



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Public Employee**, Public Entity,
State of Nevada,

Advisory Opinion No. 20-022A

Former Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Employee ("Public Employee"), Public Entity, State of Nevada, requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission"), regarding the propriety of certain conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes. Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.¹ The Commission considered the request for an advisory opinion, a list of proposed facts that were affirmed as true by Public Employee and publicly available information.²

Public Employee sought an opinion from the Commission regarding the applicability of the Ethics Law and its "cooling-off" requirements set forth in NRS 281A.550(5) and NRS 281A.410(1)(b) to a proposed employment opportunity for a specific private contract vendor for Public Entity ("Contract Vendor"). If the statutory restrictions apply, Public Employee seeks relief to permit employment with the Contract Vendor or one of its subcontractors.

After fully considering Public Employee's request, the Commission deliberated and advises that NRS 281A.550(5) applies to Public Employee's circumstances and would restrict employment with Contract Vendor, and the Commission does not grant relief under NRS 281A.550(6) to permit this employment. The Commission further confirms NRS 281A.550(5) would not apply to a subcontractor that has no other contract with Public Entity. Nevertheless, the Commission advises that Public Employee may not represent or provide consulting services to any private employer, such as Contract Vendor or its subcontractors, for a period of one year, on any issue that was under consideration by Public Entity during Public Employee's tenure of public service, including any existing projects or anticipated projects in the queue for potential award or any other form of public bid or contract.

The Commission now renders this abstract opinion stating its formal findings of fact and conclusions of law. The facts in this matter were obtained from documentary evidence provided by Public Employee. For the purposes of the conclusions offered in

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Wallin and Commissioners Duffrin, Gruenewald, O'Neill, Sheets and Yen.

² Commissioner Lowry disclosed and abstained from any participation on this matter to avoid any appearance of impropriety or bias in compliance with NRS 281A.065(5), NRS 281A.420 and Rule 2.11 of the Code of Judicial Conduct. The details of Commissioner Lowry's disclosure and abstention were detailed in the full written opinion served but are redacted in this Abstract Opinion to protect the confidentiality of Requester's identity.

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. Although a full written opinion was served on Public Employee, for confidentiality reasons, this Abstract Opinion redacts certain Findings of Fact, provides a summary of issues and removes other identifying information to protect the confidentiality of the requester.³

II. QUESTION PRESENTED

Public Employee requests an opinion from the Commission regarding whether the provisions of NRS 281A.550(5) or NRS 281A.410(1)(b) apply to prohibit employment with Contract Vendor or its subcontractors because Public Entity's policy detailing private employment restrictions would not restrict such employment. If NRS 281A.550(5) applies, Public Employee requests relief be granted pursuant to NRS 281A.550(6) to permit the proposed employment.

III. FINDING OF FACTS

1. Public Employee is a former employee of Public Entity with long-term public service.
2. Contract Vendor was awarded a contract exceeding \$25,000 within the 12-month period prior to Public Employee's separation from public service.
3. Public Employee had no role in the preparation of the scope of work, or in the selection, negotiations or award processes for the contract awarded to Contract Vendor. However, Public Employee did serve on the review team established by to review the responsive proposals, including Contract Vendor's proposal.
4. As a member of the review team, by definition, Public Employee's review and scoring of the proposals, submitted to and received by Public Entity, would necessarily have an influence on the contract award, but only to the same degree as the other reviewers—no more; no less.
5. Additionally, once Public Employee's reviews and scoring of such proposals were submitted, Public Employee had no other role in the subsequent compilation and evaluation of any other reviewer's comments or in the selection or award processes associated with the contract award to Contract Vendor.
6. Contract Vendor utilizes several subcontractors that will be tasked to work on an array of contract deliverables.
7. Neither Contract Vendor nor any of its listed subcontractors have approached Public Employee for future employment. Further, Public Employee has not approached Contract Vendor or its subcontractors or any other contract vendor for Public Entity to seek employment.

³ The Commission reserves its statutory authority should an ethics complaint be filed presenting contrary circumstances. See *In re Howard*, Comm'n Op. No. 01-36 (2002) (notwithstanding first-party opinion, public is not precluded from bringing ethics complaint) and *In re Rock*, Comm'n Op. No. 94-53 (1995) (reservation of right to review until time issue is raised).

8. Public Employee's professional integrity is paramount. Accordingly, before acting upon the possibility of seeking or being offered employment, Public Employee seeks guidance on whether NRS 281A.410(1)(b) and NRS 281A.550(5) applies to these circumstances.
9. If NRS 281A.550(5) applies to the contract, Public Employee requests relief from the one-year cooling-off period to permit employment with Contract Vendor or one of its subcontractors based upon the following:
 - a) Public Employee's plans to separate from public service were made prior to Public Entity's advertising or processing of Contract Vendor's contract.
 - b) Public Entity's personnel policies would not restrict the proposed employment.
 - c) Public Employee understands State Law may vary from the Policy. However, Public Employee believes Public Employee's integrity and circumstances meet the litmus test and the spirit of Public Entity's documented standards and the standards of the Ethics Law for granting relief.

IV. STATEMENT AND DISCUSSION OF RELEVANT STATUTES AND ISSUES

A. OVERVIEW OF ISSUES

The Ethics Law promotes public integrity through the appropriate separation of public duties and private interests by Nevada's public officers and employees. In furtherance of that mission, the Ethics Law, in two distinct statutes, imposes a one-year "cooling-off" requirement to prevent current and former public officers and employees 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 NRS 281A.550 and NRS 281A.410(1)(b).

If NRS 281A.550 is applicable, the Commission may consider whether it will grant relief from the strict application of the one-year "cooling-off" period pursuant to NRS 281A.550(6). In addition, should NRS 281A.410(1)(b) apply, the Commission will advise of its mandatory requirements that impose a one-year prohibition against representing or counseling a private person or entity, including a future employer, on any matters that were under consideration by the public officer's or public employee's public agency during their tenure of public service.

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(5) provides:

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. Relief from Strict Application of “Cooling-off” Requirements

NRS 281A.550(6), (7), (8) and (9) provide:

6. A current or former public officer or employee may file a request for an advisory opinion pursuant to NRS 281A.675 concerning the application of 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 advisory opinion to that effect and grant such relief. {

7. For the purposes of subsection 6, the request for an advisory opinion, the advisory opinion and all meetings, hearings and proceedings of the Commission in such a matter are governed by the provisions of NRS 281A.670 to 281A.690, inclusive.

8. The advisory opinion does not relieve the current or former public officer or employee from the strict application of any provision of NRS 281A.410.

9. For the purposes of this section:

- (a) A former member of the Public Utilities Commission of Nevada, the Nevada Gaming Control Board or the Nevada Gaming Commission; or
 - (b) Any other former public officer or employee governed by this section,
- ↳ is employed by or is soliciting or accepting employment from a business, industry or other person described in this section if any oral or written agreement is sought, negotiated or exists during the restricted period pursuant to which the personal services of the public officer or employee are provided or will be provided to the business, industry or other person, even if such an agreement does not or will not become effective until after the restricted period.

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 and the provisions of this chapter:

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:

(a) Shall not accept compensation from any private person to represent or counsel the private person on any issue pending before the agency in which that public officer or employee serves, if the agency makes decisions; and

(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

A. NRS 281A.550(5) APPLIES TO RESTRICT PRIVATE EMPLOYMENT

With the exception of clerical employees, NRS 281A.550(5) prohibits former and current public officers and employees from seeking or accepting employment with a private person or entity that contracts with the State or a political subdivision if the contract amount exceeds \$25,000, the contract was awarded within the 12 months immediately preceding the termination of public service, and the position held by the public officer or employee at the time the of the contract award allowed the public officer or employee to affect or influence the award of the contract.

Public Employee’s former position was not clerical in nature. Therefore, Public Employee’s public position is not within the clerical exception referenced in NRS 281A.550(5). Consequently, the Commission will consider whether the circumstances associated with Contract Vendor are within the scope of NRS 281A.550(5). If the circumstances are within the scope and reach of the statute, the 12-month “cooling-off” restriction precludes the Public Employee from seeking or accepting the proposed employment unless the Commission grants relief from the strict application of the statute pursuant to NRS 281A.550(6).

The subject contract was awarded within the 12 months preceding Public Employee’s separation from public service and the amount of the contract exceeds \$25,000. Two of the three requirements of NRS 281A.550(5) are present. Because the statutory requirements are in the conjunctive and all must be present for the statute to apply, the third requirement is evaluated, and the Commission determines whether Public Employee’s public position allowed Public Employee to affect or influence the contract award.

Public Employee confirms that Public Employee had no role in the preparation of the scope of work or in the selection, negotiations or award processes for the contract. Nevertheless, Public Employee served on the review team established by Public Entity

to review the responsive proposals, including Contract Vendor's proposal. Public Employee recognizes that the public service on the review team would necessarily have an influence on the contract award to the same degree as the other reviewers. Public Employee confirms this review of all applicants was impartial and conducted without bias or favoritism.

In prior opinions, the Commission has confirmed that even without any actual impropriety, the reach of NRS 281A.550(5) extends to those contracts where the position held by the public officer/employee has the ability or potential to influence the contract award. Influence without actual impropriety is therefore sufficient for application of NRS 281A.550. See also *In re Public Employee*, Comm'n Op. No. 18-137A (2019), at p. 8; *In re Public Employee*, Comm'n Op. No. 16-61A (2016). The Commission has no evidence that Public Employee, while serving on the review committee, was biased or failed to properly conduct the review of the applicants based upon merit. However, Public Employee's public position would have allowed Public Employee to influence the contract award.

Therefore, the Commission finds that all requirements of NRS 281A.550(5) are present with regard to Contract Vendor's contract. The contract amount exceeds \$25,000, the contract was awarded in the 12 months preceding Public Employee's separation from public service and the former public position held by Public Employee would have allowed an influence of the award. This determination is consistent with the statutory language of NRS 281A.550(5) and the Commission's opinion precedent, in which the Commission has determined that the public officer or public employee need only be part of the process rather than the final decision maker for applicability of NRS 281A.550. See *In re Public Employee*, Comm'n Op. No. 17-28A (2018) (public employee not required to be final decision maker or hold a position directly responsible for making recommendations because public duties performed even under supervision may be sufficient for application of the restrictions set forth in NRS 281A.550).

Since NRS 281A.550(5) applies to the contract, Public Employee is restricted from seeking or accepting employment with Contract Vendor, unless the Commission grants relief from the strict application of the statute under NRS 281A.550(6). If it is accurate that Contract Vendor's subcontractors do not have a contract with Public Entity, all requirements of NRS 281A.550(5) would not be present and the statute would not apply to the subcontractor. Therefore, the proposed employment with the subcontractor would not be prohibited. However, there are other compliance obligations set forth in NRS 281A.410(1)(b), as set forth below.

B. NRS 281A.550(9) – STATUTORY DEFINITION OF CONDUCT CONSTITUTING SOLICITING AND ACCEPTING PRIVATE EMPLOYMENT

In 2017, the Legislature amended NRS 281A.550 to clarify restricted conduct associated with soliciting or accepting private employment from a contract vendor or the regulated industry. NRS 281A.550(9) establishes that a public officer/employee "is employed by or is soliciting or accepting employment from a business, industry or other person described in [NRS 281A.550] if any oral or written agreement is sought, negotiated or exists during the restricted period pursuant to which the personal services of the public officer or employee are provided or will be provided to the business, industry or other person, even if such agreement does not or will not become effective until after the restricted period." The Legislature's amendment verifies that public officers/employees may not solicit, accept or otherwise acquire employment in the regulated industry or from a contract vendor prior to obtaining relief from the strict application of NRS 281A.550. To

do otherwise is at one's peril and directly hinders the Commission's ability to grant relief under NRS 281A.550(6).

Admirably Public Employee has not in any way sought or applied for a position with Contract Vendor or any of its subcontractors. Based upon the facts affirmed to be true in this advisory opinion, the Commission determines that Public Employee's conduct does not implicate the definition of soliciting or accepting employment as set forth in NRS 281A.550(9), which conduct is prohibited by NRS 281A.550.

C. NRS 281A.550(6) – RELIEF FROM STRICT APPLICATION OF NRS 281A.550(5)

Historically, when the Commission has granted relief, the review has included and been subject to heightened scrutiny or sensitivity to ensure the Legislature's prohibition is maintained and relief is provided in unique and qualifying circumstances that protect the public trust. To grant relief from "cooling-off" under NRS 281A.550(6), the Commission must affirmatively find that the circumstances are 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 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); *In re Public Employee*, Comm'n Op. No. 13-29A (2013).

Public Employee requests that the Ethics Commission grant relief from the strict application of the one-year "cooling-off" provision to permit the proposed employment with Contract Vendor based in significant part on Public Employee's faithful performance of public duties and Public Entity's Policy that would not preclude the employment. Although, these circumstances are most worthy of consideration and are favorable to granting relief, the Commission was not provided sufficient other facts to support granting relief under NRS 281A.550(6), which might include:

1. Why a job with the contract vendor would not implicate the public trust or ethical integrity of the involved agency.
2. Details about the future job position with Contract Vendor and associated duties.
3. Substantiation that the duties of the proposed position would not be similar to Public Employee's former public duties.
4. Whether the future job position would be assisting Contract Vendor or its subcontractors with the performance of any contract obligations to Public Entity.
5. Whether Nevada has a shortage of professionals to serve its needs and it would be beneficial to retain this talent within the State.
6. Whether Public Employee has other employment opportunities that do not involve employment with Contract Vendor.

Preliminarily, the Commission confirms that it is a foundational legal principle in Nevada that administrative regulations and local government policies do not and cannot change the provisions of NRS 281A.550(5) enacted by the Nevada Legislature. See

Roberts v. State, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988) (administrative regulations (or policy) cannot contradict or conflict with the statute they are intended to implement). Therefore, this factor is not germane to the Commission's analysis.

Although the Commission recognizes and commends Public Employee in admirably and faithfully performing public duties, there is not a sufficient basis to support granting relief when considering the required analysis under NRS 281A.550(6). Public officers and employees have an affirmative duty under the Ethics Law to properly separate their public service from their private interests. NRS 281A.020. For the Commission to consider whether the proposed employment is not contrary to the public trust and continued ethical integrity of the involved agency, the proposed future employment usually is accompanied by sufficient support establishing that the proposed position and anticipated duties have adequate indicia of separation from former public duties, which evidence of separation is not presented here.

Separately, Public Employee references the subconsultants that will be tasked to work on an array of deliverables related to the contract with Contract Vendor. It appears that the purpose of the reference is for Public Employee to identify other potential employers (Contract Vendor's subcontractors). As previously indicated, provided that Contract Vendor's subcontractors do not have a contract with Public Entity within the scope of NRS 281A.550(5), employment with the subcontractor would not be restricted. If the subcontractor has a contract with Public Entity, the associated details would require review to ascertain whether NRS 281A.550(5) applies. Further, any subcontracting work benefiting or related to Contract Vendor's contract or other contracts with Public Entity will be otherwise restricted by the provisions of NRS 281A.410(1)(b), which analysis is set forth below.

D. NRS 281A.410(1)(b) - LIMITATIONS

Public Employee is advised that full compliance with the restrictions of NRS 281A.410(1)(b) is mandatory. The statute restricts Public Employee, for the 12-month period following separation from public service with Public Entity, from representing or counseling any private person (including a private employer, other consulting firms, vendors and vendor subcontractors/partners, etc.) on any issue that was under consideration by Public Entity during Public Employee's tenure of public service. In *In re Sweeney*, Comm'n Op. No. 15-70C (2016), the Commission found a violation even where the former employee did not realize her counseling or representation of a private person through an employment scenario (her private employer) was restricted by NRS 281A.410(1)(b), even though the employment itself was not precluded. The provisions of NRS 281A.410(1)(b) apply even when the provisions of NRS 281A.550 do not and they are not subject to relief by the Commission in these circumstances.⁴

Public Employee confirms in the facts, that Public Employee will comply with NRS 281A.410(1)(b). However, the Commission advises Public Employee about the reach of NRS 281A.410(1)(b). The statute defines "issue" to include a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations. In particular, the Commission advises that that Contract Vendor's contract and related project were issues under consideration by Public Entity during Public Employee's public employment. NRS 281A.410(1)(b) therefore precludes Public Employee from providing to any person or

⁴ NRS 281A.410(2) provides an exception for part-time employees and NRS 281A.410(3) allows the Commission to consider relief for a member of a local legislative body, which is not applicable to Public Employee's circumstances.

entity paid representation or counseling services on such matters for 12 months after separation from public service. Certainly, Public Entity has many other issues that were under consideration during Public Employee's term of employment, which also would be restricted by NRS 281A.410(1)(b). Accordingly, Public Employee must be vigilant to recognize applicable situations, including the restrictions applicable to providing paid services to Contract Vendor and its subcontractors, and comply with the statutory restrictions.

VI. CONCLUSIONS OF LAW

1. Public Employee is a public employee as defined by NRS 281A.150 and NRS 281A.180.
2. Pursuant to NRS 281A.680(1), the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include educational guidance from the Commission to Public Employee pursuant to NRS 281A.665.
3. As a former public employee for Public Entity, Public Employee is subject to the "cooling-off" provisions of the Ethics Law and its restrictions prohibiting for a period of 12-months certain employment and contracts. NRS 281A.550(5) and NRS 281A.410(1)(b).
4. Under the circumstances presented, Public Employee's potential employment with Contract Vendor is within the scope of the prohibitions delineated in NRS 281A.550(5) because Contract Vendor has a contract exceeding \$25,000 awarded during the past 12-month period and the public position held by Public Employee had the ability to influence the award of the contract given the public duties performed for the review committee.
5. Insufficient facts are provided to support relief from the strict application of NRS 281A.550(5) for employment with Contract Vendor, and such relief is not granted because the Commission is not able to make the findings required by NRS 281A.550(6).
6. Subject to the restrictions of NRS 281A.410(1)(b), Public Employee may seek and accept employment from Contract Vendor's subcontractors who do not otherwise have separate contracts with Public Entity.
7. Pursuant to NRS 281A.410(1)(b), Public Employee may not receive compensation to represent or counsel a private person or entity, including Contract Vendor, any subcontractor or other independent contractor, relating to any issue that was under consideration by Public Entity during Public Employee's tenure of public service for at least 12 months after separation from public service.

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

Dated this 25th day of June, 2020.

NEVADA COMMISSION ON ETHICS

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

By: ABSTAINED
Teresa Lowry, Esq.
Commissioner

By: /s/ Kim Wallin
Kim Wallin, CPA
Vice-Chair

By: /s/ Philip K. O'Neill
Philip K. O'Neill
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: /s/ Damian R. Sheets
Damian R. Sheets, Esq.
Commissioner

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

By: /s/ Amanda Yen
Amanda Yen, Esq.
Commissioner