



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No. 22-059A

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Public Officer. /

### **ABSTRACT OPINION**

#### **I. STATEMENT OF THE CASE**

Public Officer requested this advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675, regarding certain compliance obligations under Nevada 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.<sup>1</sup> The Commission considered the request for an advisory opinion, a list of proposed facts that were affirmed as true by Public Officer, and publicly available information.

The Commission now renders this abstract opinion. Although a full written opinion was properly served, for confidentiality reasons, this abstract opinion redacts certain findings of fact that were affirmed as true by Public Officer, provides a summary of issues, and removes other identifying information to protect the confidentiality of Public Officer. Facts and circumstances that differ from those presented to and relied upon by the Commission in this opinion may result in different findings and conclusions than those expressed in this opinion.<sup>2</sup>

#### **II. QUESTION PRESENTED**

Public Officer seeks guidance on the applicability of the Ethics Law and its "cooling-off" requirements set forth in NRS 281A.550(5) and NRS 281A.410(1)(b) and whether the statutory restrictions would prohibit employment with Private Employer, which business is anticipated to provide vendor services to Public Entity.

#### **III. FINDINGS OF FACT**

1. Public Officer is a public officer for Public Entity and is considering separation from public service.

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<sup>1</sup> The following Commissioners participated in this opinion: Chair Wallin, Vice-Chair Duffrin and Commissioners Gruenewald, Lowry, Oscarson, Sheets, Towler and Yen.

<sup>2</sup> 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).

2. As a part of a team, Public Officer has certain public duties associated with the selection process but not the award of vendor contracts and related contract amendments.
3. Private Employer is in the process of becoming a contract vendor for Public Entity whose contract is anticipated to be signed either during the year prior to Public Officer's anticipated separation date or shortly thereafter.
4. The proposed contract with Private Employer exceeds \$25,000.
5. As part of public duties and as a member of a team, Public Officer was involved with certain aspects associated with the proposed vendor contract with Private Employer but did not have independent decision-making authority over such matters.
6. Without any encouragement by Public Officer, Private Employer approached Public Officer to offer private employment after conclusion of public service. Public Officer's proposed duties for Private Employer directly relate to providing contract deliverables to Public Entity.
7. The offer of employment would assist and be beneficial to Public Entity in receiving deliverables under the proposed contract with Private Employer.
8. Public Officer accepted the offer of private employment conditioned on the Commission's guidance that the employment would not be restricted by the Ethics Law. Further, Public Officer believes it would be an unfair application of the Ethics Law to bar passively accepting private employment offered through no affirmative outreach, or to bar Public Officer from assisting Public Entity as a potential employee of Private Employer.
9. If the Commission determines NRS 281A.550(5) applies to the circumstances, Public Officer requests relief from the employment prohibition to permit employment with Private Employer based upon a number of reasons including, without limitation:
  - a. Public Officer is a long-term public servant and the separation from public service would not be a revolving door scenario.
  - b. Public Officer's separation from public service was contemplated before any contract award to Private Employer and is not dependent on the proposed employment.
  - c. Even though Public Officer had public duties relating to contract vendors, such duties had no independent decision-making authority.
  - d. Public Officer's input, while valuable, would not have changed the recommendation to contract with Private Employer for a number of reasons.
  - e. The proposed employment with Private Employer and related contract would benefit Public Entity and would not offend or violate the principles of open procurement.

#### **IV. STATEMENT OF ISSUES AND RELEVANT STATUTES**

##### **A. OVERVIEW OF ISSUES**

Public Officer seeks guidance from the Commission on whether the restrictions from private employment established in NRS 281.550(5) or NRS 281A.410(1)(b) apply to

the circumstances. NRS 281A.550(5) restricts soliciting or accepting employment from a person to whom a contract was awarded within the preceding 12 months if the amount of the contract exceeds \$25,000 and the position held at that time of the contract award allowed the public officer or employee to affect or influence the award of the contract. NRS 281A.410(1)(b) restricts paid compensation for providing services pertaining to consulting or representation on any issue that was under consideration during the tenure of public service for a 12-month period after separation from public service.

In enacting these statutes, 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 serve to protect the public trust and associated relationships acquired during public service, or expertise obtained as a result of public duties.

## **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" – Employment Prohibitions**

**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. "Cooling-Off" – Representing or Counseling**

**NRS 281A.410(1)(b), in relevant part, provides:**

In addition to the requirements of the code of ethical standards and other 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:

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(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. COMMISSION DECISION**

### **A. NRS 281A.550(5) – EMPLOYMENT WITH CONTRACT VENDOR**

NRS 281A.550(5) establishes a one-year "cooling-off" period for public officers and employees of the State and its political subdivisions that restricts solicitation or acceptance of employment from a contract vendor if the amount of the contract exceeds \$25,000, the contract was awarded in the preceding 12-month period prior to termination of employment, and the public position held by the public officer or employee placed them in the position to affect or influence the award of the contract. The statutory requirements are in the conjunctive, and all must be present for the restriction to apply. See *In re Public Employee*, Comm'n Op. No. 20-020A (2020), at p. 6.

With regard to the proposed contract anticipated to be awarded to Private Employer, its amount exceeds the threshold of \$25,000, and Public Officer's public duties provided the ability to influence the award of the contract, even when there is no evidence of actual influence. 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 does not equate to decision making and it may be overt or part of a team considering a proposed contract. Further, the ability to influence does not require an act of actual influence for application of NRS 281A.550. See *In re Public Employee*, Comm'n Op. No. 18-137A (2019); *In re Public Employee*, Comm'n Op. No. 16-61A (2016).

The Commission has no evidence that Public Officer was biased in performing public duties or failed to properly consider the involved issues related to the proposed contract. However, Public Officer's public duties were not clerical or insignificant and placed Public Officer in a position to have influence over the process to award the contract to Private Employer. Accordingly, the Commission determines that the Public Officer's position would have provided the ability to influence the contract award to Private Employer for application of NRS 281A.550(5), should the contract proceed to be awarded during the year period prior to separation from public service. If the contract is not awarded within the applicable year period, the statutory restriction would not apply to the circumstances.

## **B. NRS 281A.550(6) – REQUEST FOR RELIEF FROM EMPLOYMENT RESTRICTION**

The Commission considers whether relief should be granted under NRS 281A.550(6). Historically, when the Commission has granted relief, the review has 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. In considering relief from "cooling-off," NRS 281A.550(6) requires the Commission to 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 this chapter.

"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." *In re Public Officer*, Comm'n Op. No. 11-96A (2012), at p. 5; *In re Public Employee*, Comm'n Op. No. 13-29A (2014), at p. 9.

Included in any consideration of whether relief should be granted under the statutory standards is the determination of whether there is any potential impropriety or actual impropriety associated with certain employment relationships involving contract vendors and public duties and whether there has been any solicitation of employment, as defined by NRS 281A.550(9). The anticipated duties for the contract vendor are properly considered in granting relief but are not controlling. The Commission reviews the full circumstances to determine whether or not it will render the required findings set forth in NRS 281A.550(6) to grant relief from the strict application of the "cooling-off" prohibition. See *In re Public Officer*, Comm'n Op. No. 15-74A (2018).

Public Officer requests relief be granted for a number of reasons which are mainly based upon assisting Public Entity. The endeavor to help out the public agency served is commendable. Even though the provisions of NRS 281A.550(5) would not restrict the proposed employment if the contract is not awarded within the restricted period prior to separation from public service, the Commission considers relief just in case the contract is awarded before Public Officer leaves public service.

To be entitled to relief, the Commission must be able to make all required findings under NRS 281A.550(6). Based upon the circumstances and given its opinion precedent, the Commission cannot affirmatively determine that the proposed employment would not be contrary to the ethical integrity of Public Entity or to the provisions of the Ethics Law, as required by NRS 281A.550(6). Preservation of the ethical integrity of the involved agency must be considered in determining whether relief is appropriate under NRS 281A.550(6).

Here, there are factors that create concern in maintaining the ethical integrity of the Public Entity. The Commission has found that the integrity of a public agency is compromised if jobs are sought from current or potential vendors. Even without an actual violation of the Ethics Law, there is an appearance of impropriety when a public

officer/employee utilizes public relationships to ascertain whether there are future employment opportunities. See *In re Public Employee*, Comm'n Op. No. 20-004A (2020) (relief not granted after contract vendor offered post separation employment); *In re Cegavske*, Comm'n Op. No. 05-16A (2005) (consideration relating to whether public officer would have been provided the business opportunity but for the current public position). Private Employer's initiation of the discussion about a future employment opportunity arose as a result of Public Officer's performance of public duties. The facts do not demonstrate that separation was maintained between public duties and private interests in future employment.

In addition, the restriction against solicitation established in NRS 281A.550(9) and the provisions of NRS 281A.400(1) and (2), are implicated. NRS 281A.550(9) prohibits the solicitation of employment from a contract vendor if NRS 281A.550 applies to the circumstances, which the Commission has determined the statute does apply if the contract is not awarded in the year prior to Public Officer's separation from public service. Nevertheless, the provisions of NRS 281A.400(1) and (2) impose a duty to avoid actual and perceived conflicts of interest, and a public position may not be used to secure or grant unwarranted personal or private privileges, preferences, exemptions or advantages for a public officer or employee, or for any person to whom the public officer/employee has a commitment in a private capacity. See NRS 281A.020 and NRS 281A.400(1) and (2). There is a personal and pecuniary interest in seeking or soliciting private employment.

Asking the position to be held open rather than declining the advancement constitutes at a minimum an appearance of impropriety and may amount to a prohibited solicitation.<sup>3</sup> Private employment discussions taking place during work hours with contract vendors when the public officer/employee is representing the public agency is of concern, even with the benefit of the doubt that there was no intention that these discussions would result in an employment solicitation. "Discussions about private employment while on the taxpayer time and carrying out public duties present a slippery slope." See *In re Public Officer*, Comm'n Op. No. 20-004A (2020) at p. 9; *In re Public Employee*, Comm'n Op. No. 18-080A (2019) (appearance of impropriety or actual impropriety exists when public officer/employee fails to maintain proper separation and holds future private employment discussions with regulated industry (or contract vendor) while performing public duties).

"The catch-22 for public officers/employees is they, not the potential employer, must assure proper separation between private interests and public duties to comply with the Ethics Law (NRS 281A.400 and NRS 281A.550)." *Id.*, at p. 9. The duty to avoid conflicts does not always rise to the level of a violation of the Ethics Law and the Commission is not making this determination in this advisory opinion. However, lack of separation between public duties and private interests is contrary to the foundational principles of protecting the integrity of the involved agency and the provisions of the Ethics Law and hinders the ability of the Commission to grant relief under NRS 281A.550(6).

Accordingly, the Commission does not grant relief if the contract proceeds to an award during the restricted period, because the Commission cannot affirmatively find that

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<sup>3</sup> In *In re Public Employee*, Comm'n Op. No. 20-020A (2020), the Commission applied the plain language definition for solicitation, which is "Black 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."

all of the required conditions set forth in NRS 281A.550(6) are met. Therefore, the employment prohibition established in NRS 281A.550(5) applies if the contract is awarded to Private Employer during the year prior to Public Officer's separation from public employment.

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

In addition, Public Officer is advised that the restrictions of NRS 281A.410(1)(b) are mandatory and to fully comply with the statute. The statute restricts for the one-year period following separation from public service any compensated representing or counseling any private person (including any contract vendors, subcontractors/partners, etc.) on any issue that was under consideration by the agency during the tenure of public service. NRS 281A.410(1)(b) 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.

The Commission found a violation even where the former employee did not realize the counseling or representation of a private person through an employment scenario (for a private employer) was restricted by NRS 281A.410(1)(b). *See, In re Sweeney*, Comm'n Op. No. 15-70C (2016). The statutory restrictions apply even when the provisions of NRS 281A.550(3) and (5) do not, and these restrictions are not subject to relief by the Commission under these circumstances.<sup>4</sup> Accordingly, Public Officer must be vigilant to recognize applicable situations and comply with the statutory restrictions.

The proposed contract with Private Employer certainly was under consideration by Public Entity, even though there has not been an official award of contract, to date. Accordingly, the restrictions set forth in NRS 281A.410(1)(b) apply to these circumstances.

## **VI. CONCLUSIONS OF LAW**

1. Public Officer is a public officer as defined by NRS 281A.160.
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 the public officer or employee under NRS 281A.665.
3. Public Officer's employment with Private Employer is not prohibited by NRS 281A.550(5) unless a contract within in the scope of the statute is awarded in the year prior to Public Officer's separation from public service.
4. Pursuant to NRS 281A.550(6), relief from the strict application of the "cooling-off" restriction is not appropriate if the contract proceeds to an award within the year prior to Public Officer's separation from public service because the Commission cannot affirmatively find that all of the required conditions set forth in NRS 281A.550(6) are met. Accordingly, the Commission declines to grant relief from

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<sup>4</sup> NRS 281A.410(2) provides an exception for part-time Legislators and members of a local body because they may represent or counsel a private person before an agency for which they do not service 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.

the employment prohibition established pursuant to application of NRS 281A.550(5) under these circumstances.

5. Pursuant to NRS 281A.410(1)(b), Public Officer may not receive compensation to represent or counsel a private person or entity, for at least one year after separation from public service on any contracts or other matters considered by Public Entity during the full term of public service or tenure with this agency, which prohibition includes any services anticipated to be provided under any existing contract and the contemplated vendor contract with Private Employer.<sup>5</sup>

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 18<sup>th</sup> day of August, 2022.

NEVADA COMMISSION ON ETHICS

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

By: /s/ James Oscarson  
James Oscarson  
Commissioner

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

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

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

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

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

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

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<sup>5</sup> Without limitation, person or entity includes any employer whether contract vendor, subcontractor, consulting firm, or other form of business or person.