on a case-by-case basis to determine whether there has been a use of a public position to seek or gain a business opportunity or private employment. For example, the use of a public position to seek or gain a business opportunity or employment was found when a public officer/employee used his or her position to either hire himself or herself or when a subordinate was asked to assist with obtaining private employment for the public officer. *In re McNair*, Comm'n Op. Nos. 10-105C, 10-106C, 10-108C, 10-109C, and 10-0115C (2011) and *In re Maurizio*, Comm'n Op. No. 09-40C (2010). In addition, the Commission has confirmed that a public officer/employee may not use a public position as a "selling point" in marketing future private services. *In re Hales*, Comm'n Op. No. 07-13A (2008).

But where the future employer reaches out to the Public Officer and there is no evidence that a public position is used to seek or gain the employment or contract or other concern under the Ethics Law, the Commission has indicated that there may not be a violation. See *In re Frehner*, Comm'n Op. No. 07-48C (2008)(insufficient evidence showing public employee sought the employment contract). However, even when the public officer or public employee does not specifically initiate the contact or reach out to seek the private employment opportunity, other circumstances may be present warranting consideration under the Ethics Law.

These circumstances might include whether the job would have been provided but for the public position held or when the employment or contract closely relates to the public duties of the public officer or employee. See *In re Cegavske*, Comm'n Op. No. 05-16A (2005)(concerns about whether public officer would have been provided the business opportunity but for her public position; however, caution was advised since there was insufficient evidence for an unequivocal finding) and *In re Public Employee*, Comm'n Op. No. 15-28A (2016)(concerns expressed regarding use of public position to seek post-termination consulting contract with employing public entity because anticipated private services were similar to Public Employee's assigned public duties). Concerns would be present where a public officer or employee was reaching out to vendors or companies that have business relationships with the public entity to seek or obtain future employment.

B. IMPLICATIONS UNDER NRS 281A.400

Although Public Employee does not intend to use Public Employee's public position to affect or influence the award of a private contract, the position Public Employee now holds could allow this to occur. Even without actual impropriety, Public Employee is in an opportunistic position to dilute the public trust, which may lead to a violation of the Ethics Law. While holding an opportunity alone does not create a violation, it does create a duty to avoid conflicts of interest and prevent a violation of the Ethics Law. NRS 281A.020. Here, Public Employee has recognized the contract prohibitions imposed on public officers/employees under the Ethics Law and is commended in seeking the advice of the Commission prior to entering into the proposed independent contract for private consulting services.

Due to Public Employee's foresight in seeking guidance from the Commission prior to taking action, no private independent contract has been entered into with Public Entity No. 2. Accordingly, the Commission does not find that there is sufficient evidence to establish a past violation of NRS 281A.020 or NRS 281A.400(1), (2), (3), (5), or (10). Nonetheless, the Commission advises Public Employee that future violations are possible if Public Employee were to proceed seeking the private contract with Public Entity No. 2.³ For each referenced section of NRS 281A.400, the following implications are expressed:

- NRS 281A.400(1) -- A reasonable person in Public Employee's situation, if Public Employee was allowed to enter into the proposed private contract, would be seeking or accepting an engagement or economic opportunity which would tend to improperly influence the public employee from departing from Public Employee's public position with Public Entity No. 1. A departure from public duties is implicated due to prior discussions and contacts relating to the

³ With regard to NRS 281A.400(3), Public Employee has confirmed that Public Employee has no intention in participating as an agent of government in the negotiation of the anticipated independent contract for private-professional consulting services between Public Employee and Public Entity No. 2. Accordingly, NRS 281A.400(3) is not implicated by these circumstances.

proposed independent contract which occurred in the workplace by virtue of Public Employee's public position and related relationships even though these discussions did not culminate into an executed contract.

- NRS 281A.400(2) -- Public Employee's services were sought due to Public Employee's public service and experience in providing services to Public Entity No. 1, as the primary employer, and prior service to Public Entity No. 2. The circumstances associated with the job offer from Public Entity No. 2 are inextricably intertwined with the specific public duties Public Employee performs for Public Entity No. 1. Whether it was intended or not, this public service cannot be separated and serves to provide a selling point as to why Public Entity No. 2 would desire to directly retain Public Employee's private services.
- NRS 281A.400(5) -- If Public Employee entered into the private contract to provide consulting services to Public Entity No. 2, Public Employee could be utilizing information and relationships that Public Employee has acquired by virtue of Public Employee's public position, including possible nonpublic or confidential information, to benefit Public Employee's private interests. A public position should not be utilized to further Public Employee's own significant pecuniary interest by receiving fees for private services.
- NRS 281A.400(10) -- Although it does not appear that Public Employee intends to use Public Employee's public position to seek or acquire the proposed private consulting contract, Public Employee's public position and duties are substantially similar, if not virtually identical, to the proposed private consulting services, which brings the independent contract within the prohibition set forth in this subsection.

C. IMPLICATIONS UNDER NRS 281A.430

1) Prohibited Contracts - NRS 281A.430(1) and (4)

NRS 281A.430 requires a separate evaluation from NRS 281A.400(10). This statute prohibits a public officer or employee, personally or through a business entity in which the public officer/employee has a significant pecuniary interest, from bidding on or entering into a contract with a public agency unless: (a) the contracting process is controlled by rules of open competitive bidding or the rules of open competitive bidding are not employed as a result of the applicability of NRS 332.122 or NRS 332.148; (b) the sources of supply are limited; (c) the public employee has not taken part in the developing the contract plans or specifications; and (d) Public Employee will not be personally involved in the opening, considering or accepting of offers. See NRS 281A.430(4).

It has been factually established that the proposed contract with Public Entity No. 2 for provision of private consulting services amounts to a significant pecuniary interest. Further, since the requirements to establish the exception are in the conjunctive, all of them must be met or the prohibition will apply. A review of the facts and related requirements of NRS 281A.430 results in the following:

- NRS 281A.430(4)(a) requires competitive bidding unless the rules of open competitive bidding are not employed as a result of the applicability of NRS 332.112 (emergency contracts) or NRS 332.148 (failure to receive responsible bids). Based upon the record presented, neither statutory exemption is present.

Separately, the Commission has opined that an “open, transparent “contracting” process” may satisfy the intent of NRS 281A.430(4)(a).⁴ However, the contract in question does not entail an open and transparent contracting process. Although NRS 332.115 permits contracting for professional consulting services by a local government without an open process, such a statute is not a listed exemption to NRS 281A.430(4)(a). Governmental contracts for private consulting services is commonplace and the Legislature could have included them within a stated exception and it did not do so. Further, the anticipated public process for this independent contract does not fall within the guidance provided in opinions issued by the Commission, when unusual circumstances are presented.

- NRS 281A.430(4)(b) requires the sources of supply to be limited. While there are some facts under which one might assert that there is a limited supply for the contemplated services, this fact has not been established because there are persons or consultants who have similar experience and are able to provide these services in Nevada. Accordingly, the Commission is unable to make an affirmative determination that this requirement is satisfied.
- NRS 281A.430(4)(c) requires the public employee has not taken part in contract development. Although, the Commission believes that Public Employee’s intentions are noble and don’t implicate Public Employee’s duties of public service to Public Entity No. 1, the concern is that Public Employee holds a public position which provides greater opportunity to interface and discuss the potential independent contract with Public Entity No. 2.
- NRS 281A.430(4)(d) has been met because Public Employee would not be personally involved in opening, considering or accepting offers associated with the potential private consulting contract for Public Entity No. 2, if permitted.

Since all of the conjunctive requirements of NRS 281A.430(4) have not been satisfied, Public Employee is prohibited under NRS 281A.430(1) from bidding on or entering into the proposed independent contract for private consulting services with Public Entity No. 2 while employed in public service for Public Entity No. 1, and the Commission does not grant relief from the strict application of the provisions of NRS 281A.430 pursuant to NRS 281A.430(6).

2) Relief from the Strict Application of the Contracting Prohibition is not Granted - NRS 281A.430(6)

NRS 281A.430(6) provides the Commission authority to grant relief from the strict prohibition of government contracting by public officers/employees, provided that the relief would not be contrary to each of the following:

- (1) The best interests of the public;
- (2) The continued ethical integrity of each agency affected by the matter; and
- (3) The provisions of this chapter.

⁴ See *In re Johnson*, Comm’n Op. No. 12-68A (2013) at p. 9, citing *In re Public Officer*, Comm’n Op. No. 12-13 (2012) (open process and access to public facility) and *In re Blackburn*, Comm’n Op. No. 09-90A (2009) (county firefighter owned mortuary business and was permitted to contract with county to provide services under County’s open rotation agreements available to all mortuaries).

The record demonstrates the existence of some public benefit in permitting the independent contract, including: (1) Public Employee already has experience in providing similar services to Public Entity No. 2; (2) Public Entity No. 2 would benefit from consistency in these services; and (3) there does not appear to be a conflict between the two public entities if Public Employee were to enter into the independent contract.

Even though attributes of public benefit are present, concerns are also evident given the continued ethical integrity of each agency affected by this matter and the provisions of the Ethics Law, as expressed throughout this Abstract Opinion. Such concerns outweigh the public benefit Public Entity No. 2 would have received by retaining an experienced public servant to provide the services in a private capacity. Further, to grant relief, the Commission is required to review the facts to assure they are not contrary to public interest, the continued integrity of each affected public entity or the provisions of the Ethics Law. Based upon the record presented, it has not been established that relief would not be contrary to all of the statutory requirements. Accordingly, the Commission does not grant a waiver of the provisions of NRS 281A.430.

3) Entering Contract with Governmental Entity - NRS 281.230

Outside the scope and jurisdiction of the Ethics Law is a substantially similar prohibition against public officers and employees entering into contracts with governmental entities. Specifically, NRS 281.230 contains a similar prohibition as that imposed by NRS 281A.430, but imposes a criminal rather than an administrative sanction. In *In re Cunningham*, Comm'n Op. No. 10-52A (2010), the Commission confirmed that:

The Commission interprets the two similar provisions in NRS Chapters 281 and 281A to be intended to encompass those situations in which a public employee improperly uses Public Employee's public position to benefit himself in Public Employee's private capacity. While the Commission cannot and does not interpret NRS 281.230, it does not intend to infer that an activity permissible under the Ethics Law would otherwise be permissible under other law. Therefore, the Commission's interpretation of NRS 281A.430 is intended to be consistent with NRS 281.230.

Id. at p. 5. Public Employee is advised of this comparable law so that care may be taken to avoid conflicts of interest and prohibited contracts to assure compliance with the law by public officers and employees.

VI. 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.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Based upon the record, there is insufficient evidence to determine that there was a past violation of NRS 281A.020 or NRS 281A.400(1), (2), (3), (5), or (10).
4. If Public Employee proceeds to enter into an independent contract for private consulting services with Public Entity No. 2, violations of NRS 281A.020, NRS 281A.400(1), (2), (5) and (10) and NRS 281A.430 would occur.

5. The proposed independent contract is within the contracting prohibition established by NRS 281A.430(4) and interpretive opinions.
6. Pursuant to NRS 281A.430(6), relief from the strict application of the contracting prohibition is not granted because such relief is not sustained by all required factors that it be in the best interests of the public and not contrary to the continued ethical integrity of each affected agency and the provisions of the Ethics Law.

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 Abstract Opinion:

Dated this 3rd day of October, 2016.

NEVADA COMMISSION ON ETHICS

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

By: /s/ Barbara Gruenewald
Barbara Gruenewald
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