



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of **PUBLIC OFFICER**, Former Member,
State Regulatory Body, State of Nevada,

Request for Opinion No. 13-09A

Former Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

A former Member of a Nevada State Regulatory Body (“Public Body”), Public Officer, requested a confidential advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.440(1) regarding the propriety of the Public Officer’s anticipated future conduct as it relates to the Ethics in Government Law (“Ethics Law”) set forth in Chapter 281A of the Nevada Revised Statutes (“NRS”). A quorum¹ of the Commission heard this matter on February 20, 2013. The Public Officer appeared in person and provided sworn testimony. The Public Officer was represented during the Commission proceedings by legal counsel.

The Public Officer sought an opinion from the Commission regarding the Public Officer’s “cooling-off” obligations under the Ethics Law if the Public Officer were to serve as an independent contractor for a private Nevada business entity on issues related to the industry regulated by the Public Body within one year of the Public Officer’s separation from public service.

After fully considering the Public Officer’s request and analyzing the facts, circumstances and testimony presented by the Public Officer, the Commission deliberated and orally advised the Public Officer of its decision that the cooling-off provisions are applicable to the Public Officer’s circumstances, but the Public Officer’s proposed activities and engagements would be permissible. The

¹ The following Commissioners participated in this opinion: John Carpenter, Timothy Cory, Gregory Gale, Magdalena Groover, Paul Lamboley, Cheryl Lau, James Shaw and Keith Weaver.

Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.²

The Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this Abstract in lieu of the Opinion that was issued to the Public Officer on or about October 21, 2013.

The facts in this matter were obtained from documentary and testimonial evidence provided by the Public Officer. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact set forth below accept as true those facts the Public Officer 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. EVIDENTIARY RECORD AND BASIS FOR REQUEST

In the Public Officer's written submissions and testimony, the Public Officer provided a history of the Public Officer's public and private service as follows:

1. In the Public Officer's former public capacity, the Public Officer served as a member of the Public Body for several years. The Public Officer's duties generally included the administration of the provisions of NRS related to the regulation of a licensed industry within the State.
2. The powers of the Public Body include, but are not limited to inspections, examinations and audits of any and all records of any applicant or licensee.
3. Prior to the Public Officer's public service on the Public Body, the Public Officer's private endeavors included high-level employment in significant senior management positions within the industry regulated by the Public Body, with areas of responsibility in finance, strategy and management/policy formation spanning a 15-year time period. Specifically, the Public Officer's experience was concentrated in financial performance of entities within the industry.
4. The Public Officer was previously employed by various entities regulated by the Public Body and managed the complete day-to-day operations and overall operations of the entities, some of which also operate in and are regulated by other jurisdictions.

Additionally, the Public Officer proposed several scenarios of post-government business opportunities in the private sector regarding which the Public Officer has considered or been approached to undertake on behalf of businesses or persons that may or may not be regulated by the Public Body, and which form the basis of this request for opinion.

² The individual comments made by any commissioner during the hearing are not binding on the Commission's final opinion.

Based on the testimony presented during the hearing and the factual record of written submissions, including a legal brief, the Public Officer requests a Commission opinion concerning the applicability of statutory cooling-off requirements while serving as an independent contractor under the scenarios presented.

III. QUESTIONS PRESENTED

The Public Officer generally questions whether the one year “cooling-off” provisions of the Ethics Law affect the Public Officer’s ability to solicit or accept employment as an *independent contractor* consultant to a regulated entity in Nevada, or any other private person operating within the industry.

Specifically, the Public Officer questions whether the restrictive “cooling-off” provisions set forth in NRS 281A.550(1) and/or (2)³ and 281A.550(3) apply to the proposed scenarios of private sector opportunities if undertaken as an *independent contractor*. If those “cooling-off” provisions do apply, the Public Officer has not specifically asked whether the Public Officer should be granted relief therefrom under NRS 281A.550(6). Further, the Public Officer concedes that the application of the restrictive “cooling-off” provisions in NRS 281A.410(1)(b) will apply to any activity contemplated in the scenarios.

IV. STATEMENT AND DISCUSSION OF RELEVANT STATUTES AND ISSUES

For the reasons set forth below, the Commission declares that service as an *independent contractor* qualifies as employment within the meaning and context of the companion cooling-off requirements set forth in NRS 281A.550 and 281A.410. However, based upon the specific facts provided by the Public Officer, the services in the confines of the proposed scenarios presented would not violate the “cooling-off” restrictions of the Ethics Law as such services do not involve any quid pro quo or revolving door implications and are not deemed the type of work or employment which is otherwise regulated by the Public Body. Furthermore, the Public Officer’s proposed services are not contrary to the public trust and best interests of the State of Nevada. Any such services shall, however, be subject to the *one year restriction* on “representing” or “counseling” for compensation any private person on any issue that was under consideration by the Public Body during the Public Officer’s time of service.

³ The provisions of NRS 281A.550(1) and (2) provide virtually identical cooling-off prohibitions for former members of the Public Utilities Commission of Nevada, the State Gaming Control Board and the Nevada Gaming Commission. Because the Commission seeks to preserve the confidentiality of the requester by not identifying the specific public body, the Commission applies and interprets the provisions of NRS 281A.550(1) and (2) identically for the purposes of the analysis provided in this Abstract Opinion.

A. RELEVANT STATUTES

1. Declared Nevada Public Policy on Government Ethics

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(1), (2) and (3) provide:

1. A former member of the Public Utilities Commission of Nevada shall not:
 - (a) **Be employed by** a public utility or parent organization or subsidiary of a public utility; or
 - (b) Appear before the Public Utilities Commission of Nevada to testify on behalf of a public utility or parent organization or subsidiary of a public utility,
→ for 1 year after the termination of the member's service on the Public Utilities Commission of Nevada.

2. A former member of the State Gaming Control Board or the Nevada Gaming Commission shall not:
 - (a) Appear before the State Gaming Control Board or the Nevada Gaming Commission on behalf of a person who holds a license issued pursuant to chapter 463 or 464 of NRS or who is required to register with the Nevada Gaming Commission pursuant to chapter 463 of NRS; **or**
 - (b) **Be employed by** such a person,
→ for 1 year after the termination of the member's service on the State Gaming Control Board or the Nevada Gaming Commission.

3. In addition to the prohibitions set forth in subsections 1 and 2, and except as otherwise provided in subsections 4 and 6, a former public officer or employee of a board, commission, department, division or other agency of the Executive Department of State Government, except a clerical employee, **shall not solicit or accept employment from a business or industry whose activities are governed by regulations adopted by the board, commission,** department, division or other agency for 1 year after the termination of the former public officer's or employee's service or period of employment if:
 - (a) The former public officer's or employee's principal duties included the formulation of policy contained in the regulations governing the business or industry;
 - (b) During the immediately preceding year, the former public officer or employee directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business or industry which might, but for this section, employ the former public officer or employee; or
 - (c) As a result of the former public officer's or employee's governmental service or employment, the former public officer or employee possesses knowledge of the trade secrets of a direct business competitor.

(Emphasis added).

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

NRS 281A.550(6) provides:

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

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

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.

B. ISSUES/DECISION

1. Independent Contractor Status

As a former member of the Public Body, the Public Officer questions whether the one-year "cooling-off" requirements of the Ethics Law set forth in NRS 281A.550(1) and/or (2) and NRS 281A.550(3) apply if the Public Officer serves as an *independent contractor* for, as distinguished from "being employed by" or "soliciting or accepting employment from" a regulated entity of the Public Body or another private entity within the industry. The Public Officer contends that activity undertaken in any of the scenarios presented is excluded from any statutorily required "cooling-off" period if the Public Officer undertakes such activity as an independent contractor. The Public Officer argues that an engagement as an "independent contractor" creates a relationship and status distinct from that of an "employee" in the context of "being employed by" or "soliciting or accepting employment from" an entity, as those specific terms are used in the statutes.

Essentially, the Public Officer suggests that the Legislature did not intend the broader, plain meaning of those terms, but a narrower meaning of “employee.” In support of the Public Officer’s argument, the Public Officer cites precedent of the Nevada Supreme Court that distinguishes an employee from an independent contractor in an employment liability context.

The Commission disagrees and concludes that the “cooling-off” provisions of NRS 281A.550(1) and (2) and NRS 281A.550(3) apply to anticipated future activities as an “independent contractor” for a variety of reasons that focus on the perceived purpose and intent in the Legislature’s adoption of “cooling-off” provisions as well as the relationship and activities undertaken. The context of the “cooling-off” questions at issue in this RFO involve the Public Officer’s service on a public body governed by NRS 281A.550(1) or (2). Accordingly, as a matter of statutory interpretation and application, the specific “public utility regulator” and “gaming regulator” provisions of NRS 281A.550(1) and (2) govern and preempt consideration or application of the provisions of NRS 281A.550(3) that generally address other “non-public utility” and “non-gaming regulator” situations distinct from the Public Officer’s circumstances here at issue. However, because the Public Officer requested an opinion on all statutory sections (NRS 281A.550(1) and/or (2) and NRS 281A.550(3)), the Commission’s opinion relating to all would be instructive and beneficial because of their similarity as “cooling-off” provisions.

Concepts of “cooling-off” and “revolving-door” are integral to principles of ethics in government. The Nevada legislative history notes several concerns that prompted its adoption: (a) efforts to lobby, persuade, or gain favor of former colleagues in regulatory matters; (b) public investment and training in expertise for regulatory service; (c) return of public confidence for investment and training in expertise; (d) access to proprietary, confidential, sensitive or beneficial internal information or technology regarding competitors in a regulated industry; (e) eliminate the perception or appearance of impropriety in regulated matters; (f) keep, maintain or restore public confidence in public service as well as regulatory structure; and (g) prevent a regulator from using information and public service merely for private gain or profit. See Minutes, Senate Bill No. 329, Senate Committee on Judiciary, April 13, 1987 and Assembly Committee on Government Affairs, May 11, 13 and 20, 1987, 64th Nevada Legislative Session, and Minutes, Assembly Bill No. 90, Assembly Committee on Government Affairs, January 28, 1993 and March 10 and 25, 1993 and Senate Committee on Government Affairs, May 10, 1993 and July 1, 1993, 67th Nevada Legislative Session. Indeed, when asked, the Public Officer’s counsel agreed that “cooling-off” policy had an ethics purpose, stating: “the legislative intent of the ‘cooling-off’ period is to avoid the rotating door between government service and the private sector I think for the most part. So that those who have been in government service cannot just turn right back around and then begin to try to lobby or influence their former colleagues. So I think that was viewed as an integrity issue and ethics issue that the Legislature wanted to address.” Comm’n Hearing Transcript, pp. 17-18 (confidential).

The Public Officer's former service as a member of the Public Body included the formulation of policies set forth in the State's regulations, performance of activities which directly controlled and influenced decisions and actions affecting the regulated industry and allowed access to or knowledge of proprietary, confidential and sensitive information, technology and trade secrets of various business competitors within the industry. Based on the nature of the Public Officer's former public service, NRS 281A.550(1) and (2) prohibit, for one year, the Public Officer from being "employed by" any public utility entity and/or gaming licensee or appearing before the Public Utilities Commission ("PUC") or Gaming Control Board/Nevada Gaming Commission ("GCB/NGC") on behalf of any entity or licensee for one year, and NRS 281A.550(3) prohibits, for one year, the Public Officer from "soliciting or accepting employment from" an entity regulated by the Public Body.

The Public Officer asks the Commission to construe the terms "employed by" and "employment from" as used in NRS 281A.550(1), (2) and (3) to exclude an independent contractor relationship with a regulated entity. The Commission, however, declines to accept the Public Officer's narrow, distinct interpretation of the relationship intended to be encompassed by the "cooling-off" provisions set forth in NRS 281A.550(1), (2) and (3). Instead, the Commission concludes that the status of the technical form, character or limiting term of the relationship is irrelevant, but rather the nature, scope and content of the engagement are determinative.

The Commission believes the terms "employed by" and "employment from" as used in NRS 281A.550(1), (2) and (3) are intended to have plain meaning and be construed as "to make use of", "to use or engage the services of", "to work for" or "to work", in any form of service or agency on behalf of another for a purpose which implies a request and contract for compensation in the ordinary affairs of business or personal life. Were it otherwise, it would exalt form over substance for the purpose of implementing the Ethics Law.

2. Qualified/Permissive Activities

However, the Commission does not interpret the provisions of NRS 281A.550(1), (2) or (3) prohibiting private employment by a regulated entity as an absolute bar and recognizes that there are permissive activities that can be pursued unrelated to the regulated activity and limited by the prohibitions set forth in NRS 281A.410. The prohibitions set forth in NRS 281A.550(1), (2) and (3) contemplate only temporary, one year, restrictions on future private employment in or by the businesses or industry regulated by the State. These restrictions apply only where such a future engagement is directly related to the regulatory purposes of the agency or secured through improper public resources, means or relationships.

The "cooling-off" provisions are clearly temporal, and delay, only for a 12-month period, certain private employment engagements with a regulated entity which are related to its regulated activity and/or which are sought or secured through public resources or relationships. In the context of the public utility and gaming industries,

two of the State's primary economic industries, the type of employment available is diverse and encompasses a wide range of employment opportunities from customer service, product installation/service, janitorial, food and beverage, security and hotel and resort services to intellectual technology, human resources and legal compliance. The provisions of NRS 281A.550(1), (2) and (3) should not reasonably be read or interpreted to prohibit former government employees and officials responsible for regulatory matters from any or all future employment in areas not related to the State regulation, so long as it is not sought for improper purposes or acquired through improper public resources.

The Commission has on a prior occasion considered the purpose and intent of the "cooling-off" provisions affecting future employment and has held that where a former State regulator of a private industry sought to leave that public service and pursue a career with a regulated entity in an area of employee benefits unrelated to the entity's State regulation, the anticipated employment was not the type of employment intended to be prohibited under the "cooling-off" provisions, unless it was achieved through inappropriate use of the former public position. See *In re Public Officer*, Comm'n Opinion No. 11-79A (2012)(Although the Commission applied the exception set forth in NRS 281A.550(6), it nevertheless described the type of employment generally contemplated by the cooling-off requirements as not intended to prohibit private employment that is unrelated to the State regulation or that is not acquired through public resources or relationships). In this case, because the Public Officer did not request consideration of statutory relief under NRS 281A.550(6), the Commission offered no opinion on that issue.

In this case, the Public Officer seeks to provide consultation and/or representation services under certain proposed scenarios to various regulated entities, some of which are regulated by the Public Body, but the Public Officer does not anticipate providing such services on matters related to the regulatory issues affecting those entities that were under consideration during the Public Officer's tenure. Based on the specific circumstances proposed by the Public Officer relative to NRS 281A.550, the Commission approves the private opportunities available to the Public Officer as set forth in the specific proposed scenarios; however, relative to NRS 281A.410, the Commission necessarily restricts for one year the types of consulting and representation activities that may be undertaken in any one of the proposed activities.

3. One-Year Prohibition

NRS 281A.410(1)(b) temporarily (one year) prohibits private representation and counseling regarding issues that were under consideration by the Public Body during the Public Officer's tenure, but permits the Public Officer to provide representation and consulting regarding "proposals or consideration of legislative matters and administrative regulations" on issues related to the regulated industry. Accordingly, a former regulator may not advise a private person on matters that were under consideration by the public body during one's tenure, but could, presumably,

represent (lobby on behalf of) or counsel a private person on issues related to the agency's former consideration of legislative measures and administrative regulations during the regulator's tenure. However, the Commission believes that NRS 281A.410(1)(b) was logically intended to preclude a former regulator from participating in a private engagement involving the proposal or consideration of a legislative matter or administrative regulation that was under consideration by the agency during the regulator's tenure if the legislative matter or administrative regulation is reasonably related to a separate and distinct regulatory issue (i.e., a specific case, proceeding, application, contract or other determination) that was considered during the regulator's tenure. For example, if the legislative measure or administrative regulation considered by the agency was prompted by a separate agency issue that was under consideration during the public officer's tenure, that measure or regulation is likewise off limits for one year.

The one-year "cooling-off" requirement therefore precludes, for one year, participation on any issue that was under consideration before the former agency, including participation on issues related to a specific case or matters before the Legislature on "legislation" or the agency on "regulations" dealing with that same issue. To construe the exception otherwise would swallow the general prohibition and allow future participation in the same issue under the guise that the representation/counseling merely involved the consideration of legislation and/or administrative regulations. Such an outcome would enhance the former regulator's active advantage or influence on the same issue in both old and new forums, and defeat the intent to reduce and remove the former regulator's advantage or influence on the same issue for a 12-month period of time.

Under the statutory umbrella identified herein, the Commission finds that the Public Officer, as described in certain identified scenarios, may provide private consulting and representation services to any private person or entity, including a person or entity regulated by the Public Body, regarding any policy, legislation or administrative regulation before the Nevada Legislature and other jurisdictional legislatures and administrative agencies, as long as those policies, legislative measures and administrative regulations are not reasonably related to other issues that were under consideration by the Public Body during the Public Officer's tenure. However, NRS 281A.550(1) and (2) remain binding such that the Public Officer may not personally appear before the Public Body for one year after the termination of the Public Officer's public service. The Public Officer testified candidly that the Public Officer did not intend to and would not appear before the Public Body under any of the Public Officer's permitted activities outlined herein for at least one year. The Commission further concludes that the Public Officer's anticipated activities are permissible and consistent with the intent and purpose of the "cooling-off" provisions and the limitations set forth in NRS 281A.410 and as outlined herein governing the "cooling-off" provisions for private representation or consulting.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidentiary record, the Commission makes the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

1. In the Public Officer's former public capacity, the Public Officer served as a member of the Public Body for several years. The powers of the Public Body include, without limitation, inspections, examinations and audits of any and all records of any applicant or licensee.
2. As a member of the Public Body, the Public Officer's duties generally included the administration of the provisions of NRS respecting certain regulated entities. The Public Officer's former service included the formulation of policies set forth in the State's regulations, performance of activities which directly controlled and influenced decisions and actions affecting the regulated industry and access to or knowledge of proprietary, confidential and sensitive information, technology and trade secrets of various business competitors within the industry.
3. Prior to the Public Officer's public service on the Public Body, the Public Officer's private endeavors included high-level employment in significant senior management positions within the industry regulated by the Public Body.
4. The Public Officer intends to pursue any one or all of the proposed factual scenarios of post-government business opportunities in the private sector regarding which the Public Officer has been approached or has considered undertaking on behalf of businesses or persons that may or may not be regulated by the Public Body, and which form the basis of this request for opinion.
5. Given the Public Officer's prior executive level employment experiences in the private sector, nothing in this record suggests the Public Officer is attempting to improperly "parlay" the Public Officer's public service as a regulator into a lucrative private sector opportunity.

B. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, the Public Officer was a former public officer as defined by NRS 281A.160 and 281A.180.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. The provisions of NRS 281A.550(1), (2) and (3) apply to any employment activity undertaken through an independent contractual relationship.

4. The provisions of NRS 281A.550(1) and (2) specifically apply to the public utility/gaming industry circumstances that form the basis for the request at issue, and preempt the application of the more general provisions of NRS 281A.550(3); however, given the importance of the issue raised with respect to all sections, the Commission concludes it appropriate to include all provisions in its opinion for educational and instructive purposes.
5. Pursuant to NRS 281A.550(1), (2) and (3), the Public Officer may provide private consulting and representation services for compensation for a private person or entity, including an entity regulated by the Public Body, regarding any policy, legislation, or administrative regulation as contemplated by the certain identified scenarios proposed by the Public Officer, as long as those policies, legislative measures and administrative regulations are not reasonably related to any other issues that were under consideration by the Public Body during the Public Officer's tenure. Moreover, pursuant to NRS 281A.550(1) and/or (2), the Public Officer may not appear before the Public Body on any matter for one year after the termination of the Public Officer's public service.
6. Pursuant to NRS 281A.410(1)(b), the Public Officer may not, however, represent or counsel the regulated entity, or any other private person, for at least one year after the termination of the Public Officer's public service, on any issues that were under consideration by the Public Body during the Public Officer's tenure.

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

The Following Commissioners Participated in this Opinion:

Dated this 4th day of February, 2014.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul Lamboley
Paul Lamboley
Vice-Chairman

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ John Carpenter
John Carpenter
Commissioner

By: /s/ Cheryl Lau
Cheryl Lau
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ James Shaw
James Shaw
Commissioner

By: /s/ Gregory Gale
Gregory Gale
Commissioner

By: /s/ Keith Weaver
Keith Weaver
Commissioner