



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No.23-006A

Public Officer. /

### **ABSTRACT OPINION**

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

Public Officer requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission"), regarding the propriety of Public Officer's 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.<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.

Public Officer sought an opinion from the Commission regarding conflicts of interest between Public Officer's public duties as a member of a Public Board ("Board") and pecuniary interests and private commitments associated with Public Officer's employment with an employer who is regulated by the Board. After fully considering Public Officer's request and analyzing the facts and circumstances presented, the Commission provides the following guidance regarding Public Officer's disclosure and abstention duties under NRS 281A.420 and compliance obligations with the Code of Ethical Standards set forth in NRS 281A.400.

The Commission now renders this abstract opinion. The facts in this matter were obtained from documentary evidence provided by Public Officer. 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 may result in different findings and conclusions than those expressed in this opinion.

#### **II. QUESTIONS PRESENTED**

Public Officer seeks guidance on the disclosure and abstention requirements of the Ethics Law regarding Public Officer's participation as a member of the Board on agenda items requiring the Board to take action on its regulated entities, including Public Officer's employer.

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

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

1. Public Officer is a member of the Board.
2. Public Officer is employed by a regulated entity (“employer”) which currently is not meeting its regulatory requirements.
3. The Board’s adopted regulations require regulated entities to meet performance benchmarks.
4. Currently over a dozen different entities are covered by this regulation.
5. When an entity fails to meet the requirements of the regulation, conditions are placed on its ability to operate.
6. Ultimately, the Board has the authority to deny regulated entities the approval to operate.
7. The Board is not currently considering changes to the regulation.
8. Industry compliance with the regulation was heard by the Board at a public Board Meeting in 2023.
9. The discussion focused on general trends in compliance. A Board member inquired about the status of certain entities, including Public Officer’s employer, in terms of required improvement plans. Board staff also discussed a recent site visit to Public Officer’s employer.
10. Public Officer indicated at the meeting that Public Officer has participated in this agenda item in the past but has questions about disclosure and abstention obligations under the Ethics Law.
11. Public Officer seeks advice regarding participation in this discussion, future similar discussions, and direction on future actions the Board might take with regards to Public Officer’s employer.

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

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

Private commitments can lead to conflict situations with public duties. Consequently, these conflict situations must be recognized and properly navigated to assure compliance with the Ethics Law, including following the policy of the State of Nevada to avoid conflicts and appearances of impropriety. NRS 281A.020. The public trust must be protected when a person has a commitment in a private capacity to the interests of others under NRS 281A.065, which statute details a number of relationships deemed to be private commitments, including an employer and persons with whom there is a substantial business relationship. NRS 281A.065(4) and (5). For purposes of the application of the Ethics Law, the interests of persons to whom there are private commitments are imputed to be the interests of the public officer or employee for application of the Ethics Law because these types of relationships constitute relationships that would reasonably and materially affect public decisions. See *In re Romero*, Comm’n Op. No. 19-059A (2019); *In re Alworth*, Comm’n Op. No. 19-049A (2019).

Public Officer has specific public responsibilities that must be separated from Public Officer's employer's private interests to preserve the public trust. In protecting the public trust in conflict situations, the Ethics Law requires compliance with the disclosure and abstention requirements of NRS 281A.420 and the Code of Ethical Standards set forth in NRS 281A.400.

## **B. RELEVANT STATUTES**

The following provisions of the Ethics Law are relevant to this matter.

### **1) Duty to Avoid Conflicts of Interest**

#### **NRS 281A.020 provides in relevant part:**

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) "Pecuniary Interest" Defined**

#### **NRS 281A.139 provides:**

"Pecuniary interest" means any beneficial or detrimental interest in a matter that consists of or is measured in money or is otherwise related to money, including, without limitation:

1. Anything of economic value; and
2. Payments or other money which a person is owed or otherwise entitled to by virtue of any statute, regulation, code, ordinance or contract or other agreement.

### **3) "Commitment in a private capacity" Defined**

#### **NRS 281A.065 provides, in relevant part:**

"Commitment in a private capacity," with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

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4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; . . .

#### **4) Improper Use of Government Position**

##### **NRS 281A.400(1) provides:**

A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity 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.

##### **NRS 281A.400(2) provides:**

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 to the interests of that person. As used in this subsection, "unwarranted" means without justification or adequate reason.

#### **5) Disclosure and Abstention**

##### **NRS 281A.420(1) and (3) provide, in relevant part:**

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a significant pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interests of another person,

↳ without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's significant pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

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3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

- (a) The public officer's acceptance of a gift or loan;
- (b) The public officer's significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

## **V. COMMISSION DECISION**

### **A. COMMITMENTS IN A PRIVATE CAPACITY**

The Legislature has determined that private pecuniary interests and certain private relationships listed in NRS 281A.065 form the foundation for conflicts of interest. Here, Public Officer has a private commitment to Public Officer's employer who is subject to the oversight of the Board of which Public Officer is a member. See NRS 281A.139 and NRS 281A.065(4) and (5).

The Commission has confirmed the commitment to the employer in several opinions, including addressing the breadth of the public officer's obligation. In *In re Brown*, Comm'n Op. No. 13-28A (2014), the Commission explained: "[t]he Ethics Law recognizes various conflicts or perceived conflicts between public duties and a person with whom public officers and employees have employment commitments." *Id.* at p. 9. This means that the interests of the person to whom there is a private commitment, including an employer, business affiliate or client, or similar relationship, are statutorily attributed to the public officer based on the presumption that a person lacks independent judgment toward the interests of those persons to whom the public officer has such commitments. See *In re Public Officer*, Comm'n Op. No. 13-71A (2014).

In this case, Public Officer has a clear commitment in a private capacity to Public Officer's employer and as such the employer's interests are imputed to Public Officer. In addition, Public Officer has a pecuniary interest in continued employment by employer.

### **B. DISCLOSURE REQUIREMENTS – NRS 281A.420(1)**

The disclosure requirements of NRS 281A.420(1) apply every time Public Officer's pecuniary interests or private commitments intersect with Public Officer's public duties. NRS 281A.420(1) requires a proper disclosure when the public officer or employee is carrying out their public duties to approve, disapprove, vote, abstain or otherwise act upon a matter: (a) regarding a gift or loan, (b) in which they have a significant pecuniary interest, (c) which would reasonably be affected by their commitment in a private capacity to the interests of another person, or (d) which would be related to any representation or counseling of a private person for compensation before another agency within the preceding year.

When any significant pecuniary interest of a public officer or any of the identified relationships set forth in NRS 281A.065 are reasonably affected by public duties, the nature of these interests and relationships requires a proper disclosure, which may be extended to the business endeavors and clients to whom there is a private commitment.

See *In re Romero*, Comm'n Op. No. 19-059A (2019), at p. 6; *In re Public Officer*, Comm'n Op. No. 15-74A (2018).

Since Public Officer acknowledged past participation on similar items and abstained at the meeting at which the Board considered the matter pertaining to Public Officer's employer, Public Officer has complied with the requirement established in the Ethics Law to avoid the conflict. NRS 281A.420(1) requires that the disclosure be made before any participation and before taking any form of action. The Ethics Law does not discern between the many and varied forms of action that may be taken on a matter by a public body that could range from continuances, holds, approvals, disapprovals, or a multitude of other directives. Instead, it requires disclosure at the outset before consideration of the matter.

Public Officer is reminded that the Ethics Law does not recognize a continuing disclosure or a disclosure by reference. The purpose of disclosure is to provide sufficient information regarding the conflict of interest to inform the public of the nature and extent of the conflict and the potential effect of the action or abstention on the public officer's private interests and commitments. Silence based upon a prior disclosure fails to inform the public or supervisory head of the organization about the nature and extent of the conflict. See *In re Buck*, Comm'n Op. No. 11-63C (2012) (holding that incorporation by reference of a prior disclosure, even though based upon the advice of counsel, did not satisfy the disclosure requirements of NRS 281A.420(1)). Disclosure further serves to protect the public officer or public employer. In *In re Weber*, Comm'n Op. No. 09-47C (2012), the Commission held:

In keeping with the public trust, a public officer's disclosure is paramount to transparency and openness in government. The public policy favoring disclosure promotes accountability and scrutiny of the conduct of government officials. ...Such disclosures dispel any question concerning conflicts of interest and may very well ward off complaints against the public officer based on failure to disclose.

Public Officer is required to disclose Public Officer's commitment in a private capacity each time the Board is considering matters which may affect the interests of Public Officer's employer. A sufficient disclosure must at least identify the employer by name, Public Officer's employment status and job title, duties for the employer, and indicate that, under the Ethics Law, Public Officer has a commitment in a private capacity to Employer and a pecuniary interest in continued employment.

### **C. ABSTENTION REQUIREMENTS – NRS 281A.420(3) AND (4)**

NRS 281A.420(3) and (4) detail the abstention requirements to be considered after a proper disclosure has been made by the public officer/employee. NRS 281A.420(3) mandates that a public officer shall not participate on a matter when the independence of judgment of a reasonable person in the public officer's situation would be clearly and materially affected by the disclosed conflict.

There are three foreseeable scenarios that Public Officer could be presented with at a Board meeting:

1. Discussion of trends of industry compliance with regulations or other similar broad discussions about the industry
2. Consideration of changes to the Board's regulations
3. Specific action related to employer



In order for the presumptive participation sections of the Ethics Law to apply, there must be first be an adequate disclosure. If Public Officer is in a meeting at which any of the above scenarios occur, the Commission advises that Public Officer must make a public disclosure based upon the requirements of NRS 281A.420(1) and that the disclosure must adequately inform the public about the conflict. See *In re Murnane*, Comm'n Op. No. 15-45A (2016). In addition, Public Officer is encouraged to review each item with the Board's legal counsel in order to obtain appropriate legal direction.

The abstention statute treats each of the three scenarios above differently. Public Officer is instructed as follows:

1. General industry discussions

The abstention statute could allow participation once a proper disclosure is made provided that the matter considered would not result in any form of benefit or detriment accruing to the public officer (or persons/entities to whom the public officer has a private commitment) that is greater or less than that accruing to any other member of the general business profession, occupation, or group that is affected by the matter. See *In re Stork*, Comm'n Op. No. 17-01A (2017). For example, in scenario one above in which there is discussion of general compliance trends of industry compliance with regulations or other similar broad discussions about the industry, Public Officer can participate following an appropriate disclosure.

2. Consideration of changes to a regulation

If the public officer is voting upon a change to Board regulations and the employer would be subject to the changes in the same way as other businesses similarly situated, the public officer may make a proper disclosure and explain to the public why the legal presumption permits participation. As the Commission explained:

...[W]ithout a public disclosure, the Commission is hindered from application of the presumption, and the Public Officer is left without the benefit of the public policy presumption set forth in NRS 281A.420(3) and (4). A proper disclosure acts as a condition precedent to recognition of the public policy attributes of NRS 281A.420(3) and (4), which instruct that appropriate weight and proper deference be given to the public policy of this State, which favors the right of a public officer to perform the duties for which the public officer was appointed and to otherwise act upon a matter, provided the public officer has properly disclosed the public officer's commitment in a private capacity to the interests of another person in the manner required, and the independence of judgment of a reasonable person would not be clearly and materially affected by the private interests.

*In re Public Officer*, Comm'n Op. No 15-74A (2018), at pgs. 9-10.

The Commission instructs Public Officer to be aware that if newly proposed regulations apply to all similar employers, but Public Officer's specific employer, given their facts and circumstances, has a greater benefit or detriment than other employers, this presumption does not apply, and Public Officer should disclose and abstain from the vote to change the regulations. For example, if the Board were to consider regulations to lower the compliance requirements and only Public Officer's employer is below the

current regulation but would come into compliance with the new regulation, Public Officer would be required by the Ethics Law to abstain.

3. Specific action related to employer

If the Board is considering specific action against Public Officer's employer, the participation presumptions found in NRS 281A.420(4) clearly do not apply and Public Officer must disclose and abstain from the matter to comply with the Ethics Law. See *In re Stork Comm'n Op. No. 17-01A (2017)*.

**D. CODE OF ETHICAL STANDARDS – NRS 281A.400**

The Commission commends Public Officer for seeking an advisory opinion and provides information about the requirements of NRS 281A.400 to educate about other compliance obligations under the Ethics Law associated with this conflict. The requirements of NRS 281A.400 serve to assist Public Officer in maintaining a proper separation between Public Officer's private interests and public duties. For each referenced section of NRS 281A.400, Public Officer must be mindful of the following implications:

- NRS 281A.400(1) – Public Officer's public duties will intersect with private commitments to Public Officer's employer. To avoid this conflict, Public Officer must not seek or accept economic opportunities to benefit these interests.
- NRS 281A.400(2) – Public Officer's role as a member of the Board could place Public Officer in a position to create an unwarranted benefit for employer. Therefore, Public Officer must be vigilant and determine the extent of such interests and comply with NRS 281A.400 and the disclosure and abstention requirements of NRS 281A.420.
- NRS 281A.400(5) and (6) – Public Officer must not utilize non-public information obtained through Public Officer position on the Board to benefit employer and must not suppress any report or document that might tend to unfavorably affect employer.

The Commission trusts that Public Officer will be proactive and diligent to maintain a proper separation between Public Officer's public duties and private interests by not engaging in conduct that creates unwarranted or improper private benefits for Public Officer or those persons to whom Public Officer has a private commitment. The Commission advises Public Officer about these statutory requirements, so Public Officer may apply them in performing public duties. If there are any questions or concerns, the Commission's advisory opinion process is available to Public Officer on future matters.

**VI. CONCLUSIONS OF LAW**

1. Public Officer is a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.675, 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 has a pecuniary interest in Public Officer's salary and a commitment in a private capacity to the interests of employer under NRS 281A.139 and



281A.065(4) and (5), respectively. Accordingly, Public Officer must comply with the Code of Ethical Standards set forth in NRS 281A.400 and NRS 281A.420.

4. Pursuant to NRS 281A.420(1), prior to acting on a matter reasonably affecting either Public Officer's pecuniary interests or the persons to whom Public Officer has a private commitment under NRS 281A.065, Public Officer should properly disclose to the public the full impact on all private interests and commitments that could be affected by Public Officer's public duties.
5. Public Officer must analyze the nature of the items coming before the Board which may affect employer and comply with the abstention requirements of NRS 281A.420(3) and (4).

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 5<sup>th</sup> day of April, 2023.

#### 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: ABSENT  
Damian R. Sheets, Esq.  
Commissioner

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

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

By: /s/ Teresa Lowry  
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By: /s/ Amanda Yen  
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