



Confidentiality Waived for Opinion Only

STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Justin Sweetland**, Supervisor 3,
Associate Engineer, Department of
Transportation, State of Nevada,

Advisory Opinion No.20-069A
CONFIDENTIAL

_____ Public Employee. /

OPINION

I. STATEMENT OF THE CASE

Justin Sweetland ("Sweetland"), Supervisor 3, Associate Engineer, Nevada Department of Transportation ("NDOT"), requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission"), regarding the propriety of his past conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS"). 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 Sweetland and publicly available information.

Sweetland sought an opinion from the Commission regarding the applicability of the "cooling-off" requirements established in NRS 281A.550(5) because Sweetland anticipates retiring from public service and is interested in seeking employment from HDR Engineering, Inc. ("HDR"), a contract vendor for NDOT. After fully considering Sweetland's request and analyzing the facts, circumstances and testimony presented by Sweetland, the Commission deliberated and advised that the anticipated employment with HDR is not restricted by the "cooling-off" provisions of NRS 281A.550(5). However, Sweetland must comply with the mandatory prohibitions of NRS 281A.410(1)(b) against representing or consulting for compensation for a 12-month period after separation from public employment on any issue under consideration by NDOT during Sweetland's public service. Although NRS 281A.410(1)(b) would not restrict employment with HDR, the statute does limit Sweetland's ability to provide services benefiting HDR, either as a paid employee or independent consultant, on NDOT contracts considered or awarded during the term of Sweetland's public service.

The Commission now renders this final written opinion stating its formal findings of fact and conclusions of law. The facts in this matter were obtained from documentary evidence provided by Sweetland. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact set forth below accept as true those facts Sweetland 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.

¹ The following Commissioners participated in this opinion: Chair Wallin, Vice-Chair Dufrin and Commissioners Lowry, Towler and Yen.

II. QUESTIONS PRESENTED

Sweetland questions whether the “cooling-off” provisions of the Ethics Law set forth in NRS 281A.550(5) prohibit him, for one year after his separation from public service, from providing private engineering services as a future employee with HDR who has several contracts with NDOT awarded during the past 12 months, each exceeding \$25,000. In addition, Sweetland seeks guidance regarding the application of the cooling-off restrictions set forth in NRS 281A.410(1)(b).

III. FINDINGS OF FACT

1. Justin Sweetland (“Sweetland”) is a Supervisor 3, Associate Engineer for the Department of Transportation, State of Nevada (“NDOT”). Sweetland plans on retiring in October, 2020.
2. After he separates from public service, Sweetland desires to work for HDR Engineering, Inc. (“HDR Engineering”), a contract vendor for NDOT.
3. HDR Engineering has been awarded at least six NDOT contracts during the past 12 months, each exceeding \$25,000.
4. Sweetland recalls reviewing a proposal from HDR Engineering about 10 to 12 years ago. Since that time, Sweetland has not participated in the bid preparation, review or selection process for any contracts awarded to HDR Engineering, including those contracts awarded during the past year. Further, Sweetland does not oversee any staff members participating in NDOT’s contract process related to award of contracts including the contracts awarded to HDR Engineering.
5. Sweetland confirms that his NDOT position would not permit him to alert the review team or selection committee if a contract vendor did not perform adequately in providing services under a contract, and he does not oversee or monitor any deliverables for any contract between NDOT and HDR Engineering.
6. Sweetland had lunch with a former NDOT colleague who is employed by HDR Engineering and the colleague indicated that HDR Engineering might have work for him as an inspector or assistant resident engineer for NDOT after Sweetland retires from public service. The colleague indicated that if Sweetland had any interest in applying for work with HDR Engineering, he would need to contact the Ethics Commission before proceeding.
7. Sweetland confirms that he will comply with the limitations set forth in NRS 281A.410(1)(b) that restrict any representing or counseling for compensation provided to any private person (including an employer) on any issues that were under consideration by NDOT during the tenure of Sweetland’s public service for that agency.
8. Sweetland confirms he will comply with NRS 333.705(1), which states:

NRS 333.705(1) relates to contract for services and details certain limitations and requirements. In doing so, it provides authority for the Board of Examiners to approve an agency’s contract with certain retired employees and provides:

1. Except as otherwise provided in this section, a using agency shall not enter into a contract with a person to provide services for the using agency if:

(a) The person is a current employee of an agency of this State;

(b) The person is a former employee of an agency of this State and less than 2 years have expired since the termination of the person's employment with the State; or

(c) The person is employed by the Department of Transportation for a transportation project that is entirely funded by federal money and the term of the contract is for more than 4 years,

↳ unless the using agency submits a written disclosure to the State Board of Examiners indicating the services to be provided pursuant to the contract and the person who will be providing those services and, after reviewing the disclosure, the State Board of Examiners approves entering into a contract with the person. The requirements of this subsection apply to any person employed by a business or other entity that enters into a contract to provide services for a using agency if the person will be performing or producing the services for which the business or entity is employed.

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 applicable to public officers and employees to prevent these government actors from using any proprietary or regulatory information or relationships belonging to the public to create competitive disadvantages or otherwise misuse government information in the private sector regulated by or contracting with the governmental entity. See NRS 281A.410(1)(b) and NRS 281A.550.

NRS 281A.550(5) prohibits a public officer/employee from soliciting or accepting employment from certain vendors if the vendor was awarded a contract exceeding \$25,000 during the past 12 months and the position held by the public officer/employee allowed them to affect or influence the award.² NRS 281A.410(1)(b) does not prohibit employment but instead limits the ability of public officers and public employees to represent or counsel a private person including a business or entity on any issue under consideration during the tenure of the public officer or public employee. This limitation extends to representing or providing services to a business on any pending contract with the agency as an employee or independent contractor for the vendor because the statutory definition of an "issue under consideration" includes a case, proceeding, application, contract or determination. The limitations of NRS 281A.410(1)(b) are in effect for a 12-month period after separation from public service.

² The Commission has authority to grant relief from the employment restrictions under NRS 281A.550(6) if such relief is not contrary to the interests of the public, the continued ethical integrity of the affected agency and the Ethics Law. However, based upon his circumstances, Sweetland focused his request on the applicability of NRS 281A.550 and not whether he was entitled to relief because he did not believe the statute applies to his circumstances.

Based upon Sweetland's public service for NDOT, he is a public employee as that term is defined in NRS 281A.150. In this opinion, the Commission provides guidance to Sweetland on whether the employment restrictions codified in NRS 281A.550(5) apply to his situation if he seeks employment with HDR and details the extent to which the restrictions set forth in NRS 281A.410(1)(b) will limit Sweetland's duties for HDR, if employment is obtained with this employer.

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

NRS 281A.400(1), (2), (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, for the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity, 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. As used in this subsection, "unwarranted" means without justification or adequate reason.

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 for the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity through the use of the public officer's or employee's official position.

3. “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.

4. Definition of Soliciting or Accepting Employment

NRS 281A.550(9) provides:

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.

5. “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

The Legislature has identified limited circumstances in which a public employee may be restricted in future employment endeavors in the private sector so as not to dilute the public's faith in government. Notably, the Legislature, in enacting the distinct and separately enforceable restrictions in NRS 281A.550 and NRS 281A.410, has not prohibited all future private income or employment opportunities. Each statute has a varied focus, but similarly serves to protect the public trust and associated relationships acquired during public service, or expertise obtained as a result of public duties. The Commission considers whether NRS 281A.550(5) applies and provides guidance on the mandatory provisions of NRS 281A.410(1)(b), which prohibit for a 12-month period, the provision of paid counseling and representation on issues under consideration by NDOT during Sweetland's public service. Further, the Commission instructs that the provisions of the Ethics Law are separately enforceable from the requirements of NRS 333.705(1) and obtaining permission to provide services under NRS 333.705(1) does not alter or excuse the application of the requirements of the Ethics Law. See *In re Durski*, Comm'n Op. No. 118A (2018).

A. NRS 281A.550(9) – RESTRICTION ON SOLICITING OR ACCEPTING PRIVATE EMPLOYMENT

Prior to discussing whether NRS 281A.550(5) applies to Sweetland's circumstances, the Commission first assesses whether Sweetland solicited, accepted or otherwise acquired employment in the regulated industry or from a contract vendor, which could be restricted by NRS 281A.550(9). The Commission has confirmed that:

To do otherwise is at one's peril. At a minimum, the restricted conduct hinders and could serve to preclude the ability of the Commission to grant relief from the "cooling-off" prohibition pursuant to NRS 281A.550(6).

In re Public Employee, Comm'n Op. No. 18-80A (2019), at p.7.

The plain language of the word "solicit" is utilized to interpret the statutory restriction in accordance with the principles of statutory construction. When the plain meaning of a statute is clear on its face, then the adjudicator "will not go beyond the language of the statute to determine its meaning. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004). "When a statute is clear on its face, this court gives the statute's plain language its 'ordinary' meaning." *UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union v. Nev. Serv. Emps. Union / SEIU Local 1107*, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008).

Black's Law Dictionary, 10th Edition, defines "solicitation" to be the act of or an instance of requesting or seeking to obtain something. The 2010 Ballentine's Law Dictionary, 3rd Edition, defines "solicit" as to entreat, implore, ask, attempt, or try to obtain. The Meriam-Webster's Collegiate Dictionary, 11th Edition, defines "solicit" as to promote, approach with a request, urge or entice. Based upon the plain meaning of the term "solicit," the Commission determines the plain meaning of the term "soliciting" in NRS 281A.550(9) is to approach, ask, request, attempt or try to obtain employment, which associated conduct will be viewed on a case-by-case basis.

The Commission determines whether there has been a solicitation of employment from a contract vendor on a case-by-case basis. See *In re Public Officer*, Comm'n Op. No. 20-041 (2020). The Commission has determined that solicitation of employment does not occur when the public employee properly seeks the advisory opinion from the Commission prior to holding any discussions with the potential employer. *In re Public Employee*, Comm'n Op. No. 18-032A (2018), at p. 5. The Commission also found there was no solicitation of employment when a public employee was approached for employment but declined to consider it. *In re Public Employee*, Comm'n Op. No. 19-068A (2019), at p. 8.

Here, the context of the discussion between Sweetland and a former colleague employed by HDR was to see whether there was future work with HDR. Even a brief conversation about future employment prospects is captured in the definition of NRS 281A.550(9). A public officer or public employee who does not initiate but receives future employment suggestions, inquiries or promotions from a vendor and does not cease the dialog has been found to be within the restrictions of NRS 281A.550(9). In *re Public Officer*, Comm'n Op. No. 20-004A (2020) (Commission determined NRS 281A.550(9) applied even though employment terms were not finalized, the employment opportunity was left on the table for continued discussion, the employment was not declined.)

The employment-related discussion was brief, but it did occur. Commendably, the colleague employed by HDR appropriately directed Sweetland to the Commission for an advisory opinion. This advice is well-counseled given the requirements of NRS 281A.550(9) and the plain meaning of "solicit." Further, if NRS 281A.550(5) had applied to his circumstances, Sweetland's conduct in asking about future job positions would be considered as a factor against granting relief from the strict application of NRS 281A.550(5).

B. NRS 281A.550(5) DOES NOT PRECLUDE THE PROPOSED EMPLOYMENT WITH HDR

NRS 281A.550(5) prohibits seeking or accepting employment with a private 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 former public officer or employee at the time of the contract award allowed the former public officer or employee to affect or influence the award of the contract. All conjunctive requirements of NRS 281A.550(5) must be present for the one-year "cooling-off" prohibition to apply to restrict the employment.

Notably, affecting an award of a contract is not restricted to the final decision maker. In *In re Public Employee*, Comm'n Op. No. 16-61A (2016), the Commission specified that pursuant to the language of NRS 281A.550(5), 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 also *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). Further, even without an actual affect, the language of NRS 281A.550(5) extends to those contracts where the position held by the public officer/employee, at the time of the contract award, would have permitted the public officer/employee the ability to influence the award. The ability to influence even without conduct of actual influence is therefore sufficient for

application of NRS 281A.550. See *In re Public Employee*, Comm'n Op. No. 18-137A (2019), at p. 8.

HDR is the type of private employer that NRS 281A.550(5) would restrict employment with because it has been awarded several substantial contracts during the past 12 months, each exceeding \$25,000. However, Sweetland's potential employment is not restricted because he confirms that he did not participate in the processing or award of any HDR contract and he had no ability to influence any contract awarded to HDR. Further, Sweetland confirms he was not assigned any public duties relating to any HDR contracts during the past year. This representation is material because it serves to alleviate any concerns that Sweetland used his public position and associated relationships to seek private employment, which implicates provisions of the Code of Ethical Standards set forth in NRS 281A.400.

Based upon the circumstances presented, the Commission finds that one of the three conjunctive requirements of NRS 281A.550(5) is not present because the circumstances establish that Sweetland did not affect and had no ability to influence any of the contract awards to HDR. Therefore, the employment restriction set forth in NRS 281A.550(5) does not apply to Sweetland and he may solicit and accept employment with HDR. Consequently, the Commission need not consider granting relief under NRS 281A.550(6).

Even though NRS 281A.550(5) does not restrict Sweetland's employment with HDR, the Commission takes this opportunity to remind public officers and employees to comply with NRS 281A.550(9) including recognizing that even a conversation about future employment before obtaining relief from NRS 281A.550, provided the statute applies, may hinder the ability of the Commission to grant relief based upon the requirements of NRS 281A.550(6).

The Commission further takes this opportunity, again, to emphasize its concern regarding the implications of these types of future employment engagements with the public's trust in government. The Commission has repeatedly concluded that a public employee may seek employment with a vendor where they either did not, or did not have the opportunity to, influence the *awarding* of the agency's contract with the vendor in the prior year. The Commission interprets the Legislature's restriction in this arena literally. Nevertheless, the Commission recognizes the very real perception, if not the reality, of a pay-to-play scenario when public employees are solicited by agency vendors for future private employment while they are still employed by the agency. The Commission understands the spirit of this law to recognize the Legislature's focus on the public's trust in government free from conflicts between public duties and private interests. Therefore, the Commission notes these implications where an agency employee may not be influential in the *awarding* of the contract but is nevertheless instrumental in *administering* the contract deliverables.³

A vendor which is awarded a contract with a public agency is likely motivated to perform well on the contract deliverables for future contracts with the agency. It is unimaginable that a public employee who has authority to *administer* contract deliverables to a vendor would not have influence in how the vendor performs for

³ The Commission reviews advisory opinions associated with NRS 281A.550 and NRS 281A.410 based upon the individual facts presented, and it does not issue blanket waivers of the cooling-off restrictions to those public officers/employees who seek employment with public entity vendors by referencing similar lists of reasons as those presented previously by a requester for an advisory opinion. See *In re Public Employee*, Comm'n Op. No. 20-0201 (2020), at p. 9; see also *In re Durski*, Comm'n Op. No. 18-118C (2018).

purposes of future contracts, or at least implicate the provisions of NRS 281A.410(1)(b), as more fully discussed below. So, caution must be exercised by public employees who have this level of involvement in vendor contracts with public agencies. Sweetland has represented that he has not been involved in contract deliverables for HDR in the previous year. Thus, the Commission has much greater comfort in recognizing his opportunity under the Ethics Law to future employment with HDR, subject to the limitations on future consulting services to HDR on issues that were before NDOT during his tenure.

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

The limitations established in NRS 281A.410(1)(b) preclude representing or counseling a *private* person for compensation on any matter that was an “issue under consideration” during a public officer/employee’s term of service. Consequently, Sweetland is advised that under NRS 281A.410(1)(b), he may not, for the one-year period following separation from his public service with NDOT, represent or counsel any private person (including HDR, his potential employer or other business entities) on any issue that was under consideration by NDOT during Sweetland’s tenure. This restriction applies to all vendor contracts with NDOT that occurred during Sweetland’s 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 (her employer) was restricted by NRS 281A.410(1)(b). The Commission reiterates that NRS 281A.410(1)(b) applies to private consulting or service firms even when the ultimate service benefits a public entity because the former employee will receive a salary from the firm for advising it and representing its interests in providing client services associated with a contract for the applicable public entity. See *In re Public Employee*, Comm’n Op. No. 18-029A (2018).

The requirements of NRS 281A.410(1)(b) are mandatory and apply to Sweetland’s situation even though relief has been granted from the employment restrictions of NRS 281A.550(5). Given the mandatory requirements imposed by NRS 281A.410(1)(b), the Commission advises Sweetland that he is restricted, for a one-year period after separation from public service, from providing representation to or counseling for compensation to a private person on any “issue under consideration” during Sweetland’s term of public service for NDOT, including all NDOT contracts.

An “issue under consideration” includes a case, proceeding, application, contract or determination, but does not include a legislative measure or administrative regulation. See NRS 281A.410(1)(b). HDR contracts with NDOT constitute issues under consideration by NDOT for application of NRS 281A.420(1)(b). Consequently, Sweetland is advised to review his potential duties for HDR to determine whether they have a nexus or connection to an issue under consideration by NDOT during his public service including any contracts between HDR and NDOT.

The Commission has no authority to waive the requirements of NRS 281A.410(1)(b) even in the presence of equitable reasons that arguably might support such relief. Accordingly, the Commission advises full compliance with the statutory requirements. If there is a concern, Sweetland may utilize the advisory opinion process established in NRS 281A.675.

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VI. CONCLUSIONS OF LAW

1. Sweetland is a public employee as defined by NRS 281A.150.
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 Sweetland under NRS 281A.665.
3. Under the circumstances as presented, Sweetland's prospective employment with HDR is not precluded by NRS 281A.550(5) because Sweetland did not actually influence and his position at NDOT did not permit him to influence the award of the contracts to HDR given his public duties as NDOT's Associate Engineer.
4. Pursuant to NRS 281A.410(1)(b), Sweetland may not represent or counsel a private person or entity, including any potential employer (HDR), for a 12-month period after the termination of his public service on any issues that were under consideration by NDOT during his tenure. Pursuant to NRS 281A.410(1)(b), the Commission determines that the NDOT contracts awarded to HDR were issues under consideration by NDOT during Sweetland's term of service.

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 30th day of November, 2020.

NEVADA COMMISSION ON ETHICS

By: /s/ Kim Wallin
Kim Wallin, CPA, CMA, CFM
Chair

By: /s/ Thoran Towler
Thoran Towler, Esq.
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Vice-Chair

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

By: /s/ Teresa Lowry
Teresa Lowry, Esq.
Commissioner