



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No. 20-025A

Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Employee ("Public Employee"), formerly employed by a public entity ("Public Entity") in the State of Nevada, requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission"), regarding the propriety of Public Employee's past 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.

Public Employee sought an opinion from the Commission regarding the applicability of or relief from the strict application of the "cooling-off" requirements established in NRS 281A.550(5) because Public Employee has separated from public service and has acquired employment from one of Public Entity's private contract vendors ("Contract Vendor"). After fully considering Public Employee's request and analyzing the facts, circumstances and testimony presented by Public Employee, the Commission deliberated and advised that Public Employee's employment with Contract Vendor is not within the scope of conduct regulated by the "cooling-off" provisions of NRS 281A.550(5), and therefore, it was not precluded. Nevertheless, Public Employee must comply with the mandatory prohibitions of NRS 281A.410(1)(b) against providing representation or consulting services for compensation to Contract Vendor or any other person or entity on any issue that was under consideration by the Public Entity during the term of Public Employee's public service.

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 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

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Wallin and Commissioners Duffrin, Gruenewald, Lowry, O'Neill, and Sheets. In her private capacity, Commissioner Yen made a disclosure premised on a private commitment associated with Public Entity and abstained from participation in order to avoid any appearance of impropriety and because the independence of judgment of a reasonable person in her situation would be materially affected by the private commitment under the legal standard established in NRS 281A.420. The particular details of the private commitment are set forth in the written opinion served on Public Employee; however, for purposes of this Abstract Opinion this information is redacted to protect the identity of the requester.

those expressed in this opinion.² 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.

II. QUESTIONS PRESENTED

Public Employee questions whether the “cooling-off” provisions of the Ethics Law set forth in NRS 281A.550(5) prohibited Public Employee from accepting or maintaining employment with Contract Vendor, a private contract vendor for the Public Entity after Public Employee’s separation from public service. If NRS 281A.550(5) applies, Public Employee requests the Commission grant relief from NRS 281A.550(5) pursuant to NRS 281A.550(6). In addition, Public Employee seeks guidance regarding the “cooling-off” restrictions set forth in NRS 281A.410(1)(b).

III. FINDINGS OF FACT

1. Public Employee is a former employee of Public Entity.
2. Public Employee was a mid-level manager for Public Entity.
3. After a long-term career in public service, Public Employee separated from Public Entity and applied for and received employment with Contract Vendor.
4. Contract Vendor is a contract vendor for Public Entity with a contract exceeding \$25,000 that was awarded in the 12-months prior to Public Employee’s separation from employment with Public Entity.
5. Public Employee did not serve on the selection committee that reviewed and recommended awarding any contracts related to Contract Vendor, nor did the public position held by Public Employee allow the ability to influence the award of a contract to Contract Vendor.
6. Public Employee confirms that the contract for Contract Vendor, as well as other consultants, were selected through a multi-step, highly structured, selection process ensuring objectivity, and Public Employee’s public duties did not relate to selection of Contract Vendors or associated award of contracts.
7. Once a contract is awarded to a particular vendor, Public Entity will assign staff to oversee the contract deliverables. Public Employee was never assigned any public duties relating to a contract between Public Entity and Contract Vendor.
8. Prior to applying for any private employment, Public Employee contacted a representative from the administration department for Public Entity to discuss application of the Nevada Ethics Law and Public Entity’s policies to Public Employee’s situation. Public Employee was advised that the employment with Contract Vendor was not restricted and Public Entity had no related concerns.

² 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).

9. Public Employee accepted employment from Contract Vendor after separating from public service. As a condition of this employment, Public Employee requested to be assigned work on matters that are unrelated to Public Entity for a 12-month period, and Contract Vendor instituted this protocol to assure compliance with the provisions of NRS 281A.410(1)(b) restricting providing paid consulting or representation to any person (including an employer) on any issued under consideration by Public Entity during Public Employee's tenure of public service.
10. Contract Vendor now requests that, in addition to the letter already provided by Public Entity stating that the employment was not restricted, Public Employee obtain an opinion from the Commission to confirm that Public Employee has complied with the requirements of the Ethics Law.
11. If NRS 281A.550(5) applies to restrict employment with the Contract Vendor, Public Employee seeks relief from its strict application pursuant to NRS 281A.550(6) based upon the following:
 - a. Public Employee had a long-term public career and separation from public service does not reflect a revolving door situation.
 - b. Public entities and private business within the State of Nevada continues to experience a shortage of professionals with the qualification held by Public Employee.
 - c. Prior to seeking private employment, Public Employee reasonably sought and relied upon direction from the Public Entity to confirm there was no restriction in applying for and obtaining employment with Contract Vendor, and Public Employee received a letter confirming this position prior to seeking private employment.
 - d. Public Employee's confirmation that Public Employee will not work on any issues under consideration by Public Entity for 12-months after separation from public service, including providing services relating to any contract vendor for Public Entity.
 - e. Public Employee did not use a public position or associated relationships to seek private employment with Contract Vendor and has maintained proper separation between former public duties and private pecuniary interests associated with Contract Vendor.

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 accepting certain private sector employment opportunities to prevent these government actors from using any proprietary or regulatory information or relationships belonging to the public to create competitive disadvantages or other misuse of government information in the private sector contracted with or regulated by the governmental entity.

Based upon Public Employee's public position and former public service, Public Employee is a public employee as that term is defined in NRS 281A.150 and NRS 281A.180. Public Employee seeks guidance from the Commission on whether NRS 281A.550(5) or NRS 281A.410(1)(b) restricted Public Employee from accepting employment with Contract Vendor. If NRS 281A.550(5) applies, Public Employee requests relief from the strict application pursuant to NRS 281A.550(6).

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. Exception to "Cooling-Off" Requirements for Employment – Relief from Strict Application

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:

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

In this opinion, the Commission considers whether Public Employee’s past conduct in obtaining employment with Contract Vendor implicated any provisions of the Ethics Law and advises Public Employee regarding Public Employee’s compliance obligations under NRS 281A.410(1)(b). At the outset, the Commission reaffirms that public officers and employees should seek an advisory opinion from the Commission before soliciting or accepting employment that could be restricted by NRS 281A.550. In particular, NRS 281A.550(9), enacted in 2017, prohibits the solicitation or acceptance of employment if the employment is within the scope of NRS 281A.550. 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). The Commission does not usually grant relief retroactively on compliance obligations with the Ethics Law

and declines to do so here. If there was a concern about a prior violation of the Ethics Law, those circumstances are properly considered through the complaint process set forth in NRS 281A.710 to NRS 281A.790, when and if a complaint is to be considered. Nevertheless, as more fully set forth below, the provisions of NRS 281A.550(5) do not apply to prohibit Public Employee's current employment and therefore the Commission need not reach a decision relating to relief.

Accordingly, the Commission focuses this opinion on why NRS 281A.550(5) does not prohibit the private employment with Contract Vendor and provides guidance on the mandatory provisions of NRS 281A.410(1)(b), which restrict former public officers/employees from rendering paid counseling or representation services to any person (including an private employer) within 12 months after separation from public service.

A. NRS 281A.550(5) DID NOT APPLY TO RESTRICT PRIVATE EMPLOYMENT WITH CONTRACT VENDOR

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 confirms that a contract was provided to Contract Vendor within the 12 months prior to Public Employee's separation from public service with the Public Entity and the contract exceeds \$25,000. Therefore, two of the three requirements of NRS 281A.550(5) are satisfied. Since the statutory requirements are in the conjunctive and all must be present for the statute to apply, the Commission evaluates whether Public Employee's former public position allowed Public Employee to affect or influence the contract award.

With regard to any contract between the Public Entity and Contract Vendor, Public Employee did not serve on the Public Entity's selection committee that reviewed and recommended awarding the subject contracts nor did Public Employee's public position allow Public Employee to influence the contract award. Public Employee confirms that the consultant contracts for Contract Vendor, as well as other consultants, were selected through a multi-step, highly structured, selection process ensuring objectivity and Public Employee had no public duties relating to the selection or award of any contract. In consideration of these circumstances, the Commission determines that Public Employee did not influence the contract award, and the public position Public Employee held with the Public Entity did not allow Public Employee to have influence on the award. Consequently, NRS 281A.550(5) did not apply to prohibit Public Employee from seeking or accepting employment with Contract Vendor.

In addition, the Commission takes this opportunity to appreciate Public Employee's conduct in obtaining approval from the Public Entity to confirm that the Public Entity did not perceive the proposed employment to be restricted. For the sake of additional advice, the Commission reminds Public Employee, and any public officers or employees similarly situated, that the Ethics Law provides certain safe harbors from findings of willful ethics violations for good faith reliance on agency legal counsel and encourages consultation with the agency's administration, personnel and legal departments when conduct relates to policy and legal requirements. Furthermore, if NRS 281A.550(5) did apply and Public

Employee had sought an opinion from the Commission prior to soliciting or accepting the subject employment, Public Employee's conduct would have been considered as a factor favoring granting relief from the strict application of NRS 281A.550(5).

B. NRS 281A.410(1)(b) LIMITATIONS

Public Employee is advised that the restrictions of NRS 281A.410(1)(b) are mandatory and to fully comply with the statute. The statute restricts Public Employee, for the one-year period following separation from Public Employee's public service with the Public Entity, from representing or counseling any private person (including Contract Vendor or any other private employer, other consulting firms, vendors and vendor subcontractors/partners, etc.) on any issue that was under consideration by the 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). These provisions apply even when the provisions of NRS 281A.550 do not and are not subject to relief by the Commission in these circumstances.³ The term "issue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations. The Legislature purposely used this term to capture most matters and it would apply to a variety of issues including existing contracts even if the contract is not within the scope of NRS 281A.550(5).

Public Employee has confirmed that as a condition of Public Employee's acceptance of employment with Contract Vendor, Public Employee requested to be assigned work that is unrelated to the Public Entity including all vendor contracts for a 12-month period, and Public Entity instituted this protocol to assure compliance with the provisions of NRS 281A.410(1)(b) which restricts providing paid consulting or representation to any person (including an employer) on any issued under consideration by the Public Entity during Public Employee's tenure of public service.

To assure that Public Employee maintains compliance with NRS 281A.410(1)(b), the Commission advises Public Employee to be aware of the reach of NRS 281A.410(1)(b) and evaluate each issue to determine whether it was under consideration during Public Employee's public service. In particular, the Commission advises that if Public Employee is requested to assist with any vendor contract or other services provided to the Public Entity, the associated circumstances must be reviewed to determine whether they were issues under consideration by the Public Entity during Public Employee's public employment. The Commission anticipates Public Employee will comply with NRS 281A.410(1)(b) because both Public Employee and Contract Vendor employer have instituted protocols to assure such compliance.

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³ NRS 281A.410(2) provides an exception for part-time Legislators and members of a local body and they may represent or counsel a private person before an agency for which they do not serve, and NRS 281A.410(3) provides authority to the Commission to grant relief to a member of a local legislative body under certain circumstances. Neither statute is applicable to the circumstances presented in this opinion and all other provisions of NRS 281A.410 are mandatory.

VI. CONCLUSIONS OF LAW

1. Public Employee is a public employee as defined by NRS 281A.150 and NRS 281A.180 and based upon Public Employee's former public service for Public Entity.
2. Pursuant to NRS 281A.680(1), the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to Public Employee under NRS 281A.665.
3. Under the circumstances as presented, Public Employee's employment with Contract Vendor is not within the scope of the prohibitions delineated in NRS 281A.550(5) because Public Employee did not affect nor did Public Employee's public position allow Public Employee to influence the award of any contract to Contract Vendor. Therefore, relief from the strict application of NRS 281A.550(5) need not be considered by the Commission.
4. Pursuant to NRS 281A.410(1)(b), Public Employee may not represent or counsel a private person or entity, including Contract Vendor, for at least one year after the termination of Public Employee's public service on any issues that were under consideration by the Public Entity during Public Employee's tenure.

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: /s/ Teresa Lowry
Teresa Lowry
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: ABSTAIN
Amanda Yen, Esq.
Commissioner