MINUTES OF THE
SENATE COMMITTEE ON LEGISLATIVE OPERATIONS AND ELECTIONS

Eightieth Session
March 13, 2019

The Senate Committee on Legislative Operations and Elections was called to order by Vice Chair Nicole Cannizzaro at 4:13 p.m. on Wednesday, March 13, 2019, in Room 2144 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Council Bureau.

COMMITTEE MEMBERS PRESENT:

Senator James Ohrenschall, Chair
Senator Nicole J. Cannizzaro, Vice Chair
Senator Yvanna D. Cancela
Senator Heidi Seevers Gansert
Senator Keith F. Pickard

STAFF MEMBERS PRESENT:

Michael Stewart, Policy Analyst
Kevin Powers, Committee Counsel
Diane Rea, Committee Secretary

OTHERS PRESENT:

Yvonne Nevarez-Goodson, Executive Director, Commission on Ethics
Tracy Chase, Commission Counsel, Commission on Ethics
David Cherry, City of Henderson
Dylan Shaver, City of Reno
Shirle Eiting, Chief Assistant City Attorney, City of Sparks
Tom Dunn, Professional Fire Fighters of Nevada

Chair Ohrenschall asked for a motion to re-refer Senate Bill (S.B.) 190 to the Senate Committee on Finance, stating the bill proposes a commission to study the 2020 census and there are fiscal implications that would be better addressed in the money committee.

SENATE BILL 190: Creates the Nevada 2020 Census Commission. (BDR S-727)

SENATOR CANNIZARRO MOVED TO RE-REFER S.B. 190 TO THE SENATE COMMITTEE ON FINANCE.

SENATOR GANSERT SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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Chair Ohrenschall opened the hearing on S.B. 129.

SENATE BILL 129: Makes various changes relating to ethics in government. (BDR 23-191)

Yvonne Nevarez-Goodson, Executive Director, Commission on Ethics, accompanied by Tracy Chase, Commission Counsel, Commission on Ethics, said the goal today is to provide a lengthy overview of the bill and submitted a summary with amendments (Exhibit C). She stated the Commission on Ethics (COE) is going to amend the bill, putting the acknowledgment forms back to the original language due to the potential fiscal impact on the Commission.

Ms. Nevarez-Goodson said the COE would request the Committee to consider an amendment to include a section that parallels the Secretary of State (SOS) Office with regard to financial disclosure statements. This requires local governments and the Department of Administration to forward a list of public officers to the COE so it can get a better understanding of those who are required to file the acknowledgement forms and are failing to do so.

Ms. Nevarez-Goodson continued with the review of the summary starting with topic 1, Requests for Advisory Opinions and topic 2, Ethics Complaints. Any public officer or employee is entitled to file a request for advisory opinion from the COE, which is confidential, and request the COE's advice where a public officer or employee has a conflict of interest. If he or she does, is that conflict disqualifying, or does the COE have some other obligation under the ethics law in dealing with that particular conflict? An advisory opinion can be regarding a person's past, present or future conduct under the Nevada Ethics in

Government Law (NEGL). The local or special ethics committees are authorized to provide advice about their own provisions to a public officer or employee to the extent those questions trigger issues under the NEGL.

Ms. Nevarez-Goodson stated the COE wants to authorize a State or local agency legal counsel to request an advisory opinion from the COE, so long as the agency is retaining confidentiality on that issue. There are situations where an agency's legal counsel, sometimes supervisory heads of organizations, have questions about the applicability of the NEGL to a particular position or circumstance within that agency, and the public employee or officer may be unwilling to come to the COE for advice. It is a manner in which the COE can offer declaratory relief to the agency about a particular issue.

Ms. Nevarez-Goodson stated there is a two-year statute of limitations that applies to ethics complaints. The COE determined two years would be an appropriate limitation when giving advice about past conduct of public officers or employees.

Ms. Nevarez-Goodson continued, saying the COE wants to codify into the bill a practice regarding stays or dismissals of an advisory request upon the filing of an ethics complaint that raises similar legal issues. Whether the individual is willing to waive the opinion or the hearing transcript or the actual request that was filed, sometimes there may be reasons why the individual only wants to waive one and not all of them together.

Ms. Nevarez-Goodson said under the law, statutory deadlines for the COE to render its advice are in place. The COE is able to offer advice to any public officer or employee within 45 days, based on scheduling and the ability of staff to work on the issues. Once the COE renders that decision, which often occurs in a hearing, the staff needs time to develop a written opinion from the hearing or decision. Some of those decisions are subject to judicial review, so it is important for the COE to have the ability to properly address the written opinions and have staff assigned.

Ms. Nevarez-Goodson stated because the requests and results are confidential, the law authorizes the COE to hold a public hearing if there has been a waiver of confidentiality. The COE would like the law to clarify that it is exempt from the Open Meeting Law and will address how to hold hearings through regulations.

Chair Ohrenschall asked regarding the new language in section 13 of the bill, about the request for an advisory opinion, page 16, lines 32 through 37,

> Except as otherwise provided in this section, if a current public officer or employee of a state or local agency intends to file a request for an advisory opinion, the official attorney of the state or local agency, as applicable, shall represent the public officer or employee in proceedings concerning the request for advisory opinion … .

stating he is trying to see how that would work if this bill passes because if a public officer or employee files for an advisory opinion, it is between the employee and the COE. How would the general counsel for the employer be involved with the employee who has asked for the advisory opinion?

Ms. Nevarez-Goodson replied the statutes mandate the Attorney General (AG) represent all public officers of the Executive Branch of State government with regards to ethics complaints and advisory opinions. One of the requirements for the AG to represent a public officer or employee is the employee has to request that representation. He or she can come to the COE without legal representation if it is an issue in which he or she does not want legal representation by the AG. Section 13 of the bill was to authorize the same level of representation available to any agency of government in the State, not just the Executive Branch. It is not the COE's intent to tell a local government agency's legal counsel when or under what circumstances he or she must represent a public officer or employee, so the law and amendment provided (Exhibit D) includes many exceptions to when that attorney may decline to take representation for several issues. There are a lot of exceptions included in the amended language to both section 13 and the existing section in the chapter that deals with representation by the AG's Office.

Chair Ohrenschall asked if section 13 were to pass, would it affect the local public officer's or employee's right to seek an opinion from another counsel. Would that change, or would the individual still be able to seek advice from COE if he or she wanted to?

Ms. Nevarez-Goodson responded no. The COE encourages public officers and employees to first seek the advice of their legal counsel, and often that is what prompts them to come to the COE for formal opinions.

Senator Pickard said typically when an employee has in-house counsel, that counsel will represent the company, not the employee. If he or she has violated something, the employee gets the opinion and ultimately this exposes some financial misdeed. Does that participation in the advisory process conflict with the attorney so a deputy attorney general has to represent the agency? How does this work?

Ms. Nevarez-Goodson responded the COE tried to copy what already exists in law under *Nevada Revised Statutes* (NRS) 41 for the representation of public officers and employees. It is a situation where an attorney or legal counsel could choose not to represent a public officer or employee if there was an issue of a conflict of interest. The legal counsel does not need to advise or defend a person in an ethics complaint. He or she should send it either to special counsel or use his or her own internal firewalls within his or her agency. Another attorney can take the representation.

Senator Pickard said he sees the amendment retains the language where the official attorney is not required to represent, or may upon written notification of the COE, withdraw representation of the public employee. What he does not see is any provision where if he or she is the official attorney for the agency. He asked where do we have some recovery from that scenario?

Ms. Nevarez-Goodson said this bill does not address that circumstance. She would suggest that legal ethics apply and the attorney has to make a decision whether it conflicts him or her out.

Kevin Powers, Committee Counsel stated, for the record, to follow up with what the Executive Director just said. Public attorneys, like private attorneys, are governed by the Nevada Supreme Court Rules of Professional Conduct. So, if an attorney for a law firm is conflicted out and the law firm has a firewall, then other attorneys in the firm can represent clients who potentially have adverse interests. The same in a public agency. If there is a firewall created then if the official attorney of the agency is conflicted out because they have already represented the public officer or employee, then other attorneys within that agency can provide representation for the agency, or the agency can seek outside counsel to provide that representation.

Chair Ohrenschall asked if the COE has seen many examples where the public officer or employee has sought an opinion from his or her local government

counsel but then wanted to use the counsel and the counsel has not wanted to represent the public officer or employee. What has happened in those cases?

Ms. Nevarez-Goodson replied the answer is yes, but more often the COE is seeing the contents of ethics complaints. Witnesses interviewed will be employees of the same agency and will request representation of his or her legal counsel. She said 95 percent of the time, most subjects are represented by agency legal counsel.

Chair Ohrenschall asked if that was also the case when he or she did not follow the agency counsel's advice.

Ms. Nevarez-Goodson replied when that happens, the "safe harbor provision," which states any public officer or employee who relies upon the advice of agency legal counsel will be deemed protected from the finding of a willful violation of the NEGL, applies. The COE encourages any public officer or employee to first seek the legal advice of his or her agency counsel to provide a safe harbor, and if it is a question of unsettled law, he or she may come to the COE for an advisory opinion.

Chair Ohrenschall stated many times an attorney will tell a client one thing and the client will come back in a week and say "you said this." Sometimes communication is not great between attorneys and their clients. If this were to pass with the amended language, the agency counsel can say "no, this public officer or employee did not follow my advice." Is there any opportunity for the COE to decide if there is miscommunication or misunderstanding concerning the public officer or employee saying "I want to do what I want to do and do not care what legal counsel said?" Or would it just be on the request of the agency counsel to say "I do not want to represent this officer or employee"?

Ms. Nevarez-Goodson went to the exclusions included in the amended language based on the feedback received by State and local agency counsel saying sometimes there are miscommunications and misrepresentations. In those circumstances, the agency counsel did not feel it was prudent that he or she be subject to having to maintain that relationship if there has been a misrepresentation of material fact or things of that nature. In an ethics complaint, if the COE is looking at a safe harbor provision, the safe harbor provision says that the public officer or employee relied in good faith on the advice of legal counsel. If there was some evidence that came forward saying

he or she had not provided all the necessary information to the legal counsel to provide adequate legal advice, the COE might construe it as not reasonable because he or she withheld information. The COE has received affidavits from attorneys and the COE had questions about the information given to it for advice. The COE does not want to decide circumstances for agency legal counsel when the counsel has to give representation, if these exclusions apply.

Ms. Nevarez-Goodson stated the amendments regarding ethics complaints say any person can file an ethics complaint against any public officer or employee in Nevada and local government alleging a violation of the NEGL. The COE has the statutory authority to initiate a complaint on its own motion. The Executive Director can conduct a preliminary investigation before the COE has made its jurisdictional determination. The COE reviews and evaluates every ethics complaint and determines if it has jurisdiction over this public officer or employee, the alleged violation and whether there sufficient evidence to warrant an investigation. A full-blown investigation can be avoided if the COE conducts a preliminary investigation.

Ms. Nevarez-Goodson stated an additional change would allow for anonymous complaints to be filed as long as the COE could either initiate its own complaint or accept the complaint based on otherwise publicly available information. The COE would like the statutory authorization to dismiss a complaint that is initiated on its own motion with a confidential letter of caution or instruction. The COE would like that ability because it is appropriately resolved through a letter versus a formal investigation. Additionally, the COE would like the authorization in statute to be able to issue a notice of investigation (NOI) when the COE provides notice to the subject of an ethics complaint. The COE is putting in the public's hands the requirement to understand the NEGL, what the law means and how to apply those allegations. The COE would like to do the determination that it has jurisdiction and provide an NOI. Ms. Nevarez-Goodson stated this is important as the COE has existing authority to protect the identity of certain requestors who file against an individual and who work at the same agency. The COE has to provide a redacted copy of the ethics complaint. Human error is what gets left out of redactions, and the COE could inadvertently release the identity of a requestor. By issuing a NOI, the COE would be able to eliminate all of those concerns.

Ms. Nevarez-Goodson continued saying under the law, any subject of an ethics complaint is entitled to file a written response, to any allegation. If the subject

chooses not to file a written response, it cannot be held against him or her. The subject has an obligation to participate in the investigation of the COE and can be subpoenaed to do so.

Ms. Nevarez-Goodson said S.B. No. 84 of the 79th Session did clarify some issues, but S.B. 190 would offer additional clarifications as to who constitutes the parties before a COE hearing in a judicatory context.

Chair Ohrenschall asked if public officers or employees receive an NOI, does it give them enough information if they want to hire a private attorney or their agency counsel to know what they are being investigated about, or is it a general notice?

Ms. Nevarez-Goodson replied yes, it would be a full notice.

Senator Pickard asked if elimination of a willful violation referring to the safe harbor law is not a willful violation of criminal intent. He stated as he read the summary, the removal of the willful language creates a per se violation standard. If just looking at the fact of the violation, it may be that he or she misunderstood or was given bad advice. There was no criminal intent to violate the rule. He asked if this creates a per se violation.

Ms. Nevarez-Goodson replied the definition of "willful" violation requires the act be intentional and knowing. The COE has taken away the word "willful" and defined the term "violation" to require intent and knowing. Intentional act does not necessarily require an element of bad faith. The COE is not creating a per se issue.

Senator Pickard stated he is concerned that functionally the bill offers a deliberate intent to violate the rule. That is different from the volitional act because he or she did it voluntarily, no one forced the individual. If he or she did not have the understanding of the violating nature of the conduct, it may still be an intentional act but not willful.

Ms. Nevarez-Goodson responded the change to the bill is not doing that because the definition of a willful violation is now the same definition as applies to any definition of the NEGL. The goal is not to create a per se issue. The COE wants to take the designation of willful away, which allows for monetary values.

Mr. Powers stated the key for the counsel is to look at section 22 of the bill on page 20. Although the bill removes the word "willful" as a modifier for the term "violation", the bill does not remove the mental elements for the violation, willful violations as defined in section 22. You have to be acting intentionally and knowingly for there to be a willful violation. In this definition, we have removed the word willful but we have kept the mental elements of intentionally and knowingly so it is the same type of violation. It just does not have that modifier "willful" in front of it. What that means, then, is that every violation of the ethics law will have to be proven by these mental elements, intentionally and knowingly. Now, there are two classifications of violations under the Ethics Law. There are willful violations that are intentionally and knowingly and all other violations. So we are removing those violations that do not require mental elements and now making all violations essentially the same standard as willful. They all require those mental elements. Once the violation is proven, that is when the Commission exercises discretion to determine the amount or type of remedy or penalty, so there is still that threshold mental element, and the determination of the severity of the violation is determined by the Commission through imposing the types of remedies and penalties that are appropriate under the facts and circumstances.

Chair Ohrenschall asked if someone on the board of a local authority finds there is a job opening for a building inspector. He or she has been told by another board member there is nothing wrong with telling his or her college roommate that there is an opening. He or she tells but did not intend to violate the ethics rules. Would there be a lower standard if this is removed and the individual did not intend to break an ethics law?

Ms. Nevarez-Goodson replied in that situation, the COE may still violate the intention of the NEGL. The COE would be required to take into account the evidence and determine whether it was sufficient to qualify as a mitigating factor for the violation or the determination. He or she did not have to act in bad faith for it to be intentional. The COE looks at the facts and circumstances every time it evaluates something.
Chair Ohrenschall said in section 22 of the bill, proposed deleted language on page 20, lines 8 through 11, says, "unless the Commission determines, after applying the factors set forth in NRS 281A.775, that the public officer's or employee's act or failure to act has not resulted in a sanctionable violation of this chapter." In the bill, those factors are not proposed to be deleted. He asked

why delete the reference to those mitigating factors in NRS 281A.775 in section 22?

Ms. Nevarez-Goodson answered the intent is eliminating the designation of willful, but if the Committee looks at section 59 of the bill, which amends NRS 281A.775, it eliminates the designation of being willful but continues to instruct the COE to consider the same criteria when determining whether there is a violation of the NEGL.

Chair Ohrenschall asked Mr. Powers would those factors still be applicable with removing the reference in NRS 281A.170 for the definition of violation. How would that work if this were to pass the two sections in conjunction?

Mr. Powers stated in answering that question he will address some of the other issues that were raised by Senator Ohrenschall's prior question. First and foremost, there is a presumption that everyone knows the law. So whether it is in a criminal context or civil context, no one can defend based on a lack of knowledge of the law. The presumption is everyone knows the law and that is how all statutes are set up. What the mental elements involve is that you have to prove that the person knew that the facts existed and knowing those facts, intentionally took action. Those are the two things that have to be proven for a violation, and this bill would maintain that existing requirement. You do not ever have to prove someone knows the law because otherwise it would make it almost impossible to prove any violation whether in the civil or criminal context.

So, with that presumption in mind, that again takes us back to you still have to prove those mental elements. There is an elision of the language in section 22 that the Chair just mentioned that was necessary under the willful structure because the Commission had to make a determination first of whether it was willful or not and then determine whether or not that willfulness resulted in a serious violation that required a serious penalty. What the situation will be now is that instead of making that determination of whether or not it is willful, the Commission will first determine whether it was intentional and knowingly. If the Commission determines it is intentional and knowingly, that is a violation. Then the Commission will use the mitigating factors to determine the severity of the punishment. So, instead of using the mitigating factors to determine whether a violation is willful or not, the mitigation factors will be used to determine the severity of the punishment, which is really more akin to most civil and criminal proceedings. First you determine whether there is a violation by determining

those minimal elements and then after a violation is found, then you determine what punishment to be imposed based on the aggravating and mitigating factors. Under this structure, the aggravating and mitigating factors that are in NRS 281A.775 would continue to be applied by the Commission but only after that finding of a violation.

Chair Ohrenschall asked if those mitigating factors are considered prior to the finding of a violation.

Mr. Powers replied the way the statutes are currently structured, they are actually factored into both. They are used first to determine whether it is willful, and then the Commission uses them again to determine the severity of the violation, so that is really an anomaly in the law. This way, it is more of a structured process where the Commission first focuses on the intent and knowledge, finds a violation and then uses the mitigating factors to determine the type of penalty to impose for that violation. So, this actually streamlines the process and moves the mitigating factors to the appropriate stage, and that is the determination of the penalty, not the determination whether it was intentional and knowingly.

Senator Pickard asked if the bill is then adding a discretionary factor or issue for the COE so it can now give a nonpublic reprimand or correction if someone were acting in good faith but just did not realize he or she was making a violation. Can it be fixed and move forward? He said as he understands that is the addition to the disciplinary structure.

Ms. Nevarez-Goodson stated that is already existing law. The designation of willfulness simply gives the COE the ability to determine, based upon finding of willfulness, monetary sanctions are appropriate.

Ms. Nevarez-Goodson proceeded to the amendments saying the COE is requesting the ethical standards of conduct state some procedural cleanup and clarifications to existing standards, and additional new standards are required for the Committee's consideration.

Chair Ohrenschall asked Mr. Powers to provide clarification again that he had provided earlier.

Mr. Powers stated he thinks the concern of the Committee and the removal of the word willful from the ethics law would somehow lower the threshold to prove an ethics violation. As your Legal Counsel, and drafting this, that certainly was one of the concerns considered initially, but then looking at the original structure of the statute as it is now versus the change, it is our legal opinion that removing the word willful does not lower the threshold for proving a violation. Every violation will still have to be proven, that the public officer and employee acted intentionally and knowingly and that will be a violation, and that is no different than the standard now for a willful violation. What the removal of willful will do will take away what a connotation, not a requirement, but a connotation from the word willful that requires ill intent or bad faith or maliciousness, and that is not required now under the law, but that word willful seems to imply that or carry a connotation. So, all we are doing in the statute is removing that connotation from the word willful but not changing the threshold of proof of violation. So that, if a public officer acted knowingly, that would be a violation. The next step, though, the Commission would still have to determine what punishment, if any, to impose, and that when the Commission turns to NRS 281A.775, that has the aggravating and mitigating circumstances. So then after that violation is found, the Commission then applies those aggravating and mitigating circumstances and determines the type of penalty imposed for that violation. Again, I think the takeaway is that removing the word willful just removes a connotation that does not have to be proved of bad faith, ill intent of maliciousness and by removing that, it takes away that implication that every violation involved—those high levels of bad behavior, when in fact that is not what the existing law says. This will just keep that threshold the same without using that one term, willful.

Chair Ohrenschall stated to clarify, if the bill passes as section 22 and section 59 are written, there would be no more willful violations. There would be just violations.

Mr. Powers replied they would simply be violations. But any other aggravating or mitigating factors, like the situation that the public officer was in, would be considered by the Commission in determining the type of penalty, if any penalty would be imposed.

Senator Pickard mentioned the COE has a slew of progressive discipline measures it can use from private letters of caution and instruction to public reprimand and fines, depending on the severity of the violation. The public

officer or employee would not be facing serious violations but less serious penalties to match the violation. The goal for the COE is to make sure the penalties match the violation and require a penalty that has connotations or implications that actually are not required to be proven in the law.

Ms. Nevarez-Goodson stated the other thing she may have neglected to inform the Committee about, with regard to the willful designation, is the position that it puts the COE in concerning attempts to negotiate settlement agreements. Very often it hinges upon whether the COE is going to find it to be willful versus nonwillful under the existing law. Simply because of the connotation of the word willful, people will choose not to settle the case without a true understanding of what that means.

Ms. Nevarez-Goodson moved into a summary of what the bill attempts to do with regard to the ethical standards of conduct as set forth in NRS 281A saying the COE's statute of limitations, with regard to public officers and employees, is 2 years. There could be a situation in which the standards are being applied to someone who no longer is in public service if the conduct has occurred within the prior two years.

Ms. Nevarez-Goodson stated the COE has received feedback on the nature of the volunteer relationship. The intent of COE is not to allow the volunteer nature of these relationships to hold up this bill. The intent is to be concerned about public officers or employees who committed a substantial amount of time to volunteer with an organization or entity and then have that entity appear before his or her agency in an official capacity, and questions of bias or ethical improprieties might come up.

Chair Ohrenschall asked if someone regularly volunteers and is not on a board of directors where he or she volunteers, what kind of activity is the COE hoping to catch?

Ms. Nevarez-Goodson replied the COE's intent was not to stifle the ability of a public officer or employee to be involved in his or her communities. The concern comes when there is a competitive interest. If there are grant funds and preferential treatment toward that organization because of the volunteer work provided, that is where the intent comes from. This has to be a commitment in a private capacity.

Senator Pickard stated he would not suggest eliminating the section. The COE has a goal in mind that is probably based on experience. He asked if there is language that might be more specific to that intent, language that suggests if that volunteer activity reaches a point to indicate an individual is involved in the direction and operations of an entity, or his or her other personal interest approaches a fiduciary relationship. He asked, how deep does the amendment have to go on the implementation role? If a contractor is awarded a contract and needs more help, is the employee excluded when he or she had no influence over the contracting? The person just has the knowledge that the contractor needs.

Ms. Nevarez-Goodson stated the result of something like that would be a material role for the contract and would prohibit the employee from working for that contractor for that one-year time-out period under existing law. The modifier of "materiality" is the amendment.

Senator Gansert said if an employee is in charge of implementing something and he or she is good at what they do but had nothing to do with the awarding of the contract, she thinks it is fair for that person to be able to take another role in employment. Individuals who are talented and have skills may be offered a job. This precludes someone from leaving State service to go into the private sector for a year if they have the skills. She said she does not agree with this.

Chair Ohrenschall said one concern brought to him is where is the line of demarcation between the employees who are higher up in an agency versus those lower who are caught in the cooling-off period but are not the ones making the decisions. He asked where that would be if this passes?

Ms. Nevarez-Goodson replied the section referred to is specific to NRS 281A.550, subsection 5, which deals with contractual relationships with vendors and the preclusion from going to work for that vendor for the 1-year period of time with regard to subsection 3, which is the overall employment from someone in the business or industry regulated by an organization. Those are different issues. The one-year cooling-off period is a one-year prohibition on going to work in the private sector for a business or industry that is otherwise regulated by the agency for certain public employees. Those employees have to have had as his or her principal duties, responsibility for the regulations that are adopted by the agency, or he or she has to be influential in affecting the business or industry by virtue of his or her job held

with the agency in terms of influencing decisions, audits, investigations or has knowledge of trade secrets of a business competitor that might otherwise employ him or her. The Legislature's intent behind cooling off has been to not see our public employees and officers pulled out of our agencies into the private sector if they are bringing proprietary business information or other information that they have learned in their public position. Subsection 3 was brought in because gaming and utilities are not the only regulatory environments within the State.

Ms. Nevarez-Goodson added that the COE does look at this on a case-by-case basis because the facts are so distinct from any one agency. The COE has to look at the nature of the employee's duties, responsibilities, what he or she has done, and if the statute or preclusion applies. The COE may evaluate, and preclude relief is an appropriate circumstance to authorize that employee to accept the position.

Senator Pickard commented on Senator Gansert's concern, stating this seems to go much lower than a person who is actually in a position of influence. An agency head or assistant position which actually affects policy decisions, as opposed to a project manager assigned to manage the project on behalf of the agency who is connected to the implementation, is now excluded from a better situation. The appropriate thing to do is to identify where that line needs to be drawn. Department heads, chiefs of staff, board members or commission members, absolutely—they are the ones making the decisions. The employees under them without a direct involvement should be free to leave public employment and go to private employment even if it is connected to his or her work unless they have access to proprietary information that would give that employer an unfair advantage. That exception makes sense.

Ms. Nevarez-Goodson stated a public employee charged with implementing a contract, like a project manager, is the type of employee who is controlling how the project is going, how the vendor is behaving and how things are happening. The COE's concern is that these actually are the employees who are influencing the nature of this vendor contract, and the COE does want to capture those individuals in the vendor context.

Chair Ohrenschall asked if there is any data for the last year or two showing how many requests for relief to the COE have been filed and what the results

are. What level of employee he or she was? Whether the relief was granted? What commission he or she was with?

Ms. Nevarez-Goodson stated she would collect that data and provide it to the Committee.

Ms. Nevarez-Goodson stated the exceptions to the one-year cooling-off period would be if it is the type of opportunity that would be available to any similar situation and provided the ability for the COE to grant relief from the strict application of the prohibition in that circumstance.

She stated regarding abusive power and authority, this is a new section that would be added to the ethical standards of conduct to prohibit gross or unconscionable use of power or one's position in government.

Ms. Nevarez-Goodson added the misuse of government resource sections exist in NRS 281A.400 subsections 7 and 8 as they apply to all public officers and employees and separately as they apply to State Legislators. The goal is to bring some of the consistent language together in both sections. The section that applies to other than State Legislators is a limited use exception when there is supervisory approval pursuant to a policy or an emergency circumstance.

Chair Ohrenschall asked if that were to pass, could there be a situation where there is a disclosure, not a conflict, but an abstention would be required.

Ms. Nevarez-Goodson said existing law would require public officers or employees to disclose whether they have a commitment in a private capacity to the interest of another person that might be affected by the issue before them.

Chair Ohrenschall asked if there would ever be an issue where disclosures would be heard, the language does not affect that official differently and the employee is going to participate. Would this never lead to a situation where someone would disclose, felt he or she could vote but then would be precluded?

Ms. Nevarez-Goodson stated that would not happen. That would be a presumption against abstention when a matter does not affect interest any more than any other person to be affected by the matter. The ethical conflict exists when the public officer or employee has the ability to influence a contract that is subject to competitive bidding and is subject to open selection.

Ms. Nevarez-Goodson stated the goal under legal defense would be to make consistent the ability for public officers and employees to get representation by agency counsel at the State and local level and provide exceptions for individual conduct outside scope and duty, engaging in bad faith, a failure to cooperate with legal counsel, misrepresentation or omission of facts, or otherwise applicable prior legal advice given by agency counsel.

Ms. Nevarez-Goodson stated with regard to the Open Meeting Law (OML), the summary correction is a complete exemption for ethics complaint purposes. The COE does comply with OML for regular business outside of advisory opinions and ethics complaints. The COE is having concerns applying OML in complaint context for issues such as personal notice requirements any time character or confidence might be considered. Ms. Nevarez-Goodson said there are 21-day notice requirements or 5-day personal requirements for each of those individuals. Written opinions come out after the COE has issued its final decision that prompts an additional open public meeting to provide direction and give approval to the written opinion versus its final decision. Settlement negotiations are issues the COE has where it is required to provide a proposed stipulated agreement to be noticed to the public and have the COE decline to approve that negotiated settlement, putting language into the public that has not been approved, causing a further adjudicatory hearing.

Ms. Nevarez-Goodson said the COE is only required to meet quarterly, which makes it difficult to accommodate all the business. Requesters often waive the confidentiality of the COE's processes. They are informed of information or file the complaints, take the information and go public with it. The COE is required to keep it confidential.

Ms. Nevarez-Goodson stated personnel matters are often considered in the ethics complaints with regard to issues affecting the subject, witnesses and other issues involving an agency.

Ms. Nevarez-Goodson said the COE has significant continuances that need to occur with supplemental materials. The goal of the COE is not to avoid transparency with regard to ethics complaints. The COE has no problem or concern rendering its decisions in an open process. The cumbersome nature of the OML has triggered the request, and the compromise is that the COE will draft regulations to ensure the COE's final decision is heard in an open hearing but not subject to all the strict requirements of the OML.

Senator Pickard asked if the investigatory process, development of the complaint, the work up until filing of the complaint or deciding to not file is confidential, but once formal proceedings are started if all of that will be done in the open.

Ms. Nevarez-Goodson replied that is wrong. Under law everything in the investigatory phase of an ethics is 100 percent confidential. Once the investigatory phase is completed, the case is public. The only thing not exempt from OML is the COE's ability to render its final action. The COE is asking for the complete exemption so even the final action would be exempt from OML. The final action would be provided to the public in an open hearing under the terms and requirements drafted in the COE's regulations for transparency purposes.

Senator Pickard stated he hesitates making the COE keep confidential activity that in other contexts are assumed to be public.

Ms. Nevarez-Goodson stated currently the COE does not need to hold hearings in a public setting, but it does. The goal was to provide a balance to the Supreme Court decision regarding statutory or regulatory authority. This bill is going to provide a similar balance to provide the public with the ability to give the delegation of authority in an open public meeting as much as the body is willing to give. It can limit it to a particular case, filing or a bit broader. That decision to delegate authority to the COE chair or executive director would have to be in the open public meeting.

Ms. Nevarez-Goodson stated if the COE received an ethics complaint about a State Legislator that did not fall within its jurisdiction, it is mandated to keep that confidential with no authority to refer it back to the Legislator's own House Ethics Committee for review. This would give the COE that authority.

Senator Pickard asked if the referral is public.

Ms. Nevarez-Goodson replied it is not. The statute states the referral and all the information provided by the Ethics Commission back to the Legislator's House would be confidential.

Mr. Powers said to follow up on Senator Pickard's question, the reason for that is that is currently the House rule. Standing Rule No. 23 in each House provides

for those confidential proceedings which are authorized by the Nevada Constitution in Article 4 that allows Committee proceedings dealing with misconduct to be confidential. However, the person who is subject to the complaint in the House is free to waive that confidentiality and have a public proceeding.

Senator Pickard asked requiring other public officers to cooperate, if they say they do not want to be caught up in all this, is their job at risk for noncooperation.

Ms. Nevarez-Goodson replied oftentimes witnesses do not want to cooperate because of fear of retribution. Sometimes the only people with the information are those who work with the subject of investigation and can be subpoenaed. If there was a provision in the law which mandates their participation, they would be more comfortable participating.

Senator Pickard asked if absent a subpoena, would they still be required to participate without losing their jobs?

Ms. Nevarez-Goodson said that would be a whistleblower protection. Information on any witnesses talked to during the scope of an investigation is confidential. If they become a witness, they become public in their notice to the opposing party.

David Cherry, City of Henderson, stated the City, with the amended language presented today, is in support of the bill.

Dylan Shaver, City of Reno, stated he is in opposition to the bill around section 18, which has to do with public officers and employees serving on a board for nonprofits and volunteering personal time. City conflicts are not always as tangible as what was heard today. Operationally speaking, the City of Reno has a specific concern because in 2016, the City set up a business improvement district for the downtown area. There is a property tax assessment which goes for paying for additional police and janitorial resources. That is in partnership with a nonprofit where a City Council member is on the board of directors. That is not a City venture but a partnership. Section 18, subsection 6, would inherently create a conflict for the City Council member for being on a board. Finally, the City objects on a philosophical ground. In the community is where the City wants its employees. An ethics violation is a serious thing, but

the allegation in a lot of these cases is often much worse than the violation because it will follow an employee.

Shirle Eiting, Chief Assistant City Attorney, City of Sparks, stated her concern is also with section 18. Volunteers would be forbidden from voting with this section. Elected officials and employees are involved in the community. Section 18, subsection 8 seems to capture what the COE is concerned about. Subsections 6 and 7 broaden it. The Sparks City Charter handles representing City employees and Council members. Amendments are helpful but are redefining the relationship with the City's clients, which are defined within the City Charter.

Tom Dunn, Professional Fire Fighters of Nevada, stated he is neutral and takes great pride with members being active in the communities as volunteers. The fire fighters' concern with the bill is it questions somebody's ethics and his or her obligation in a private capacity or as a public employee.

Ms. Nevarez-Goodson said the COE is not willing to hurt the bill with relationship to the volunteers. The COE's language with the fiduciary relationships is part of a tremendous amount of existing COE opinions that have said a person who serves in a fiduciary capacity for a nonprofit or other business entity has a commitment to a private capacity to the interest of that entity. The qualification of someone under a commitment in a private capacity does not mandate a recusal being necessary. Filing a complaint whether the COE undertakes an investigation of those cases is not solely discretionary.

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Chair Ohrenschall closed the hearing on S.B. 129 and closed the hearing at 6:36 p.m.

RESPECTFULLY SUBMITTED:

Diane Rea,
Committee Secretary

APPROVED BY:

Senator James Ohrenschall, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	1		Attendance Roster
S.B. 129	C	6	Yvonne Nevarez-Goodson / Executive Director, Commission on Ethics	Summary (with Amendments)
S.B. 129	D	14	Yvonne Nevarez-Goodson / Executive Director, Commission on Ethics	Proposed Amendments