

**OPINION NO. 1959-1 Public Employees Retirement Board—An attempt to change beneficiary under the public employees retirement act by an informal document, purportedly executed by member two days before death, but never delivered to Executive Secretary until after death of member, may or may not be entitled to recognition and presents a judicial question.**

CARSON CITY, January 21, 1959

MR. KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, Carson City, Nevada*

DEAR MR. BUCK: We have your letter of January 5, 1959, requiring an opinion of this office upon certain facts recited by you, in essence as follows:

FACTS

An employee of the Department of Highways died before retirement on November 13, 1958. His contributions to the retirement system total \$2,384.20. Under NRS 286.660 the Executive Secretary in such a case may pay such total contribution without administration to a beneficiary designated by the member. The statute also provides that in the event the named beneficiary should predecease the member, but be survived by minor children, the sum otherwise payable to the beneficiary may be paid to the minor children.

On December 1, 1947, the decedent designated a son beneficiary upon a form issued by your office. Members of the system are permitted to change the beneficiary upon another form furnished by your office. This system or change of beneficiary is without specific statutory provision.

The decedent married his present widow presumably after December 1, 1947, and several years prior to the death of his son who had been designated as beneficiary. The son died in an automobile accident on November 4, 1957. The beneficiary, the son, is survived by a minor daughter residing, it is believed, in Arizona. The decedent at no time requested a form or change of beneficiary as supplied by the department office and at no time earlier than November 11, 1958, did he sign anything to indicate a desire to change the beneficiary.

The widow previously requested your department to pay the contribution balance to her. This request was refused by reason of the provisions of NRS 286.660 and Attorney General Opinion No. 355 of December 7, 1954.

After such refusal the widow presented to you a stub of payroll check by the State Department of Highways numbered H 14426, upon the reverse side of which the following, written in ink, appears: "Nov.—11—1959 Please give my retirement to my wire [wife] Merle Lewis—(Signed) Robert J. Lewis." From specimen writing of the decedent this writing appears to be the writing of the decedent Robert J. Lewis. The widow has explained that this writing was found by her in personal effects of the decedent after her original application to the department for the contribution balance.

QUESTION

May the Public Employees Retirement Board accept the notation on the said payroll

stub as a beneficiary designation revoking the previous designation made by decedent of this son and substituting the widow Merle Lewis therefor?

OPINION

This office is of the opinion that until and unless a court order issued by a court of competent jurisdiction is issued so ordering, the answer is in the negative. This office takes the position that this question is clearly a judicial problem upon which the parties are entitled to their day in court and that for this office to declare in favor of either side would be a decision fraught with the greatest of danger, and should the decision be adverse to the decision reached by this office, the result could be a requirement that your office pay the sum that you hold in trust not once, but two times.

In Attorney General Opinion No. 54-355 of December 7, 1954, the following facts were presented:

A member of the Public Employees Retirement System, in 1947, designated his wife by name and relationship as his beneficiary. In 1954 the parties were divorced absolutely. The member of the system did not attempt to change his beneficiary, as formerly designated. Later in 1954 the member died prior to retirement.

In 1947 the statute required that the person designated as beneficiary be possessed if an insurable interest in the member. In 1951 this provision respecting "insurable interest" was deleted.

The question presented was whether or not the designation of beneficiary terminated upon the termination of the relationship of marriage. The answer was in the negative.

In resolving the present question, we are of the opinion that the court will be required to determine not only whether or not the paper heretofore mentioned is the genuine document of the decedent, but also, if genuine, the court will be required to determine what recognition is to be given to it. The latter question would require a consideration of its form and content, and of the fact that it was not delivered to or accepted by the Executive Secretary during the lifetime of the member.

Under subsection 4 of NRS 286.660 provision is made for payment of this contribution balance, in certain instances, to the estate of the deceased member. If the member (Mr. Lewis) has an estate to be administered, the personal representative, duly appointed, will be entitled to the payment of this sum, to be distributed in the estate matter by the court. If not, the widow of the deceased member or the child, through a guardian ad litem of the minor child, could commence an action against you. If and when commenced, this office would interplead the other party of the two real parties in interests, and would disclaim for your office any claim to the sum mentioned. In the absence of this manner of proceeding the parties could, through the widow for herself and the child through a guardian of her estate, stipulate by instrument in writing, duly acknowledged, with full proof of the authority of the guardian, for a distribution of the money in accordance with precise provisions, which stipulation, if properly executed, could be accepted by your department, obviating the necessity of litigation.

We advise that you return this payroll stub to Mrs. Lewis, together with a copy of this opinion, hold the fund and keep us advised of developments.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-2 Annual Leave—A terminating employee of the State is entitled to a lump sum payment for his accumulated annual leave; a terminating State employee who is re-employed by the State after he has received his annual**

**leave terminally, is entitled to retain the lump sum payment when the period of his new employment overlaps the period of his annual leave.**

CARSON CITY, January, 28, 1959

HONORABLE NEIL D. HUMPHREY, *Director of the Budget, Carson City, Nevada*

DEAR MR. HUMPHREY: Your letter dated January 20, 1959, directed to this office, requested an opinion of the Department of the Attorney General on the following questions:

(1) Does the Director of the Budget for the State of Nevada have authority to pass claims for accumulated annual leave taken by an employee of the State of Nevada terminating his employment?

(2) William N. Dunseath was re-employed by the State within a few days after he received his accumulated leave terminally. Is there any legal impediment to paying him for his new employment when the time overlaps the period of his annual leave?

OPINION

To answer the foregoing questions in light of present legislation, a discussion of the development of the legislative and judicial trend of thinking on such matters will prove helpful.

The provisions of law for annual leave of employees of the United States Government and employees of the State of Nevada are analogous.

Public Law 471, enacted March 14, 1936, and found in the United States Statutes at Large in Vol. 49, Part I, Chap. 140, provides in part as follows:

\* \* \* all civilian officers and employees of the United States \* \* \* in addition to any accrued leave, shall be entitled to twenty-six days' annual leave with pay each calendar year, exclusive of Sundays and holidays: Provided, That the part unused in any year shall be accumulated for succeeding years until it totals not exceeding sixty days. This Act shall not affect any sick leave to which employees are now or may hereafter be entitled.

There is no specific provision in said statute providing for a lump sum payment for accumulated annual leave for an employee of the United States Government terminating his employment.

Public Law 525, enacted December 21, 1944, and found in the United States Statutes at Large, Vol. 58, Chap. 632, provides in part as follows:

\* \* \* whenever any civilian officer or employee of the Federal Government or the government of the District of Columbia is separated from the service \* \* \* he shall be paid compensation in a lump sum for all accumulated and current accrued annual or vacation leave to which he is entitled under existing law. Such lump-sum payment shall equal the compensation that such employee would have received had he remained in the service until the expiration of the period of such annual or vacation leave \* \* \*.

Sec. 2. Upon the death of any civilian officer or employee of the Federal Government \* \* \* compensation for all of his accumulated and current accrued annual or vacation leave in a lump sum equal to the

compensation that such employee would have received had he remained in the service until the expiration of the period of such annual or vacation leave shall be paid, upon the establishment of a valid claim therefor, in the following order of precedence:

First, to the beneficiary or beneficiaries, if any, lawfully designated by the employee under the retirement Act applicable to his service;

Second, if there be no such designated beneficiary, to the estate of such deceased employee.

An examination of the cases prior to 1944 discloses that a terminating United States Government employee was not entitled to a lump-sum payment for accumulated annual leave. In the case of *Harrison v. United States*, 26 Court of Claims 259, the court said: "Annual leave is not a Congressional devise to increase an employee's pay, but is granted to a government employee in the nature of a refresher to afford surcease from an employee's labors for the common weal and to enable him to come back with fresh zeal to carry on in his country's service." Continuing on in the same case, "If a government employee resigns before taking the annual leave which he has accumulated and to which he is entitled, he loses his right to it; and if he dies before receiving it his estate is not entitled to collect the money value of the accumulated leave."

Again judicial thinking on the matter was expressed in *Butler v. United States*, 101 Court of Claims 641, wherein the court said: "Annual leave for a government employee was never designed as a bonus upon separation from the service."

The foregoing cases illustrate the judicial interpretation of the law prior to 1944. With the enactment of Public Law 525, referred to above, it became clear that the United States Congress, in no uncertain terms, intended terminating employees of the United States Government to receive lump-sum payments for accumulated leave. That law is in effect at the present time with some minor amendments in 1951 and 1953 not relevant to the instant problem.

Turning to the immediate problem as presented to this office, Attorney General's Opinion 315 of February 19, 1954, on the question of cash payments for accumulated annual leave to an employee leaving state service under Chap. 351, Stats. of Nevada 1953 (NRS 284.350), following a more conservative line of thinking, in accordance with the cases cited above, held that a vacation is a personal privilege and if that privilege is not exercised during the period of employment, such privilege is lost when the service is terminated, it following that after leaving the service he is no longer an employee and cannot claim additional pay for accumulated annual leave.

In 1955 two opinions relative to the instant problem were rendered by the Department of the Attorney General. The first of these, Opinion 9 of February 8, 1955, held, in essence, that the law does not authorize payment for accumulated annual leave to heirs or estate upon the death of an employee of the State of Nevada. Opinion 24 of March 17, 1955, held that employees of the State of Nevada are entitled to a lump-sum payment for accumulated annual leave upon termination of employment by reasons other than death. The latter opinion expresses the liberal view; the prior opinion, namely, Opinion 315 of February 19, 1954, the more conservative view.

On March 26, 1955, nine days after Opinion 24 was rendered, the Legislature of the State of Nevada approved an amendment to Sec. 42, Chap. 351, Stats. of Nevada 1953 (now NRS 284.350 subparagraph 2), as follows: "In the event an employee dies and was entitled to accumulated annual leave under the provisions of this Act, the heirs of the deceased employee who are given priority to succeed to his assets under the laws of intestate succession of this State, or the executor or administrator of his estate, upon submitting satisfactory proof to the director of their entitlement, shall be paid an amount of money equal to the number of days of earned or accrued annual leave multiplied by the daily salary or wages of such deceased employee."

The effect of said amendment was to make accumulated annual leave of a state

employee a property right. It follows that a state employee terminating his employment for reasons other than death is entitled to a lump-sum payment for accumulated annual leave.

We answer question (1) in the affirmative.

With respect to question (2), our law is silent on the matter. It is the opinion of this office that if an employee of the State of Nevada terminates his employment, receives a lump-sum payment for his accumulated annual leave and subsequently is reemployed by the State of Nevada within the period covered by his accrued annual leave, that employee is entitled to retain the lump-sum payment for his accumulated annual leave provided the employee terminated his employment in good faith and not for the purpose of converting accumulated annual leave into a monetary benefit. It is realized that the term "good faith" is of a nebulous character, but it should be borne in mind that the employee does not rehire himself, and, upon termination of his employment, even in bad faith, he has no assurance of being rehired, it is therefore difficult to envision such a situation unless the rehiring agency is a party to the scheme.

William N. Dunseath, after seven years' service in the Department of the Attorney General as a Deputy Attorney General, submitted his resignation to the new administration effective December 31, 1958. On January 5, 1959, Roger D. Foley, the newly elected Attorney General, appointed Mr. Dunseath Deputy Attorney General in a special capacity to assist the Department of the Attorney General in the so-called Colorado River litigation. An examination of correspondence between Attorney General Foley and Mr. Dunseath prior to December 31, 1958, indicates Mr. Dunseath submitted his resignation in good faith, and not for the purpose of converting accumulated annual leave into a cash benefit.

For the reasons set forth, question (2) is answered in the negative.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-3 Constitutional Law—Lease-Purchase contracts by state agencies in light of the restrictive limitations of Section 3, Article IX, State Constitution, except under "special fund" doctrine, are of doubtful validity.**

CARSON CITY, January 29, 1959

HONORABLE RUSSELL W. McDONALD, *Director, Statute Revision Commission, Carson City, Nevada*

DEAR MR. McDONALD: We have your letter of December 11, 1958, asking that we render an opinion in this department upon a question as stated hereinafter.

Sec. 3 of Art. IX, as hereinafter quoted, places a limitation upon the amount of combined state debt that may be incurred and outstanding, at any given time. This section also makes provision for the maximum time allowed in which a specific state debt may be financed. Sec. 2 of Art. X places an upper limit upon ad valorem taxation for all combined purposes of not to exceed five cents on one dollar of assessed valuation. At the present time our constitutional debt limitation of one percent of all taxable property within the State allows the state to become indebted in the amount of approximately \$5,900,000. The bonded indebtedness of the State as of January 2, 1959 is \$2,586,000. It is believed that the constitutional balance of \$3,044,000 does not provide the necessary cushion needed to launch a building program. You have recited that "a joint resolution

proposing a constitutional amendment changing the limit to two percent will be returned to the Legislature in 1959.”

You have supplied this office with an extensive brief upon this subject, for which we are grateful.

#### QUESTION

Would a “lease-purchase” statute be in violation of Sec. 3 of Art. IX of the Constitution of the State of Nevada?

#### OPINION

There is some authority on each side of this proposition, under varying provisions of the organic laws of the states that are concerned and under varying statutes and varying contractual arrangements. To reconcile all of this material is, of course, impossible. The general nature and difficulty of the program is also apparent when one reflects upon the proposition that nothing is precise and certain in resolving the question, except the content of the constitutional provisions. That is, a court in resolving the question of validity or invalidity in a given case would have for its guidance the constitutional provisions, a statute and contractual terms, the latter made presumable in pursuance of the constitutional and statutory provisions. These differences render our treatment of this subject somewhat more general than could and would be the case if an action were presented to a court.

To render our treatment of this question clear and the constitutional limitations that exist more understandable, we first set out the constitutional provisions and, secondly, show the purpose of those provisions and evils sought to be avoided and minimized.

Article IX of the Constitution deals with Finance and State Debt, in part, this article reads as follows:

Section 1 Fiscal year. The fiscal year shall commence on the first day of July of each year.

Section number 2 appears to contain nothing pertinent to this study.

“Sec. 3. State indebtedness: Limitations and exceptions. The state may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of one percent of the assessed valuation of the state, as shown by the reports of the county assessors to the state controller, except for the purpose of defraying extraordinary expenses, as hereinafter mentioned. Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within twenty years from the passage of such law, and shall specifically appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished until the principal and interest of said debts shall have been wholly paid. Every contract of indebtedness entered into or assumed by or on behalf of the state, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion, suppress insurrection, defend the state in time of war, or, if hostilities be threatened, provide for the public defense.

The state, notwithstanding the foregoing limitations, may, pursuant to authority of the legislature, make and enter into any and all contracts necessary, expedient or advisable for the protection and preservation of any of its property or natural resources, or for the purposes of obtaining the benefits thereof, however arising and whether arising by or through any undertaking or project of the United States or by or through any treaty or compact between the states, or otherwise. The legislature may from time to time make

such appropriations as may be necessary to carry out the obligations of the state under such contracts, and shall levy such tax as may be necessary to pay the same or carry them into effect.”

Nevada Revised Statutes—Vol. 5, under heading “Nevada constitution.”

Sections 4 and 5 of Article IX appear to have no bearing upon the current problem.

Article X of the Constitution entitled “Taxation” is in Section 2 thereof significant in the present problem. Section 2 reads as follows:

Sec. 2. Total tax levy for public purposes limited. The total tax levy for all public purposes including levies for bonds, within the state, or any subdivision thereof, shall not exceed five cents on one dollar of assessed valuation.

Certain provisions of the constitution as it formerly existed are significant and cast light upon this inquiry. In the original constitution, Article IX thereof, section 1, provides that the fiscal year shall begin January 1; section 2 provides inter alia that the Legislature shall provide for an annual tax sufficient to defray the estimated expenses of State Government; section 3 provides that the State shall transact its business on a cash basis, from its organization, and that the State may contract debts which “shall never, in the aggregate, exclusive of interest, exceed the sum of three hundred thousand dollars,” with certain exceptions of an emergency nature. The section also provides that all debts with all accumulated interest thereon shall be paid within twenty years, and that debts beyond the specified maximum shall be void, unless contracted for the designated emergencies. See: Constitution at back of book entitled “Nevada Constitutional Debates and Proceedings.” Andrew J. March, Official Reporter.

The first amendment to Sec. 3, Art. IX, became effective in 1916. This constitutes the first paragraph of Sec. 3 of its present form. See: Sec. 143 NCL 1929.

The amendment of 1934 to Sec. 3, Art. IX, added the second paragraph of this section and left the first paragraph without modification. See: Nevada Constitution—Nevada Revised Statutes, Vol. 5.

A study of the debates of the delegates shows that the delegates were interested in economy of government and sound financial practices. They were also interested in placing certain limits upon the power of the legislative branch, respecting taxation. They were not certain that the territory could afford the costs of statehood, and they wanted an instrument with such just and lenient provisions respecting taxation that they would be able to “sell” the provisions thereof to the electorate, preliminary to the vote thereon. See: Nevada Constitutional Debates and Proceedings—Marsh, page 753 et seq.

Upon this background of material then we learn that four inflexible principles of the founders of State Government have carried over and limit and regulate the fiscal policies of certain state (and county) officers, viz:

1. Departments of government operate upon a cash (and budgetary) system.
2. The total maximum allowable amount of state debt is proportional to the total of taxable property within the State.
3. The maximum tax rate of ad valorem taxation is established at \$5 per \$100 per year.
4. The maximum time allowable for the redemption and settlement of public debts.

Provisions similar to the Sec 3 of Art. IX of the Constitution of Nevada, limiting the amount of state debt are common to the constitutions of the various states. Some are much more restrictive than that of Nevada. California limits the state debt to \$300,000, unless a greater sum be approved by the electorate. See: Dissenting opinion of Justice Edmonds, in *Dean v. Kuchel* (California 1950), 218 P.2d 521 at 525. Such was argued for as the maximum allowable state debt in the Nevada Constitutional Convention. This was not approved however. See: Nevada Constitutional Debates and Proceedings, page 753 et seq.

Despite this very restrictive provision of the California Constitution, the supreme court of that great and very wealthy state has promulgated the rule that to term the contract a lease when in truth and in fact it is a conditional sales contract will not lift it from the restrictive provisions of the constitution. In *City of Los Angeles v. Offner* (California 1942), 122 P.2d 14, the court said:

It has been generally held in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment as for the consideration actually furnished that year, no violence is done to the constitutional provision. (Citing authorities.) If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a "lease" is a subterfuge and it is actually a conditional sales contract in which the "rentals" are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void. (Citing authorities.)

The rule as applied to each of these situations is well stated in *Garrett v. Swanton*, supra, 216 Cal. at 226, 13 P.2d at page 728, as follows: "The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, where each installment is not in payment of the consideration furnished that year, and the total amount of said installments, when coupled with other expenditures, exceeds the yearly income, are violative of the constitutional provisions in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease, or conditional sale."

In an article entitled "Lease-Financing by Municipal Corporations As a Way Around Debt Limitations," in Volume 25, (1956-1957) *The George Washington Law Review*, beginning page 377, it is pointed out that the "leases" in practice were non-terminable, and that the annual "rent" payments are indistinguishable from debt service on bonds, and that since "the fiction exists only in the courtroom," this practice of lease-financing is therefore borrowing and not renting. This author points out that the present debt limitations are too inflexible, and that a great deal of ingenuity and dexterity has been displayed in avoiding the constitutional limitations. He doubts that his procedure is proper and closes with the truism that the "best way to insure repeal of a bad law is to enforce it strictly."

This author (25 *George Washington Law Review*) also makes the point that year-to-year leases, by reason of a provision of option for renewal, are meaningless as to the office or other space required for most governmental purposes. Jails, courthouses, schools, mental institutions and the like, cannot close down their operation at the end of a year and move to other quarters. Exceptions enumerated (page 392) are few. Of course, if the instrument creates a present obligation upon its execution for the full amount of the "rent," the provisions of the constitution that are by intent to be circumvented, remain to fully block the course. In such cases the instrument creates a "debt" which when added in amount to other debts is beyond the forbidden limit.

It is held in *Ash V. Parkinson*, 5 Nev. 15, at 26, that claims against the State that are promptly paid when they fall due, are not "debts" within the constitutional limitation.

In 71 A.L.R. at 1318, this subject is fully treated, under the heading, "Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitutional or statutory limitation of indebtedness."

Under the decisions a great deal of variety and ingenuity is displayed and evidenced on the part of those who seek to avoid or evade the constitutional or statutory limitations and safeguards. No useful purpose would be served in attempting to distinguish the cases and the statutory and constitutional provisions under which the rulings of the high courts, in each case, have depended. Sufficient to say that in each case the true nature of the transaction is determined and if the payments although termed "rents" are in fact installments upon principal, and if from the beginning of the contract, the full amount of the contract is a present existing obligation, the constitutional safeguards will prevail. There are cases however in which, through options to renew or other devices it is held that the execution of the contract by itself does not create a present existing obligation for the full amount of the "rent" and hence in such cases the constitutional provisions have not been violated.

We would indeed be naïve if we did not recognize that the extreme limitations of a constitutional provision combined with extreme necessity of a political subdivision or body, does not have some effect, in cases such as here under review, upon the judicial tribunal, vested with a duty of determining the validity or invalidity of a contract.

There is one clear cut line of cases, relying upon the "special fund" doctrine, which hold that if the money with which to pay the installments or "rents" is derived from a special operation not from a tax levy, such fund is not a burden upon the taxpayer and therefore not restricted by the constitutional provisions under review. See: *Boe v. Foss*, 77 N.W.2d 1 and *Garrett v. Swanton*, 13 P.2d 725.

Due to the fact, as formerly stated, that we do not have before us a statutory provision authorizing lease-purchase contracts, and do not have such a contract made or contemplated in pursuance thereof, our opinion hereon is necessarily qualified.

But considering this qualifying feature of the problem and the fact that under the one percent formula the State could expend over \$3,000,000 by way of further debt, and the further fact that in the Governor's message of January 26, 1959, he advocates the expenditure of \$2,928,656 in a building program, to expended this year and be taken from state fund balance, and remembering the fact that the people approve constitutional amendments with alacrity, and the further fact that such a statute would be for the avowed purpose of circumventing the provisions of the constitution, we are clearly of the opinion that such a statute would be in violation of the meaning and spirit of the constitutional provisions and therefore void.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-4 Education, Department of—The State Board of Education has power to require the county school districts and joint school districts to publish quarterly a listing of all expenditures in a form prescribed by such board. NRS 387.320 construed. See Opinion No. 59-24.**

CARSON CITY, January 30, 1959

HONORABLE BYRON F. STETLER, *Superintendent of Public Instruction, Carson City, Nevada.*

DEAR MR. STETLER: We have your letter of January 20, 1959, in which you propound a question requiring an opinion of this department.

QUESTION

Does the State Board of Education have authority under NRS 387.320 to direct the county school districts to publish the annual contract salaries of employees and do the annual contract salaries constitute expenditures within the purview of this act?

OPINION

The section inquired about, in part, reads as follows:

387.320 Quarterly publication of school district expenditures.

1. During the quarter of the school year beginning January 1, 1956, and in each quarter school year thereafter, the clerk of the board of trustees of a county school district shall cause to be published a list of expenditures of the county school district made during the previous quarter school year. *The published list of expenditures shall be in the form prescribed by the state board of education.*

2. During the quarter of the school year beginning October 1, 1956, and in each quarter school year thereafter the clerk of the board of trustees of a joint school district shall cause to be published lists of expenditures of the joint school district made during the previous quarter school year. *The published list of expenditures shall be in the form prescribed by the state board of education.* (Italics supplied.)

Subsection 3 appertains to the place in which the newspaper shall be published to qualify under subsection 1, and subsection 4 appertains to the place of publication of the newspaper to qualify under subsection 2. Subsection 5 prescribes the qualifications of newspapers that are to be used, and subsection 6 makes provision for the required publications and in what newspapers to be published in cases in which there are no local newspapers qualified under the provisions of the previous sections.

NRS 387.320, subsections 1 and 2, was amended by Chap. 138, Stats. 1957, p. 189. The amendment consisted of adding the portion that has been italicized. No other changes were made and the former statute is the present statute except for the addition of the italicized material.

It could not be assumed that the legislative act of amending in the manner specified was an idle gesture, and without purpose. It was clearly for the purpose of conferring upon the State Board of Education a power which it previously did not possess, that of prescribing the form of the "published list of expenditures."

This construction is in keeping with Volume 1, Sutherland's Statutory Construction, Article 1934, in which it is stated that "Part of section not changed and provisions added by amendment to be construed together."

From what we have said heretofore the authority of the State Board of Education to prescribe the form of a list of expenditures for publication, of both county school districts and joint school districts, is established. The only question that remains is whether or not teachers' and other salaries may be, by the State Board of Education, included in that prescribed form for publication. It is clearly an expenditure and the statute makes no exception, thereby making it mandatory that certain of the expenditures be published and permitting others to be omitted. It follows that all expenditures shall be published in a "form prescribed by the state board of education." The State Board of Education could allow all salaries to be lumped together if such is the form that it wishes to "prescribe."

For the reasons heretofore assigned the question is answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-5 Public Service Commission—Reduced rates by a common carrier to the United States Government as authorized by NRS 706.370 are not subject to regulation by the Public Service Commission as being just and reasonable; the Commission is precluded from any action in reduced rates between the Federal Government and a common carrier; Commission may require common carrier to file tariff setting forth reduced rates to the United States Government.**

CARSON CITY, February 3, 1959

HONORABLE NOEL A. CLARK, *Commissioner, Public Service Commission, Carson City, Nevada*

DEAR MR. CLARK: Your letter dated January 20, 1959 requested an opinion of this department on the following questions:

(1) Must a carrier file a tariff setting forth reduced rates to the United States Government as authorized under Section 706.370 of Nevada Revised Statutes?

(2) Are these rates subject to regulation by the Commission as being just and reasonable?

(3) Is the Commission precluded from any action in reduced rates between the United States Government and a common carrier?

#### STATEMENT

The United States Government is paying for the intrastate shipment of personal belongings and household effects of service personnel stationed at Stead Air Force Base who are moving from temporary living quarters in the Reno area to the new Capehart Housing Project. In that connection the above enumerated questions have arisen.

#### OPINION

The case of *Public Utilities Commission of California v. United States of America*, 355 U.S. 534, 2 L.Ed.2d 470, decided March 3, 1958, is in point. In that case the United State Supreme Court ruled, in a majority opinion, that Section 530 of the California Public Utilities Code, as amended in 1955, was unconstitutional as being in conflict with the supremacy clause of the Federal Constitution. (Art. VI, Cl. 2).

Section 530 of the California Public Utilities Code, as amended in 1955, reads in part as follows:

Every common carrier subject to the provisions of this part may transport free or at reduced rates: (a) Persons for the United States \* \* \*. The Commission may permit common carriers to transport property at reduced rates for the United States \* \* \* to such extent and subject to such conditions as it may consider just and reasonable.

Basically the said 1955 amendment subjected the reduces rates for transportation of United States Government property by common carriers to approval by the Commission. Prior to said amendment the Commission had authorized highway permit carriers to

deviate from prescribed minimum rates in connection with the transportation of property for the armed forces of the United States.

The applicable California Code provision before the 1955 amendment was essentially the same as the present provisions in the Nevada Revised Statutes (see NRS 706.130, NRS 706.350 and NRS 706.370). The question of the constitutionality of the California Code never arose prior to 1955 because the Commission had authorized common carriers to negotiate with the Federal Government for reduced rates and ship at those negotiated rates without prior approval of the Commission.

We are of the opinion that if the Public Service Commission of Nevada attempts to regulate as just and reasonable the reduced rates between the common carrier and the United States Government, or to take any action that would delay or hinder the Federal Government in the negotiation of reduced rates from common carriers and the transportation of property for the United States Government, even in intrastate commerce, such action on the part of the Commission would place the law of Nevada, on that matter, squarely within the authority laid down in *Public Utility Commission of California v. United States of America*, supra. (Also see *United States v. Pennsylvania Public Utilities Commission*, 143 A.2d 341.)

We take this view notwithstanding the fact the property in question is personal belongings and household effects of military personnel and not military property as such. It is our opinion question (2) above must be answered in the negative; question (3) is answered in the affirmative.

With respect to question (1) the necessity for the carrier to file a tariff setting forth the reduced rates to the United States Government will in no way impede or conflict with the operations of the United States Government or the Federal Constitution so long as the Commission does not subject the reduced rates to its approval prior to shipment. Requiring the carrier to file a tariff after the shipment would be a police matter within the jurisdiction of the State Government.

Question (1) is answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-6 Fish and Game Commission—State legislation is required to enable United States to acquire land within the State of Nevada for migratory bird, wildlife purposes.**

CARSON CITY, February 6, 1959

MR. FRANK W. GROVES, *Director, Fish and Game Commission, P.O. Box 678, Reno, Nevada*

DEAR MR. GROVES: Reference is made to your letter of December 18, 1958 addressed to Mr. Dickerson, then Attorney General. In said letter you request the opinion of this office upon the question which is hereinafter stated.

FACTS

We are informed that the Migratory Bird Conservation Act of 1929 and the amending Migratory Bird Hunting Stamp Act of June 15, 1935 require the consent of the state before federal acquisition of state land through purchase for wildlife purposes.

Migratory Bird Conservation Act (1929) 45 Stat. 1222, 16 U.S.C.A. 538.  
(See 16 U.S.C.A. Section 715—Consent of state to conveyance)  
Migratory Bird Hunting Stamp Act (1934) 48 Stat. 452, 16 U.S.C.A.  
547.

We are further informed that the Migratory Bird Hunting Stamp Act was further amended in 1957 to provide that all of the funds collected from the sale of Migratory Bird Hunting Stamps might be applied to the acquisition of waterfowl lands.

Your letter indicates that the State of Nevada might become eligible to allocation of a part of such funds provided there is no impediment or prohibition to such participation on the basis of existing Nevada law. In this connection, your letter notes and makes reference to a law providing a method for consent of the state to the acquisition by the United States of America of land and water rights, as possibly applicable, and an adequate basis for qualification and eligibility of Nevada to share in such federal funds. (Chap. 108, Nevada Stats., 1957; NRS 328.030 et seq.)

#### QUESTION

Does the Federal Government require additional enabling state legislation in order to purchase lands within the State of Nevada for wildlife purposes?

#### OPINION

The United States Congress may lawfully legislate under the commerce clause of the Constitution to protect the game, nongame, and insectivorous birds which migrate with the changing seasons.

Cochrane v. U.S. (C.C.A. 7) 92 F. (2d). 623.

The United States Congress has power to establish game refuges in view of the Migratory Bird Act and the treaty with Great Britain.

U.S. v. 2271.29 Acres (D.C. Wis.) 31 F. (2d). 617 (1928).  
Migratory Bird Conservation Act (cited supra).  
Migratory Bird Treaty Act (1918) 40 U.S. Stat. 755; (1936) 49 U.S. Stat.  
1556.

\* \* \* \* \*

The State of Nevada may also be properly concerned with the conservation and protection of migratory birds as part of the State's "natural resources," during such periods of time as such wildlife is actually present and located within state boundaries.

It may be asserted as an established proposition of law that it is a right inherent in the State, as the sovereign power, to enact laws for the protection and preservation of fish and game in the waters and on the land within the confines of its territory.

(Ex parte Crosby, 38 Nevada Reports, 389, 392 et seq. (1915))

Sec. 3, Art. IX, Constitution of the State of Nevada, (as an exception to the limitation of the State Debt), in part, makes provision as follows:

The State, notwithstanding the foregoing limitations may, pursuant to authority of the legislature, make and enter into any and all contracts

necessary, expedient or advisable for the protection and preservation of any of its property or natural resources, or for the purposes of obtaining the benefits thereof, however arising and whether arising by or through any undertaking or project of the United States or by or through any treaty of compact between the States, or otherwise.

\* \* \* \* \*

NRS 501.055: "Migratory game birds" defined.

NRS 501.100: Fish and game as part of natural resources belonging to people.

NRS 501.210: Enforcement of fish and game laws by commission.

\* \* \* \* \*

The State's authority and power to take such action as may be reasonably designed to effectuate the conservation and protection of migratory birds as part of the "natural resources" of the State must now, therefore, be deemed conclusive.

\* \* \* \* \*

Thus far, our inquiry has shown ample authority both on the part of the United States Government and of the State Government, within their proper spheres, and with respect to their own public lands to take appropriate action for the conservation and protection of natural resources, including migratory birds.

The next situation, and the one involved in your inquiry, is as to the availability of land within our State to the United States for wildlife purposes, including refuges for migratory birds. In this connection, you specifically invite our opinion as to the adequacy of existing Nevada law to qualify the State of Nevada to be eligible for, and to participate in, federal funds collected from the sale of Migratory Bird Hunting Stamps (cited supra) which might be allocated by the Federal Government for the acquisition of waterfowl lands in Nevada.

Our attention has been directed to Chap. 108, Nevada Laws 1947 (NRS 328.030 et seq.); as possibly applicable. Research and examination of the law on the part of this office has failed to disclose any other legislative authority, either expressly, specifically or generally germane and applicable.

Consequently, the following analysis is addressed to the applicability and legal sufficiency of Chap. 108, Nevada Laws 1947 (NRS 328.030 et seq.), to provide adequately for consent of the State of Nevada to the United States to acquire land within the State through purchase for wildlife purposes.

NRS 328.030, et seq. (Chap. 108 Nev. Laws 1947, p. 405) provides a method and procedure relating to securing the consent of the State of Nevada for the acquisition of land and water rights by the United States for certain federal purposes.

Section 1 of said law provides that consent to land and water right acquisitions by the United States of America shall be limited to the federal purposes expressly stated in clause 17, Sec. 8 of Art. I of the Constitution of the United States.

Reference to this clause of the United States Constitution, insofar as pertinent to our inquiry, shows that federal purchases of land made with the consent of the state legislature shall be "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

In our opinion, this section limits land acquisitions by the United States to federal purposes clearly related to installations or constructions of a military or defensive nature.

Sec. 2 of Chap. 108, Nevada Laws 1947 provides for state consent to acquisitions by the United States where privately owned or state-owned real property is desired by the

Federal Government “for reclamation projects, flood control projects, protection of watersheds, right of way for public roads, and other purposes.” The consent of the State of Nevada under this section is further limited to be in accordance with the principles set forth in section 1 of the Act.

It should be noted that this section makes specific additions to the federal purposes for which state consent to land acquisitions may be granted to the United States “in accordance with the principles set forth” in section 1 of the Act. The legislative intent of this section would appear to authorize state consent for the specifically enumerated additional purposes wherever necessary or in furtherance of the military or defensive purposes prescribed in section 1 of the Act.

As to the applicability of “and other purposes” in section 2 of the Act: It is our opinion that the other purposes must be of the same nature or character as those specifically enumerated, under established rules of statutory construction (“Ejusdem generis”), and would not supply the desired authority for consent to land acquisitions by the United States for wildlife purposes.

It is also our considered opinion that while the conservation and protection of wildlife (including migratory birds), as “natural resources” is undoubtedly a right inherent in the sovereign power of the State, such power should be, and usually has been, exercised through specific legislative enactment.

Such legislative enactment would appear to be mandatory inasmuch as there is involved consent to acquisition of land within the State. That such acquisition, in the instant case, would be by the United States Government, and for a purpose which would be in the public interest of the State as well as the nation, is not sufficient reason for dispensing with legislative authority therefor.

Attorney General’s Opinion No. 29-335 (1929) “State Property—  
Provision for sale strictly construed.”

Attorney General’s Opinion No. 27-262 (1927) “Title of state to real  
property cannot be divested except by legislative sanction.”

Further support and confirmation for our conclusion may be found in the fact that with respect to previous federal acquisitions of land within the State of Nevada, state consent has been provided for on the basis of expressed and specifically enumerated federal purposes.

See: NRS 328.010 et seq: Land for national forest purposes (1937-1939)  
NRS 328.160 et seq: Land required by Department of Defense or Atomic  
Energy Commission (1955)  
NRS 328.010 et seq: Sale of real property authorized for Hoover Dam  
reservoir site (1933)  
NRS 328.240: Jurisdiction ceded over land for use of Indian School  
(Douglas County) (1897)  
NRS 328.250: Site for federal building in Yerington (1937)  
NRS 328.260: Jurisdiction ceded over U.S.N. Ammunition Depot (1935)  
NRS 328.280: Site for post office and federal building in Tonopah  
(1939)  
NRS 328.300: Site for post office building in Lovelock (1937)  
NRS 328.350: Lands to facilitate administration of national forest affairs  
(1937)

Such well-established and tested policy and practice should be adhered to unless clearly violative of law, which, of course, in our opinion, it is not.

With respect to the very matter which is the subject of our inquiry, namely, the establishment of a wildlife and fish refuge on the upper Mississippi River, Title 16

U.S.C.A. 552 (1924, 43 Stat. 650, 652) provides as follows:

Section 724: "Same; Consent of States to acquisition, existing rights of way, easements, and so forth: (a) Such area shall not be acquired by the Secretary of the Interior until the *legislature of each State* which is situated any part of the areas to be acquired under section 722 of this title *has consented to the acquisition of such part by the United States for the purposes therein stated*, and, except in the case of a lease, no payment shall be made by the United States for any such area until title thereto is satisfactory to the Attorney General and is vested in the United States." (Italics supplied.)

Finally, to resolve the very same problem, the neighboring State of California in 1957 expressly and specifically, through legislative enactment, declared its acceptance of the Migratory Bird Conservation Act (cited *supra*), and made provisions for consent to federal acquisition of land, with certain reservation as to state authority thereover.

See: West's Annotated California Codes: Fish and Game, Section 10680 Stats. 1957, C. 456 p. 1466, Section 10680.

For all the foregoing reasons, it is our opinion, therefore, that the Federal Government does require additional enabling state legislation in order to purchase land within the State of Nevada for wildlife purposes.

As a corollary to this conclusion, it follows that, in the absence of such enabling state legislation, the State of Nevada may not be able to qualify or become eligible to receive a share of the funds collected from the sale of Migratory Bird Hunting Stamps, and otherwise allocable for expenditure in the acquisition of waterfowl lands within the State of Nevada.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-7 Resignation of County Commissioner Made to Board of County Commissioners—Governor Fills Vacancy by Appointment.**

CARSON CITY, February 16, 1959

HONORABLE GEORGE FOLEY, *District Attorney, Clark County, Las Vegas, Nevada*

DEAR MR. FOLEY: We are in receipt of your letter of February 10, 1959, requesting an opinion from this office on two questions:

1. What legal procedure must be followed in the case of a resignation of a duly elected and qualified member of the Board of County Commissioners?
2. Upon such resignation, how is the vacancy created thereby filled?

OPINION

We thank you for your memorandum of points and authorities, which has proven very helpful.

Question No. 1:  
NRS 245.130 reads as follows:

Resignation of all county officers, except district judges, shall be made to the board of county commissioners of their respective counties.

NRS 245.150 reads as follows:

Within 10 days after a vacancy has occurred in any county office, by resignation or otherwise, the clerk of the board of county commissioners shall certify the fact of such vacancy to the secretary of state.

NRS 283.020 reads as follows:

All state officers commissioned by the governor shall resign their commission to the governor.

NRS 245.010 reads as follows:

All county officers elected by the people shall receive certificates of election from the boards of county commissioners of their respective counties.

A duly elected and qualified member of the board of county commissioners of a county of the State of Nevada is a county officer and receives his commission from the board of county commissioners, and not from the Governor. Based on these clear and unambiguous statutory provisions, it is our opinion that a county commissioner is required to submit his resignation to the board of county commissioners, NRS 245.130, supra, and the clerk of the board of county commissioners must certify the fact of such vacancy to the Secretary of State, NRS 245.150, supra.

You have cited *State. V. Beck*, 24 Nev. 92, an 1897 case, and you say that there is an implication in this decision that a county commissioner should submit his resignation to the Governor.

In this case the court held that a written resignation made by respondent, a county commissioner, to the Governor, and accepted by him, was conditionally made and that the resignation was withdrawn by respondent before the happening of the contingencies named therein and, therefore, respondent had not resigned and was entitled to continue in office.

This case is not in conflict with our view. The court did not decide the question before us, saying at page 97:

The character of respondent's act in transmitting his resignation to the governor, the effect thereof, whether the resignation is conditional or absolute, and the effect of the subsequent transactions occurring after the receipt of the resignation by the governor are the only matters necessarily to be considered in determining the question presented in this proceeding.

The court further said at page 99:

Other questions were discussed by counsel for the respective parties, but we do not deem it necessary to pass upon the same.

We must assume that the court had knowledge of the statutes and knew that the resignation should have been submitted to the board of county commissioners, but deemed it unnecessary to so comment since the resignation itself was withdrawn before

conditions precedent to its becoming effective occurred.

Question No. 2:

NRS 244.040 reads as follows:

1. Any vacancy occurring in any board of county commissioners shall be filled by appointment of the governor.
2. The term of office of a person appointed to the office of county commissioner shall not, by virtue of the appointment, extend beyond 12 m. of the day preceding the 1st Monday of January next following the next general election.

NRS 244.040, supra, is composed in part of 1935 N.C.L. 1929, which is subsection 1 of "An Act to create a board of county commissioners in the several counties of this state and to define their duties and powers," approved March 8, 1865. This section reads, in part, as follows:

\* \* \* Any vacancy or vacancies occurring in any board of county commissioners shall be filled by appointment of the governor\* \* \*.

NRS 245.170 reads as follows:

When any vacancy shall exist or occur in any county or township office, except the office of district judge and county commissioner, the board of county commissioners shall appoint some suitable person, an elector of the county, to fill such vacancy until the next ensuing biennial election.

NRS 245.170, supra, is a combination of 1951 N.C.L. 1929 and 4813 N.C.L. 1929. 1951 N.C.L. 1929 is section 19 of the said Act creating a board of county commissioners approved March 8, 1865, and reads as follows:

When a vacancy shall occur in any county or township office, except the office of county commissioner, the board of county commissioners shall appoint some suitable person, an elector of the county, to fill the vacancy until the next general election.

4813 N.C.L. 1929 is section 49 of a general act relating to officers, approved March 9, 1866, and reads as follows:

When any vacancy shall exist or occur in the office of county clerk, or any other county or township office, except the office of district judge, the board of county commissioners shall appoint some suitable person to fill such vacancy until the next general election.

In the case of State ex rel. Wichman v. Gerbig, 55 Nev. 46, the court says at page 53:

It is alleged in relator's complaint and urged in argument in his behalf that the governor of Nevada had no power or authority to fill a vacancy in the office of county commissioner. We are not in accord with this contention. Section 1935 N.C.L. 1929 provides as follows: "Any vacancy or vacancies occurring in any board of county commissioners shall be filled by appointment of the governor. \* \* \*." It is argued on behalf of the relator that this particular section was repealed by the adoption and approval of the act

of 1933 (Stats. 1933, c. 127) (*4813 N.C.L. as amended*), which provides, in substance, that when any vacancy shall exist or occur in any county or township office, except the office of county judge, the board of county commissioners shall appoint some suitable person to fill such vacancy, until the next general election. We are unable to conclude that this statute repeals by implication or otherwise section 1935, which confers upon the governor the power and right to fill by appointment any vacancy or vacancies in any board of county commissioners. (Matter italicized added.)

NRS 245.180 reads as follows:

1. When, at any time, there shall be in the county offices, except in the office of district judge, no officer duly authorized to execute the duties thereof, some suitable person may be temporarily appointed by the board of county commissioners to perform the duties of such offices, until they are filled by election or appointment, as provided by law. In case there is no board of county commissioners in such county, the governor may, on notice of such vacancy, create or fill such board.

2. Any person so appointed, in pursuance of subsection 1, shall, before proceeding to execute the duties assigned him, qualify in the same manner as required by law of the officer in whose place he shall be appointed; and he shall continue to exercise and perform the duties of the office to which he shall be so appointed until the election of his successor at the next ensuing biennial election, and the qualifications of such successor thereafter.

NRS 244.060, subsection 1, reads as follows:

A majority of the board shall form a quorum for the transaction of business.

In our opinion the power of the board of county commissioners to appoint under NRS 245.180, *supra*, has no application in the case of a vacancy in the board of county commissioners. This statute specifically states, "In case there is no board of county commissioners in such county, the governor may, on notice of such vacancy, create or fill such board." Furthermore, when there is one vacancy in the three-member board of county commissioners, there is still a board, NRS 245.060, subsection 1, *supra*.

There is no former opinion of this office touching upon this question. However, Opinion No. 363M, of December 4, 1942, deals with Section 4805 N.C.L. 1929, which is now part of NRS 245.180, and General Mashburn makes the following statement in the said opinion:

Therefore, we think it follows that the Board of County Commissioners does have the power and authority under section 4805 Nevada Compiled Laws 1929 to appoint, temporarily, a suitable person to perform the duties of the office of County Recorder and Auditor of Esmeralda County. Such appointment to be temporary in character only, subject to the return of Mr. Chiatovich at some future time within the term of his office.

It is the opinion of this office that NRS 244.040 governs and a vacancy created by resignation of a member of the board of county commissioners of any county in this State shall be filled by appointment of the Governor. The term of office of such person shall not extend beyond 12 p.m. of the day preceding the first Monday in January next following the next general election.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-8 Gambling—Nevada Tax Commission. Gaming Control Board. Refusal to License. Foreign Interest. It is within the power of the Nevada Tax Commission and Gaming Control Board to refuse to license, or further license, applicant or licensee who owns interest in gaming establishment in foreign country where gambling is legal.**

CARSON CITY, February 17, 1959

HONORABLE GRANT SAWYER, *Governor of Nevada, Carson City, Nevada*

MY DEAR GOVERNOR SAWYER: We are in receipt of your inquiry, wherein you have asked an official opinion of this department upon the following question:

QUESTION

Does the Nevada Tax Commission and the Gaming Control Board have the power and authority to refuse to license an applicant for gaming license, and does the Nevada Tax Commission have the power and authority to revoke a gaming license of one of its licensees upon the ground that such applicant or licensee has a financial interest in a gaming establishment of a foreign country in which gaming is legal under the laws of such country?

OPINION

In order to resolve this matter, we believe a review of the pertinent Nevada statutes and case law is required.

NRS 463.130 reads as follows:

1. It is hereby declared to be the policy of this state that all establishments where gambling games are conducted or operated or where gambling devices are operated in the State of Nevada shall be licensed and controlled so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada.

2. Any license issued pursuant to NRS 463.010 to 463.360, inclusive (of the Nevada Gaming Control Act), shall be deemed to be revocable privilege and no holder thereof shall be deemed to have acquired any vested rights therein or thereunder. (Words in parentheses added.)

NRS 463.140, subsection 1 and 2, reads as follows:

1. The provisions of NRS 463.010 to 463.360, inclusive, with respect to state gaming licenses shall be administered by the state gaming control board and the Nevada tax commission, which are hereby charged with administering the same for the protection of the public and in the public interest in accordance with the policy of this state.

2. The board shall investigate the qualification of each applicant for licenses under NRS 463.010 to 463.360, inclusive, before any license is issued and shall continue to observe the conduct of all licensees to the end

that licenses shall not be issued to nor held by unqualified or disqualified persons or unsuitable persons or persons whose operations are conducted in an unsuitable manner or for unsuitable or prohibited places or locations. The board shall have full and absolute power and authority to recommend the denial of any application for license, or the limitation or restriction of such license or the suspension or revocation of any license, for any cause deemed reasonable by the board. The Nevada tax commission shall have full and absolute power and authority to deny any application for license, or to limit, restrict, revoke or suspend any license, for any cause deemed reasonable by the commission.

NRS 463.150, subsection 1, reads as follows:

1. The commission and the board are hereby empowered and shall, from time to time, make, promulgate, modify, amend and repeal such rules and regulations, consistent with the policy, objects and purposes of NRS 463.010 to 463.360, inclusive.

NRS 463.170, subsection 1, reads as follows:

1. Any person who the Nevada tax commission shall determine is a suitable person to receive a license under the provisions of NRS 463.010 to 463.360, inclusive, having due consideration for the proper protection of the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada, may be issued a state gaming license. The burden of proving his qualification to receive or hold any license hereunder shall be at all times on the applicant or licensee.

NRS 463.170, subsection 3, reads in part as follows:

3. Then Nevada tax commission may, by regulation, \* \* \* establish such other qualifications for licenses as they may, in their uncontrolled discretion, deem to be in the public interest.

On the 22nd day of February, 1956, the State Gaming Control Board and the Nevada Tax Commission adopted certain rules and regulations pursuant to NRS 463.150, then Section 15 of the Gaming Control Act of 1955. In Supplement No. 2 to the said Rules and Regulations, dated July 23, 1958, we find Rule and Regulation No. 3.060, which reads as follows:

No person who owns, controls, or has any interest of any kind in any gaming establishment or game outside the State of Nevada where such gaming or games are illegal shall be entitled to receive or hold a state gaming license, and any such state gaming license held by any such person may be summarily revoked.

In the event a person owns, controls or has an interest in a gaming establishment outside the State of Nevada in a state or country where gaming is legalized under the laws of such other state or country, the board may, in the public interest and at its discretion, refuse to license, or further license such person in this state.

In Supplement No. 1 to said Rules and Regulations, dated May 21, 1956, we find Rule and Regulation No. 5.010, Section 3 of which reads in part as follows:

The board deems that any activity on the part of a licensee, his agents or employees which is inimicable to the public health, safety, morals, good order and general welfare of the people of the State of Nevada or which would reflect or tend to reflect discredit upon the State of Nevada of the gaming industry is an unsuitable manner of operation.

NRS 463.310 reads as follows:

1. The board shall investigate any apparent violation of NRS 463.010 to 463.360, inclusive, or its rules or regulations which comes to its attention and may conduct such hearings with respect thereto as it may deem necessary. The commission may direct the board to investigate any apparent violation of NRS 463.010 to 463.360, inclusive, or any rules or regulations which comes to its attention.

2. If, after such investigation and hearing as it deems necessary, the board is satisfied that a license should be suspended, revoked or limited, it shall so recommend in writing to the commission and transmit therewith its findings of fact and conclusions of law, all evidence in its possession bearing on the matter, and any transcript of testimony at any hearing conducted by or on behalf of the board.

3. Upon receipt of the recommendations of the board, the Nevada tax commission shall review the same and all matter presented in support thereof, and may conduct such further investigation or hearings as it may deem necessary or appropriate in the circumstances.

4. The Nevada tax commission shall have full and absolute power and authority to limit, revoke or suspend any license for any cause deemed reasonable by the commission, after it has availed itself of the provisions of subsections 1 and 2 above.

5. In the event the commission shall limit, suspend or revoke any license, it shall issue its written order therefor and cause to be prepared and filed its findings of fact and conclusions of law upon which such order of suspension or revocation is based.

6. Any such limitation, revocation or suspension so made shall be and remain effective until reversed or modified by a court of competent jurisdiction upon review.

7. Upon review, all findings of fact made by the commission shall be conclusive if supported by any evidence.

We believe Nevada Tax Commission v. Hicks, 73 Nev. 115, 310 P.2d 852, dated May 3, 1957, to be the leading case of this subject and deem it advisable to quote at length therefrom. The decision, written by Justice Merrill, reads in part as follows, beginning at page 118:

It is apparent that this appeal, in general, presents two duties to this court: First, that of fixing the jurisdictional area within which the courts shall act in the field of gambling control; Second, that of proceeding to act within the jurisdictional area so delineated.

We turn to the first of these matters. In this regard statutory language, as hereinafter quoted, is general. However, against a background of common knowledge, or which we here take note, the legislative intent emerges with clarity.

We note that while gambling, duly licensed, is a lawful enterprise in Nevada, it is unlawful elsewhere in this country; that unlawfully followed elsewhere it tends there to create as well as to attract a criminal element;

that it is a pursuit which, unlawfully followed, is conducive of corruption; that the criminal and corruptive elements engaged in unlawful gambling, tend to organize and thus obtain widespread power and control over corruptive criminal enterprises throughout this country; that the existence of organized crime has long been recognized and has become a serious concern of the federal government as well as the governments of the several states.

Throughout this country, then, gambling has necessarily surrounded itself with an aura of crime and corruption. Those in management of this pursuit who have succeeded, have done so not only through a disregard of law, but, in a competitive world, through a superior talent for such disregard and for the corruption of this in public authority.

For gambling to take its place as a lawful enterprise in Nevada it is not enough that this state has named it lawful. We have but offered it the opportunity for lawful existence. The offer is a risky one, not only for the people of this state, but for the entire nation. Organized crime must not be given refuge here through the legitimatizing of one of its principal sources of income. Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. If this is to be accomplished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized.

This court has already had occasion to note that the control and licensing of gambling is a duty demanding special knowledge and experience in matters of personnel, operation, and finance, as related to this type of enterprise. *Dunn v. Nev. Tax Com.*, 67 Nev. 173, 216 P.2d 985. The risks to which the public is subjected by the legalizing of this otherwise unlawful activity are met solely by the manner in which licensing and control are carried out. The administrative responsibility is great.

Against this background of common knowledge we turn to the statutory provisions.

The court then cites and quotes from Sections 10(b) and 10(ff) of the gambling control act then applicable and since superseded by NRS 463.130, 463.140 and 463.310.

The cited and quoted statutes, insofar as this problem is concerned, may be said to be the same in substance as the sections of NRS which superceded them, and from which we have quoted in whole or in part supra.

The Nevada Tax Commission v. Hicks decision, continuing at page 120 of 73 Nevada, reads as follows:

We are dealing with the duty to determine the suitability of those who would secure or retain gambling licenses. This duty the legislature has expressly imposed upon the tax commission. In cases of revocation or suspension the manner in which this duty is carried out is made subject to judicial review.

To accomplish its duty the commission must first define suitability: fix the standards by which it is to judge suitability. Here it acts administratively. Next it must ascertain and examine the facts of the particular case to determine whether its standards have been met. Here, in cases of revocation or suspension where the factual determinations are made after hearing and notice, the commission acts in a quasi-judicial capacity. It is in this respect only, in the usual case, that revocation or suspension is subject to review by the courts. Accord: *Ex Rel. Grimes v. Board of Com. of Las Vegas*, 53 Nev. 364, 1 P.2d 570. It is not the province of the courts to

decide what shall constitute suitability to engage in gambling in this state. That is an administrative determination to be made by the commission in the exercise of its judgment based upon its specialized experience and knowledge. Accord: *Dunn v. Nev. Tax Com.*, supra. Whether suitability as defined by the commission exists in the particular case is a question of fact and of evidence, not of administrative ruling. Judgment upon such questions is judgment which the courts are qualified to review.

This is not to say that the administrative determination (as distinguished from the judicial), is wholly exempt from judicial scrutiny. Standards of suitability may be fixed which are so completely unrelated to the subject as to demonstrate that the administrative action of the commission in defining suitability was arbitrary, discriminatory, capricious, or wholly beyond the sphere of its authority.

And finally, as if to emphasize its position, the court says at page 135:

We are faced once again with the necessity for respecting the limits of judicial participation in matters of gambling control. We have determined that while, in large part, the commission's assignments of unsuitability are not supported by the evidence, in other respects they are. Once again we note that it is not for the courts to fix the standards by which suitability is to be determined.

In the case of *Nevada Tax Commission v. Mackie*, decided on January 6, 1959, the Nevada Supreme Court, citing *Nevada Tax Commission v. Hicks*, supra, says:

In *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 310 P.2d 852, this court carefully delineated the area within which the courts may act in judicial review of commission action. From that opinion it follows that it is not the province of the courts to decide what shall be reasonable cause for revocation of license; that such determination is an administrative one to be made by the commission in the exercise of its judgment based upon its specialized experience and knowledge. Whether reasonable cause for revocation, as the commission may have defined it, exists in the particular case, is the question which the courts may review.

The commission has determined that the operation of a cheating game is a reasonable cause for revocation of license. That determination is not subject to judicial review in the absence of a showing that the determination was arbitrary or capricious or for some other reason was beyond the administrative authority of the commission.

In the light of the broad powers with which the Legislature has clothed the Nevada Tax Commission and Gaming Control Board, and considering the decisions above cited construing such powers, we believe that Rule and Regulation No. 3.060 and that part of Section 3 of Rule and Regulation No. 5.010, above cited, are rules and regulations which the Tax Commission and the Gaming Control Board were empowered to make by NRS 463.150.

We further believe that the second paragraph of the said Rule and Regulation No. 3.060 empowers the Nevada Tax Commission and the Gaming Control Board to refuse to license, or to further license, an applicant or licensee in this State who owns or controls an interest in a gaming establishment outside of the State of Nevada in a foreign country where gambling is legal; provided, that in the exercise of their special skill the Tax Commission and Gaming Control Board have determined administratively, as a matter of suitability, within the limits of their powers as defined in *Tax Commission v. Hicks*,

supra, that no Nevada gaming licensee should be permitted to hold a particular foreign, though legal, gambling interest, and provided further, that the said Tax Commission and Gaming Control Board, acting quasi-judicially, make a factual determination in the manner required by the pertinent statutes and rules and regulations that such applicant, or existing licensee, in fact holds such foreign, though legal, gaming interest.

We, therefore, answer the question in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-9 University of Nevada—Resident alien of state—exemption from tuition charge.**

CARSON CITY, February 18, 1959

DR. CHARLES J. ARMSTRONG, *President, University of Nevada, Reno, Nevada*

DEAR MR. ARMSTRONG: Reference is made to your letter, dated February 3, 1959, in which you request the opinion of this office on the questions hereinafter stated.

FACTS

Your letter indicates that the daughter of an alien, who has resided continuously in the State of Nevada since May 5, 1958, and who, on January 18, 1957, filed his Declaration of Intention to become a United States citizen, was considered to be a nonresident of the State of Nevada, within the purview of the statute exempting bona fide residents of the State of Nevada from payment of tuition, because neither she nor her parents are citizens of the United States by birth or naturalization. You note, and invite our comment on, NRS 396.540, section 1(a) in this connection. While your letter does not expressly so indicate, it is inferred that the daughter has continuously resided with her family in the State of Nevada since May 5, 1958. Your letter is also not explicit as to the date when she applied for matriculation at the University.

QUESTIONS

1. What is a "bona fide resident" as used in NRS 396.540, section 1(a)?
2. What qualifications are necessary for the admission of a student to the University of Nevada, as a "bona fide resident" of Nevada, and, therefore, entitled to free tuition, under the provisions of NRS 396.540?

OPINION

NRS 396.530 entitled "Admission of Students: Qualifications," provides as follows:

1. There shall be no discrimination in the admission of students on account of sex, race or color.
2. No person shall be admitted who is not of good moral character, and who has not arrived at the age of 15 years, and passed such an examination as shall be prescribed by the board of regents.
3. No person under the age of 15 years shall be taught in the university.

NRS 396.540 entitled "Tuition" (insofar as pertinent to this inquiry), provides as

follows:

1. The board of regents of the University shall have the power to fix a tuition charge for students at the University, but tuition shall be free to:

(a) All students whose families are bona fide residents of the State of Nevada; and

(b) All students whose families reside outside the State of Nevada, providing such students have themselves been bona fide residents of the State of Nevada for at least 6 months prior to their matriculation at the university. \* \* \*

“Bona fide residence,” insofar as concerns the question herein involved, has been defined as “the actual taking up of by a person or place of abode with the intention of there remaining permanently or for an indefinite time then and there not expressly determined.” No. 50-858, Opinion of the Attorney General, January 27, 1950. See also, No. 28-321, Opinion of Attorney General, October 23, 1928.

Under the foregoing provisions of NRS 396.540, it will be noted “\* \* \* that a student’s family is not required to spend any prescribed length of time in this State prior to the matriculation date at the University. All that is required is that her family shall at that time be bona fide residents of the State.” No. 50-858, Opinion of Attorney General, supra.

There is no indication that the family of the student in question established residence in the State of Nevada for the sole purpose of qualifying their daughter for matriculation at the University of Nevada, and exemption from payment of any tuition. If there existed any evidence to that effect it certainly would be relevant on the question of “bona fide residence.” From the facts as submitted and hereinabove set forth, it would appear, therefore, that the family of the student in question qualified as bona fide residents, and said student came within the provisions of NRS 396.540, section 1(a), and was (if otherwise qualified under the provision of NRS 396.530) eligible for matriculation at the University, exempt from payment of tuition.

If, however, the family of said student were not “bona fide residents,” as defined above, then NRS 396.540, section 1(b) would apply and be controlling. In such case, the student herself would have to qualify as a “bona fide resident” of the State of Nevada, and would have had to have been such “for at least 6 months prior to \* \* \* matriculation at the university.” Under this provision, the determination of said student’s eligibility to free tuition at the University would depend on her qualifying as a “bona fide resident” of the State of Nevada in her own right (apart from her family) for the requisite period of 6 months, prior to seeking matriculation at the University.

The foregoing analysis and opinion is based upon a construction of the law as it now exists and is strictly limited to the scope of the inquiry. There is no express requirement of citizenship as a qualification for the admission of a student to the University, and none is implied by, or can be, inferred from, the term “bona fide residents,” which presently has a well-established and accepted meaning in the law.

It would take us too far afield to pursue our inquiry so as to embrace therein a consideration of the question on the basis of a requirement of citizenship as a qualification for admission to the University and for eligibility for exemption from payment of tuition. It will suffice, it is believed, merely to note that noncitizen taxpayers have certain rights which must be, and are, protected under both Federal and State Constitutions guaranteeing “equal protection of the laws.” (Section 1 of the 14th amendment of the Federal Constitution, among other things, in this respect significantly provides as follows: “\* \* \* nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-10 Taxation—Nevada Tax Commission. Constitutional Law.  
The beneficial interest of encumbered real property owned by the United States  
is tax exempt.**

CARSON CITY, February 19, 1959

HONORABLE R.E. CAHILL, *Secretary, Nevada Tax Commission, Carson City, Nevada*

DEAR MR. CAHILL: We are in receipt of your inquiry of February 13, 1959, with supporting documents for reference, wherein you ask this department to give its opinion upon a question, hereinafter stated. The request came to you on the same date in which you submitted the question to us.

The opinion was sought for the State Board of Equalization, which by statute is required to close its hearings on February 16, 1959. We therefore gave our views and opinion informally and orally on the afternoon of February 16, not being able in such a short time to present the opinion in writing.

QUESTION

May a beneficiary under a deed of trust, or mortgagee under real property mortgage, be assessed and taxed upon such real property interest, in a case in which the fee simple title is vested in the United States of America?

FACTS

It appears from the documents supplied to facilitate our study of this problem that Norman A. Zilber, attorney in the Office of the General Counsel, Secretary of the Air Force, United States of America, appeared in Room 209, Clark County Court House, Las Vegas, Nevada, on January 23, 1959, and testified before the County Board of Equalization, in remonstrating concerning an assessment made upon a beneficial interest of trust deed of real property used for housing of Air Force personnel, fully owned by the United States, encumbered by Trust Deed (deeds) to Manufacturers Trust Company, of 510 Fifth Avenue, New York 36, N.Y. The assessment was against said fiscal institution upon its interest as beneficiary under the said deed of trust. The real property is known as Nellis Air Force Base, also variously known as "Wherry Units" and "Capehart Housing Units." It also appears that the County Board of Equalization was of the opinion that it had no authority to remove said assessment from the rolls, and declined to strike it and that the decision of the County Board has therefore been appealed to the State Board of Equalization.

OPINION

The State Enabling Act, an act of Congress, approved March 21, 1864, and as amended, approved May 21, 1864, provided in the third subdivision of Section 4 thereof: "\* \* \* and that no taxes shall be imposed by said State on lands or property therein belonging to, or which may hereafter be purchased by the United States." See: Revised Laws of Nevada 1912, Sec. 212, Vol. 1.

In the Ordinance, preliminary to the Article I of the State Constitution, third

subdivision, it is provided: “and that no taxes shall be imposed by said State on lands or property therein belonging to, or which may hereafter be purchased by, the United States.” See: Nevada Constitutional Debates and Proceedings. Andrew J. Marsh, p. 833. We note that the third subdivision has been altered, by vote of the electorate in the year 1956, by adding the following: “unless otherwise provided by the congress of the United States.”

In the constitutional convention of July 1864, one of the most difficult of hurdles of the delegates, upon which to reach an accord, was with reference to taxation, as resolved in Article IX (Finance and State Debt) and in Article X, entitled Taxation. The debates resolved around the question of what method might be employed to tax mines, for it became clear that without a taxation upon mines or the proceeds thereof, the burden to support a state government of not less than \$300,000 per year, with moneys in addition to redeem the territorial debt, would be too great to bear. See: Nevada Constitutional Debates and Proceedings—Andrew J. Marsh—“Taxation,” pages 318-445.

The convention had protracted debates upon the question of the right to tax “possessory rights,” this term to include rights to operate mines, not patented, as well as rights to operate agricultural lands, before patent issued, under the homesteading laws of the United States, and recognizing that rights to occupy and possess lands before patent, were valuable rights of property, made provision in the constitution for taxation upon such right.

The original Article X of the Constitution, which has been subsequently amended, as hereinafter mentioned, provided as follows:

## ARTICLE X

### Taxation

Section 1. The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, and, also, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes.

See: Nevada Constitutional Debates and Proceedings—Marsh Constitution, page 845.

By constitutional amendment, approved by the people in the general election of November 1906, Article X of the Constitution was amended to provide the following:

## ARTICLE X

### Taxation

Section 1. The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed, and, also, when patented, each patented mine shall be assessed at not less than five hundred dollars (\$500) except when one hundred dollars (\$100) in labor has been actually performed, on such patented mine during the year, in addition to the tax upon the net proceeds; and also excepting such property as may be

exempted by law for municipal, educational, literary, scientific or charitable purposes.

See: Revised Laws of Nevada 1912, Vol. 1, Art. 352.

The above constitutional provision, effective November 1906, was and remained in force when the Legislature enacted Chapter 289, Statutes of Nevada 1913, page 578; amended by Chapter 147, Statutes of Nevada 1915, page 174. As amended said section reads as follows:

(Sec. 6538 N.C.L. 1929)

Taxation of Mortgages and Deeds of Trust

1. A mortgage, deed of trust, contract, or other obligation by which a debt is secured and which is a lien or encumbrance on real or personal property shall, for the purpose of assessment and taxation, be deemed, considered, and treated as an interest in said real or personal property thereby affected, except as to railroads and other quasi-public corporations, and the several assessors in their respective counties in the state shall, in assessing and fixing the value of the real or personal property affected by any such mortgage or other instrument herein mentioned, treat, consider, and deem such instrument as an interest in the real or personal property, and the assessment of the real or personal property affected thereby for the purpose of taxation shall be deemed and taken as the assessment of such mortgage or other instrument; provided, that in no case shall the valuation for taxation fixed exceed the value of such property.

(Sec. 2—6539 N.C.L. 1929)

All taxes so levied and assessed under the provisions of this act shall be a lien upon the property and the same may be paid by the owner thereof or the holder of any such security as they may stipulate in such mortgage or other instrument.

(Sec. 3—6540 N.C.L. 1929)

All taxes levied and assessed under the provisions of this act shall be lien upon the property and collected as other taxes are collected. In the event any mortgage or other instrument mentioned herein shall contain a stipulation requiring the holder thereof to pay such taxes and if such holder shall fail to make such payment, then the owner of said property shall pay such taxes and shall be entitled to a discharge of the debt thereby secured to the amount so paid.

(Sec. 4—6541 N.C.L. 1929)

The provisions of this act shall in no manner repeal or affect any law now in force relating to the assessment of mortgages held, or owned by any bank or trust company in this state. (NRS 361.250)

Disregarding for the moment the idea of ownership by the Federal Government as distinguished from ownership by an individual, it appears that there is nothing then contained in the Article X of the Constitution, which would render the above statute ineffectual, in 1913, or 1915, or for a number of years thereafter. That is, there appears to be no repugnance or conflict between the Constitution as it then existed and the statute above quoted, when it became effective, as to encumbered real property owned by an individual.

However, in general election of 1942, Article 1 of Section X was amended. leaving the initial portion without modification to and including, “in addition to the tax upon the net proceeds;” and added thereto the following:

\* \* \*

shares of stock (except shares of stock in banking corporations), bonds, mortgages, notes, bank deposits, book accounts and credits, and securities and choses in action of like character are deemed to represent interest in property already assessed and taxed, either in Nevada or elsewhere, and shall be exempt. No inheritance or estate tax shall ever be levied, and there shall also be excepted such property as may be exempted by law for municipal, educational, literary, scientific or other charitable purposes.

It therefore appears from the effective date of this constitutional amendment that even as to privately owned property (for prospective application only and not to affect contracts and assessments theretofore made) taxation upon the interest of a mortgagee or beneficiary under a trust deed was forbidden, and that the statute authorizing such taxation (NRS 361.250) was by reason of its repugnance to the constitutional provision, repealed. It would follow that the interest sought to be taxed in the matter now under consideration could not be taxed, even if the owner by the provisions of the Constitution were not an entity that enjoys exemption from taxation.

But the entity, owner of the fee, subject to encumbrance evidenced by trust deed (except that technically for security reasons only it is vested in a trustee), is the United States, which does enjoy by the provisions of the State Constitution heretofore quoted, tax exemption, "unless otherwise provided by the Congress of the United States." We are not informed that the Congress of the United States has provided otherwise and therefore presume that the immunity continues.

For the reasons heretofore given, we are of the opinion that the assessment by the county of Clark, upon the beneficial interest held by Manufacturers Trust Company of New York, under a Deed of Trust, in which the fee before execution of the Deed of Trust, was in the United States, to which the fee will return when the encumbrance is discharged, is forbidden by the Constitution, that the statute upon which it is apparently authorized is repugnant to the Constitution and thereby repealed, and that the assessment, by the State Board of Equalization, should be stricken.

The question as stated is in the negative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-11 Constitutional Law—Article IV of Nevada Constitution as amended in 1958, requires annual legislative sessions, the powers and scope of which cannot be changed by legislative act.**

CARSON CITY, February 19, 1959

HONORABLE MICHAEL NEVIN, *Assemblyman from Storey County, State Capitol, Carson City, Nevada*

DEAR ASSEMBLYMAN NEVIN: We have your request for an opinion of this office of the following question:

QUESTION

Would Assembly Bill 1 of January 19, 1959, if enacted, be constitutional?

OPINION

Assembly Bill 1, referred to above, reads as follows:

Section 1. Chapter 218 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. The regular sessions of the legislature shall be held at the seat of government, and shall commence at 12 m. on the 3rd Monday of January in each year.

2. All regular sessions in odd-numbered years shall be known as general sessions.

3. All regular sessions in even-numbered years shall be known as budget sessions, at which the legislature shall consider only:

(a) Appropriation bills for the succeeding fiscal year;

(b) Revenue acts necessary therefore;

(c) The approval or rejection of charters and charter amendments of incorporated cities and towns;

(d) Acts necessary to provide for the expenses of the session; and

(e) Such other legislative business as the governor may call to the attention of the legislature while in session.

4. During any budget session, members of the legislature shall receive compensation for their services as fixed by law not to exceed 21 days.

Sec. 2. This act shall become effective upon passage and approval.

Article 16, section 1 of the Nevada Constitution provides, in essence, that an amendment to the Constitution may be proposed in the Senate or Assembly and if the same be agreed to by a majority of all the members elected to each of the two houses such proposed amendment shall be entered on their respective journals and referred to the Legislature then next to be chosen. If the next Legislature shall agree to such proposed amendment by a majority of all the members elected to each house, such proposed amendment shall be submitted to the people and if the people shall approve and ratify such amendment by a majority of the electors qualified to vote for members of the Legislature voting thereon, such amendment shall become part of the Constitution.

In 1955, during the Forty-seventh Session of the Nevada Legislature, three Assembly Joint Resolutions, relevant to the instant question, were agreed to by the Legislature. The first of these provided for the repeal of Section 29 of Article 4 of the Constitution of the State of Nevada. Section 29 of Article 4 of the Constitution of the State of Nevada. Section 29 of Article 4 of the Constitution provided:

The first regular session of the legislature under this Constitution may extend to ninety days, but no subsequent regular session shall exceed sixty days, nor any special session convened by the governor exceed twenty days.

The second Assembly Joint Resolution, referred to above, proposed an amendment to Section 33 of Article 4 of the Constitution of Nevada by adding the following language fixing the limit of compensation for members of the Legislature "for not to exceed 60 days during any regular session of the legislature and not to exceed 20 days during any special session convened by the governor."

The third resolution proposed an amendment to Section 2 of Article 4 of the Constitution providing for annual sessions of the Legislature instead of biennial.

The said resolutions were agreed to by the Forty-eighth Session of the Nevada Legislature in 1957 and placed on the ballot for the general election of November 4, 1958 in accordance with the constitutional provisions providing for the manner of amending the Constitution.

The three resolutions, stated above, appeared on the voting machines as questions 2, 3

and 4 in the following language:

*Question 2*

Shall State Constitution be changed to remove time limits on legislative sessions thereby eliminating dilemma of covering clock on sixtieth day?

*Question 3*

Shall State Constitution be changed to provide that Legislature be paid for not to exceed 60 or 20 days service during regular or special sessions?

*Question 4*

Shall State Constitution be changed to provide that Legislature will meet once every year rather than once every two years?

All three of the foregoing questions were approved by the electorate on November 4, 1958, and, in accordance with Section 1 of Article 16 of the Nevada Constitution, said Assembly Joint Resolutions arising and passed as aforesaid are now a part of the State Constitution.

To answer the question presented to this office, it will be necessary to discuss each subsection under section 1 of Assembly Bill 1.

Subsection 1 of said bill provides for the precise hour on the third Monday of January in each year when the Legislature shall convene. While this is certainly not violative of any constitutional provision, it is repetitious of NRS 218.100, subparagraph 2, to the extent that said statute provides that on the first day of each session of the Legislature at 12 m. the Secretary of State shall call the assembly to order and shall preside over the assembly until a presiding officer is elected. We find no statutory or constitutional provision providing for the exact hour when the senate shall convene.

Subsection 2 provides for regular sessions in odd-numbered years to be known as general sessions. Comment on this provision is withheld for the reasons hereinafter set forth.

Subsections 3 and 4 of said bill limit the scope of matters the Legislature may consider in budget sessions and, further, by way of limitation, provide the compensation to be paid the legislators during budget sessions shall not exceed 21 days.

When the voters of Nevada approved the three questions submitted to them, it is presumed the terms "sessions" and "regular sessions" having been adopted from the original Constitution be taken with their established meaning. (Corpus Juris Secundum, Vol. 16, p. 115). Since statehood, with the exception of special sessions convened by the Governor, the legislative sessions have had no limitations on the scope of matters the Legislature could act upon, other than those limitations imposed on it by the Federal Constitution and the Constitution of Nevada. To qualify or place limitations on those terms after the constitutional amendments became fully effective amounts to amending the Constitution in a manner not prescribed by law.

An examination of the resolutions in question, which were adopted by our Legislature, and now part of our Constitution, leads us to the conclusion that they are self-enforcing. A constitutional provision is self-enforcing if no legislation is required to give effect to it. *Wren v. Dixon*, 40 Nev. 170; *State v. Deck* (Kansas) 188 Pac. 238; *Stevens v. Benson* (Oregon) 91 Pac. 577. In *Vanlandingham v. Reorganized School District* (Missouri) 243 S.W.2d 107, the court said, "A statute in unconstitutional which is more restrictive than a self-enforcing constitutional provision."

The general principle governing legislative power is set forth if *Corpus Juris Secundum*, Vol. 16, p. 179, in the following language:

No legislative body which is governed by a written constitution which it is bound to obey possesses sovereign power to the fullest extent. No

legislative body can make laws that are not according to, and consonant with, the fundamental laws that have been prescribed for its government by the people, who are superior to both the law-making power and the constitutions themselves. All written constitutions therefore are limitations on legislative powers or the sovereignty which in all organized governments must reside somewhere. A declared legislative policy can never rise above a constitutional grant or ignore a constitutional limitation on its powers.

Analyzing the instant problem in the light of the foregoing language, the constitutional provision here under scrutiny does not distinguish the authorized annual sessions either as to scope or duration. For the Legislature to attempt to so limit a regular legislative session, would in effect constitute amending the Constitution, which the Legislature acting alone is without power to accomplish.

We conclude that Section 1, subparagraphs 3 and 4 of Assembly Bill No. 1, if enacted, would be unconstitutional, and see no purpose in commenting further on subparagraphs 1 and 2 of said bill.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-12 Constitutional Law—The legislature is without power to grant tax exemptions to legal entities except such entities operate for “municipal, educational, literary, scientific or other charitable purposes.”**

CARSON CITY, February 20, 1959

HONORABLE CARL F. DODGE, *Chairman, Committee on Taxation, Nevada Legislative Senate, Carson City, Nevada*

DEAR SENATOR DODGE: We have your inquiry of January 27, 1959 in which you ask a question requiring an official opinion of this department.

QUESTION

Would a bill providing real and personal property tax exemption to nonprofit rural electrification cooperatives which are qualified to receive loans under the provisions of 7 U.S.C.A., Article 904, be constitutional?

FACTS

We are informed by the Senator from Esmeralda County (Senator Duffy) that the nonprofit corporation formed to which the question has particular reference, is named White Mountain Power Cooperative, Inc.

We have checked the records of the Secretary of State and have read the Articles of Incorporation of this corporation, and have found that a nonprofit corporation with this name was formed by the filing of Articles of Incorporation on February 17, 1958, for corporate life of fifty years, authorized to carry on a power transmission business for its members only, residing or to reside within the community of Fish Lake Valley of Esmeralda County, Nevada; also that the principal office of the corporation is Dyer, Fish Lake Valley, Nevada, and that the resident county is Walter Conley.

The articles also contain provisions that the corporation shall have authority to obtain

a loan from a federal agency or from federal agencies. The articles do not make clear what moneys the corporation at present has or in what manner any funds have been raised, if at all. We are also informed, if we understand correctly, that title to the corporate property would be held by the federal agency as security for a loan from such agency, until the loan might be redeemed and paid.

#### OPINION

The present statute authorizing federal assistance for construction or procurement of electric plants and transmission lines, as amended in 1955, c. 139, Sec. 2, 69 Stats. 132; Sec. 904, Title 7, U.S.C.A., pocket parts therein, is quite long and will not be quoted here. It is entitled, "Loans by Administrator for electrical plants and transmission lines; preferences; consent of state authorities." Nothing contained therein authorized the administrator to take title to the property, in any manner to secure the loan that is authorized. The entire statute apparently contemplates that the loan be secured in the manner that loans are usually and ordinarily secured when made by financial institutions, that is either by mortgage or preferably by trust deed, but not by the taking of title by the financial institution. Certain language taken from the section is compatible with this construction. The section provides: "Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed." We mention this at length for apparently it is the view of the nonprofit corporation, in sponsoring the bill, that the government will take the title to the property, and that hence the bill would not be violative of constitutional limitations, upon the doctrine of tax immunity of property belonging to the United States.

The bill here under scrutiny is Senate Bill Number 12, introduced on January 20, 1959. The bill seeks to amend Chapter 361, Nevada Revised Statutes, by adding thereto a new section to provide for such exemption from taxation. In essence the bill reads as follows:

Section 1. Chapter 361 of NRS is hereby amended by adding thereto a new section which shall read as follows: "The real and personal property of nonprofit rural electrification cooperatives which are qualified to receive loans under 7 U.S.C. Sec. 904 shall be exempt from taxation."

Although it is true that property of the United States, both real and personal, with certain qualifications not pertinent here, is under the Nevada Constitution, exempt from taxation, such provisions of exemption have no application here, for the reason formerly mentioned that the federal act, heretofore mentioned, does not contemplate or authorize the government to take title to such properties. See: Ordinance subdivision "Third," prior to Article 1 of Nevada Constitution.

We next explore the question of whether or not it is within the province of the Legislature to grant tax exemptions to legal entities, upon Nevada property, at will, and to what extent is the Legislature limited in such matters by the Constitution.

The delegates to the constitutional convention became convinced after prolonged debates that for the people of the territory to undertake the financial burdens of a state government, was a rather difficult undertaking, that in order for the burden of taxation to be endurable, and at the same time be adequate to cover need, it would be necessary to tax all property, including mines, and with few entities to be entitled to escape that obligation. Such was the over-all accord, as made crystal clear by an examination of the debates and the arguments that were advanced. See: Nevada Constitutional Debates and Proceedings—Andrew J. Marsh, pp. 318-447.

Articles IX and X deal with "Finance and State Debt" and "Taxation," respectively, and although Article X has been amended two times (content three variations) this article

has from the beginning contained an enumeration of those entities that might be entitled to receive the benefits of legislation to exempt their property from taxation.

For example Article X of the original Constitution of 1864 closed with this content: "and, also, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes."

As amended in the general election of 1906, Article X of the Constitution closed with this content: "and, also, excepting such property as may be exempted by law for municipal, educational, literary, scientific or other charitable purposes." Sec. 145, N.C.L. 1929.

As amended in the general election of 1942, Article X of the Constitution ended with the following limitation: "No inheritance or estate tax shall ever be levied, and there shall also be excepted such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes."

That this enumeration of legal entities that might receive favorable legislation exempting their properties from taxation, is an exclusive enumeration, there can be no doubt, and the Supreme Court has so held. In *State v. Carson Savings Bank*, (Nevada 1882) 17 Nev. 146, the court held that the taxing of money, loaned at interest, secured by mortgage, when the property mortgaged is taxed, is not double taxation, and is not violative of the Constitution of this State. The court said: "\* \* \* and it is equally evident that the special grant of authority to exempt property for the purpose specified, carries with it an implied inhibition against an exemption for any other purpose." Citing authorities. See, also, Attorney General's Opinion No. 59-10 of February 19, 1959.

We are of the opinion that a nonprofit rural electrification cooperative corporation, organized to qualify to receive loans under the provisions of 7 U.S.C.A., Art. 904, is not municipal, educational, literary, scientific or charitable, and hence any statute to exempt it from taxation would be in conflict with Article X, Section 1, of the Nevada Constitution. The question as propounded is answered in the negative.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-13 Welfare Department, State—Federal jurisdiction and concern presently applies solely to Indian Tribes and tribal Indians—State jurisdiction extends to individuals, nontribal Indians, unattached to Indian reservations—Federal Government (and Bureau of Indian Affairs) does not have, and, therefore cannot transfer to State Welfare Department, legal custody and control of Indian children—Termination of parental rights, through appropriate court proceedings as provided in existing state law, is necessary for State Welfare Department's legal exercise of custodial care of Indian children—Existing state law does not contemplate appointment of State Welfare Department as legal guardian of the person of a minor.**

CARSON CITY, February 23, 1959

MRS. BARBARA C. COUGHLAN, *State Director, Nevada State Welfare Department, Post Office Box 1331, Reno, Nevada*

DEAR MRS. COUGHLAN: Reference is made to your letter of April 15, 1957, directed to Mr. Dickerson, then Attorney General, and a copy of Contract No. 14-20-450-773, dated June 21, 1956, entered into between the Nevada State Welfare Department and the United States of America, acting through the Bureau of Indian Affairs, Department of the

Interior, and correspondence relating thereto from this office to Mr. Harry L. Stevens, Assistant Area Director, Bureau of Indian Affairs, Phoenix, Arizona, dated November 23, 1958, and reply from said Mr. Harry L. Stevens, dated December 23, 1958, copies of which correspondence were apparently transmitted to you for your information.

On behalf of the State Welfare Department you ask the opinion of this office upon the questions which are hereinafter stated.

#### FACTS

We are informed that, pursuant to contract between the United States Department of Interior, Bureau of Indian Affairs, and the Nevada State Welfare Department, a number of Indian children have been placed by the federal bureau under the care of the State Welfare Department. Some of these children are, apparently, full or part orphans, in some cases, of Indian mothers, in other cases of Indian fathers, and in still other cases, of parents both of whom were Indian. In many of these cases it further appears that there has never been a relinquishment of any kind for any purpose by the parents of the children to the State Welfare Department, and in such instances, it is inferred that the only basis for exercise of the state department's custodial function is believed to be the contract entered into with the Bureau of Indian Affairs, United States Department of Interior, above mentioned, or renewals thereof pursuant to mutual agreement.

The contract, among other provisions, apparently contemplates determinations of guardianship of such Indian children, whenever indicated, by the Nevada courts, at the instance of the State Welfare Department, and also appears to contemplate placement by the State Welfare Department of Indian children in foster homes, and for adoption.

To facilitate performance of its duties and responsibilities, on the basis of specific cases involving Indian children who now are, or who may hereafter come, within its province, clarification as to existing legal authority of the State Welfare Department for exercise of jurisdiction and taking appropriate case action, and any limitations on said authority, is certainly desirable.

#### QUESTIONS

1. Is there any present limitation upon the exercise by the State of Nevada of jurisdiction and authority over Indians within its territory, on the basis of the special relationship which exists between the Federal Government and Indians?

2. (a) To what extent, if any, is the contract (No. 14-20-450-773), entered into between the State Welfare Department and the Bureau of Indian Affairs, United States Department of the Interior, legally sufficient to authorize placement in foster homes, for adoption, and the appointment of guardians for, Indian minor children coming into the custodial care of the State Welfare Department?

(b) Is relinquishment by such children's parents or legal guardian, or termination of parental rights necessary, in connection with the placement of any such child for adoption, or the appointment of a guardian by the courts?

3. Under existing Nevada law, may the State Welfare Department be named by the courts as guardian of the person of an Indian minor child, placed in, or coming within, its custodial care?

#### OPINION

The legal status of the normal citizen can be ascertained on the basis of an examination of the decisions of the highest court upon the subject. And the normal citizen can, generally, be trusted to see to it that his actual position in the country, state, or other political community, conforms to his status as judicially declared.

Until recent years, the Indian has been in a different situation. Besides being alien to

his experience and temperament, our institutions were not framed with a view to the exercise of unchecked control over dependent aborigines. The Supreme Court of the United States has said, of Indians in general:

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character. U.S. v. Kagama, (1866) 118 U.S. 375, 381, 30 L.Ed. 228, 6 Sup.Ct.Rep. 1109.

The above brief remarks will suffice, it is believed, to indicate that any question or problem involving Indians is, therefore, not always susceptible of a simple or direct legal opinion and answer.

## I

A review of material in the field of Indian law shows that, because of circumstances of varying historical and legal importance, tribal Indians have been subject throughout our history to numerous treaties and special or local laws enacted by Congress providing for their governance, some of which relegated many of them to a status variously described in court decisions by such terms as pupilage, tutelage and wardship. A constant awareness of history must be maintained in order properly to understand federal Indian law. One may expect, and find, a great difference and change between the status of Indians as dependent nationalities in the time of Chief Justice Marshall, as contained in some of his pronouncements, and the national citizenship of Indians today. It rests largely with Congress to determine when such remnants of the status or relationship of Indians as "wards," which still persist, shall cease. Board of Commissioners of Creek County v. Seber, 318 U.S. 705, 178 (1943).

Since the Declaration of Independence and the beginning of our national government, the authority and power to enact legislation pertaining to the government and regulation and supervision of Indians and their affairs has been vested specifically or impliedly in the Federal Government, first by the Articles of Confederation, and later by the Constitution of the United States. That Indian tribes are largely exempt from the operations of local laws is due to the fact that the Constitution vests in the National Government rather than in the states the three powers upon which the law pertaining to Indian affairs is primarily based: the warmaking power (Art. I, Sec. 8, cl. 11), the treaty-making power (Art. II, Sec. 2, cl. 2), and the power to regulate commerce with Indian tribes (Art. I, Sec. 8, cl. 3). A review of historical developments and legal decisions indicates that these powers have furnished the chief bases for valid interposition of federal law to the exclusion of state control of Indian affairs. Thus in United States v. Kagama, already cited, the Supreme Court found that the protection of the Indians constituted a national problem and referred to the practical necessity of protecting them and the withholding of such a power from the states. Whatever view be taken of this reasoning, it is now well established that the powers of Congress over the Indians, or more qualifiedly, over Indian tribes or tribal Indians are plenary, and have proved as wide as state powers over non-Indians.

See also, Worcester v. Georgia, 6 Pet. 515 (1832). Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899).

With the disappearance of the "last frontier," some 85 years ago, the Federal Government inaugurated a policy frankly aiming at the destruction of the tribal relations of the Indian, who usually was rooted in his tribal life and land, and at "individualizing" him into a normal American citizen. I. W. W. Willoughby, The Constitutional Law of the United States (1910) p. 311; (1926) 14 California Law Review 83, 84 (The Legal Status of the California Indian). In furtherance of this policy, brief note may be taken of the following steps:

1. 1871—Congress declared that Indians should no longer be dealt with by treaty. 16 U.S.Stats. at L. 566, U.S. Comp.Stats., Sec. 4034.

2. 1868—The 14th Amendment to the United States Constitution, which first defined federal citizenship having been construed as merely declaratory of the common-law rule of citizenship by birth, was held inapplicable to Indians born of tribal allegiance, on the theory that they could not, therefore, be considered as born in the United States and subject to the jurisdiction thereof. *McKay v. Campbell*, 16 Fed. Cas. No. 8840 (1871); *Elk v. Wilkins*, 112 U.S. 94 (1884); *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

3. 1877—By the terms of the so-called Dawes Act, American citizenship was for the first time conferred upon all Indians who lived apart from a tribe and had “adopted the ways of civilized life.” 24 U.S.Stats. at L. 390, U.S. Comp. Stats., Sec. 3951. By this act, such Indians became, ipso facto, citizens of the state.

4. Prior to 1924—Indians had been able to acquire citizenship only in one of the following ways: marriage to white men, by military service, by receipt of allotments, or through special treaties or statutes. Federal Indian Law, Office of the Solicitor, U.S. Dept. of the Interior (1958), p. 520.

5. 1924—By congressional act of June 2, 1924, citizenship was conferred on all non-citizen Indians born within the territorial limits of the United States. 43 Stats. 253.

6. 1940; 1952—Such citizenship was again confirmed in the Nationality Act of October 14, 1940, and reenacted on June 27, 1952. See, 8 U.S.C. 1401; Federal Indian Law, cited supra, p. 516 and footnotes.

7. Notes may be made of the protection of Indian voting rights guaranteed by the 15th Amendment to the United States Constitution, passed on March 30, 1870, but not generally applicable to all Indians until the congressional act of June 2, 1924, supra.

As a result of the foregoing, at present, Indians born in the United States and subject to its jurisdiction are citizens of the United States and the states wherein they reside. As such, they have constitutional rights, liberties, privileges and immunities, and they also have correlative legal duties and obligations. Federal Indian Law, supra, p. 1.

They are now eligible for public office and employment in governmental service on the same basis as non-Indians. Federal Indian Law. supra, pp. 522-539 and footnotes; have the right to sue and to employ counsel of their own choice, Same, supra, pp. 540-544; have the right to contract, Same, supra, pp. 544-550; enjoy civil liberties, Same, supra, pp. 566-579; and are eligible for state assistance, Same, supra, 539-540.

Particularly since 1924, when, as above mentioned, citizenship was conferred on all native-born, non-citizen Indians, states have assumed a larger role in supplying Indians with essential public services. The economic conditions brought on by the depression also resulted in a momentous change in Indian policy. Federal and tribal funds were applied to assist in a program for the organization and incorporation of Indian tribes and the launching of tribal enterprises to enable tribes and their members to become self-sufficient by their own efforts in endeavors and pursuits more congenial and better suited to native tastes and talents. It became possible, as a result of such programs to facilitate the transfer of many responsibilities previously performed by the Federal Government to the organized tribes. Federal Indian Law, supra, pp. 268-270 and footnotes.

In the field of Indian education, the period 1940-1947 also witnessed a radical change, chiefly marked by an accelerated program not only of preparing Indians for the rapid developments of the atomic age, but also of preparing them for termination of federal supervision, acceptance of state jurisdiction, placement in industry, and even their

relocation for that purpose. Federal Indian Law, supra, p. 280 and footnotes.

In the field of Health and Welfare, the Secretary was authorized to enter into contracts with states, political subdivisions thereof, or private non-profit corporations, agencies, or institutions providing for the transfer of Indian hospitals, health facilities and operating equipment and supplies, "Whenever, in his discretion, the health needs of the Indians could be better met by so doing \* \* \*." Federal Indian Law, supra, p. 284, citing 68 Stats. 674, 42 U.S.C. 2001, et seq.

In the field of rehabilitation and relief, congressional special legislation on behalf of the Navajo and Hopi tribes is illustrative of the current trend for their training and relocation in order to bring about employment of a permanent nature. Federal Indian Law, supra, p. 285, and footnotes.

The most interesting development to date in this aspect of the Indian problems, however, is in the field of the right of Indians to participate in social security benefits. An opinion was rendered by the solicitor of the Interior Department, in 1936, holding the Social Security Act applicable to Indians with respect to the three types of direct aid by states in cooperation with the Federal Government, namely, aid to the needy aged, dependent children, and blind. This opinion was predicated upon the requirements of a state plan which shall be in effect throughout the state, which necessarily involved the inclusion of Indian reservations. The Act, also providing for allotment of federal funds on the basis of state population, and such statistics including in their compilation Indians, among others, any preclusion of Indians from the benefits under the Act was prohibited. The opinion also placed confirmation for this conclusion on the fact that Indians, as citizens, were entitled to equal protection of, and benefits under, the law. Other provisions of the Social Security Act relate to assistance in the care of crippled children, maternal health service and public health service, particularly in rural areas and localities suffering severe economic distress. Federal Indian Law, supra, pp. 286-287 and footnotes. See also, *State of Arizona v. Hobby*, 221 F.2d 498 (1954); *Begay v. Sawtelle*, 53 Ariz. 304, 88 P.2d 999 (1939); *Piper v. Big Pine School District*, 193 Cal. 664, 226 P. 926 (1924); *Shelley v Kraemer*, 334 U.S. 1 (1948); *Oyama v. California*, 332 U.S. 633 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

\* \* \* \* \*

It seems proper to note at this point that the State of Nevada, by NRS 422.260 has not only assented to the purposes of the Social Security Act, but accepts federal allotments thereunder for use by the State Welfare Department in compliance with state law and the conditions of the Social Security Act.

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*Meanings of Terms "Incompetency," "Wardship," and "Indian"  
in Relation to Indian Affairs*

Our analysis of the Indian problem in its general ramifications justifies brief consideration and clarification as to the meaning of certain terms which, when used in connection with Indians, has caused considerable confusion. Chief among these appear to be the words "incompetency," "wardship," "Indian."

"Incompetency:" This term, used in relation to Indians does not necessarily mean non compos mentis. When so used, it generally is intended to denote lack of legal capacity, and is to be found in various federal statutes or court decisions for predication of the exercise of federal power and jurisdiction in, as well as administrative regulation of, Indian affairs. Statutory provisions generally contain the term in connection with the conferring of power upon guardians or other persons authorized by the Department of the Interior, parents or guardians, heads of families, chiefs, collectors of customs, and agents,

and superintendents or other bonded officer of the Indian Service, to select allotments, or homestead entries, receive payments due, appraise property in condemnation proceedings, or perform other functions for minors or persons, in fact, non compos mentis. More restricted meanings of the terms are: (a) to describe the status of an Indian incapable of disposing of some or all of his real property, though otherwise competent in the ordinary legal sense. ("An outstanding example is Charles Curtis, who, though he became Senator and Vice President of the United States, remained all his life an incompetent Indian, incapable of disposing of his trust property by deed or devise, without securing the approval of the Secretary of the Interior.") Federal Indian Law, supra, p. 553, and footnotes. (b) Inability to receive or spend funds, illustrated by the Act of March 2, 1907 (34 Stats. 1221), which authorizes the Secretary of the Interior to designate any individual Indian belonging to any tribe whom he deems capable of managing his affairs to be apportioned his prorata shares of tribal funds. Federal Indian Law, supra, p. 557.

"Wardship." In connection with the use of this term, "\* \* \* consideration should be given to the fact that it rests with Congress to determine when and in what manner the special relationship \* \* \*" which exists between the Indians and the Federal Government, shall cease. "Until determination of this special relationship \* \* \* it is probable that a tribe will continue to be referred to as 'a semi-autonomous political entity' and that there will be discussions of 'the fiduciary duty of the (Federal) Government to its Indian wards'." While there may be important similarities and suggestive parallels between the relation of the Federal Government and Indians and the relation of guardian and ward at common law, it is clear that the common law relationship does not exist between the United States and the Indians. Federal Indian Law, supra, p. 557, and footnotes. It should suffice to indicate some of the various connections in which the term has been used to make clear its proper meaning:

Wards—as domestic dependent nations; tribes subject to congressional power; individuals (members of tribes) subject to congressional power; subjects of federal jurisdiction; subjects of administrative power; beneficiaries of a trust, non-citizens; and subjects of federal bounty.

Wardship—and restraint on alienation; inequality of bargaining power. Federal Indian Law, supra, pp. 557-566, and footnotes.

"Indian:" Legally speaking, an Indian is what the law legislatively defines, or judicially determines, him to be. In any question or problem, the answer must be sought primarily in applicable statutes, decisions, and opinions, or tribal law. General definitions do not suffice. Some practical value may, nevertheless, be found in a definition of "Indian" as a person who meets two qualifications: (a) That some of his ancestors lived in America before its discovery by the Europeans, and (b) that the individual is considered as "Indian" by the community in which he lives. Federal Indian Law, supra, pp. 4-7 and footnote citation; 48 Stats. 988, 25 U.S.C. 479; 8 U.S.C. 1401 (a) (2) and 48 U.S.C. 206. See also, *United States v. Rogers*, 4 How. 567 (1846). Accord: *United States v. Ragsdale*, 27 Fed. Cas. No. 16113 (1847); *Ex parte Morgan*, 20 Fed. 298 (1883); *Westmoreland v. United States*, 155 U.S. 545 (1895); *Alberty v. United States*, 162 U.S. 499 (1896); *Red Bird v. United States*, 203 U.S. 76 (1906).

A review of relevant statutes and cases, while interesting and germane, only emphasizes the difficulty of generalization as to the scope and exercise of federal or state criminal and civil jurisdiction. A summary analysis has been made on this point on the basis of such a review, but the same is omitted from this opinion in the interest of some brevity, and because it is not considered absolutely essential for documentation of the conclusions reached in this inquiry.

"Although Congress has classified Indians for various statutory purposes, it has never laid down a classification and either specified or implied that individuals not falling

within the classification were not Indians \* \* \*.” Federal Indian Law, supra, p. 10. An act passed for the purpose of controlling the traffic in liquor with the Indians classifies Indians under the “charge of an Indian superintendent or agent.” (1892) 27 Stat. 260, 261. A later act enlarged the definition to include “any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government” or “any Indian a ward of the Government under the charge of any Indian superintendent or agent” or “any Indian, including mixed bloods, over whom the Government through its departments, exercises guardianship.” (1897) 29 Stat. 506. This is, perhaps, the broadest classification made by congressional enactment, including as it does all mixed bloods and providing only that they be considered federal wards.

Various special or local acts applicable to certain tribes have provided for removal of restrictions on alienation from lands of the members of the tribe of less than one-half Indian blood (1908) 35 Stat. 212; (1921) 41 Stat. 1249. Other acts have use the term “mixed blood.” (1906) 34 Stat. 353; (1907) 34 Stat. 1034. See also (1954) 25 U.S.C. secs. 677-677aa; (1931) 46 Stat. 1518.

Apart from statutory definitions, federal administrative agencies concerned with Indian affairs commonly consider a person who is of Indian blood and a member of a tribe, regardless of degree of blood, an Indian. Thus the Indian Law and Order Regulations approved in 1935 provide: “\* \* \* an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction \* \* \*.” 25 C.F.R. 1612.

This definition exemplifies the evident fact, explicit and implicit throughout the field of Indian law, that the Federal Government, in dealing with Indians, is dealing not with a particular race as such but with members of certain social-political groups toward which it has assumed special responsibilities. Federal Indian Law, supra, p. 12.

This definition also confirms the significant conclusion (also amply supported throughout the entire development of federal Indian law) that today, at least, federal concern and jurisdiction is solely with Indian tribes or tribal Indians.

We further conclude that it also necessarily follows that sufficient authority only exists for exercise of state powers and jurisdiction in matters involving individual, non-tribal Indians, not on or connected with, Indian reservations of any kind. Federal Indian Law, supra, pp. 510-511 and footnotes; Storey on the Constitution, 4th Edition (1873), Vol. 2, sec. 1933, pp. 654-655. See: State v. McKenney, 18 Nev. 182, 2 Pac. 171; State v. Buckaroo Jack, 30 Nev. 325, 96 Pac. 497; State v. Niblett, 31 Nev. 246, 102 Pac. 229; Ex parte Crosby, 38 Nev. 389, 149 Pac. 989; State v. Mendes, 57 Nev. 192, 16 P.2d 300.

As regards, Indian tribes, or tribal Indians on, or connected with Indian reservations of any kind, federal powers and jurisdictions are, as they have generally always been, plenary and conclusive.

## II

In line with the conclusions reached by our inquiry thus far, we would expect to find that the contract (No. 14-20-450-773), entered into between the State Welfare Department and the Bureau of Indian Affairs, United States Department of the Interior, is concerned with “tribal Indians” or Indian “wards,”—that is, individual members of tribes subject to congressional power and, either resident on reservations under federal jurisdiction, or beneficiaries of a trust with which the Federal Government is charged.

In fact, such is the case. Article I, paragraph 1 provides: “\* \* \* Such children shall have one-fourth or more degree Indian blood and residence on trust or restricted tax-exempt Indian-owned land in Nevada at time of certification” by the Board of Indian Affairs.

Viewed in its entirety, the contract in question, in effect, constitutes the Nevada State Welfare Department an agent of the Federal Government, acting through the Bureau of Indian Affairs, to furnish and provide the specific services mentioned therein to, and for,

such children as have been certified to the State Welfare Department “by the Commissioner of Indian Affairs or his authorized representative.” Contract, Art. I, par. 1.

In restriction of discharge of functions and performance of obligations under the contract by the State Welfare Department, paragraph “4” therein provides: “That no child shall be removed from his family home without the permission of that person legally responsible for him. If such permission is not given, the Welfare Department shall secure appropriate legal action before the child is removed.”

Manifestly, this provision is crucially important with respect to any further inquiry in the premises. It clearly constitutes confirmation of the fact, set forth in our review of the law, that the relationship of the Federal Government to the Indians, while it may present important similarities and suggestive parallels, is not the same as the relation of guardian and ward as derived from common law. Federal Indian Law, *supra*, p. 557 and footnotes. See also, letter dated December 23, 1958 from Harry L. Stevens, Asst. Area Director, Bureau of Indian Affairs, Phoenix, Arizona, wherein (in reference to the problem under consideration) he writes: “Actually, the Federal Government itself does not have *custodial authority as such* over Indians and can, therefore, transfer none to the state. \* \* \*.” (Italics supplied.)

The certification of Indian children for services and care by the State Welfare Department, as provided in the contract, can only be construed a certification that the child is a tribal Indian eligible for welfare services under assumed federal responsibilities. There is no certification that the Bureau of Indian Affairs has legal custody and authority over a given Indian child, and that there is a sufficient and valid legal basis for transfer and assumption of custody of any said child by the State Welfare Department.

Under existing law, exercise of custodial rights by the State Welfare Department, such as are here involved, can only be legally justified through voluntary relinquishment of the child to the department by the natural parents or legal guardian, or, through a court order predicated upon appropriate proceedings involving termination of parental rights. This conclusion is dictated by NRS 424.080 which provides as follows: “Except in proceedings for adoption, no parent may voluntarily assign or otherwise transfer to another his rights and duties with respect to the permanent care, custody and control of a child under 16 years of age, unless parental rights and duties have been terminated by order of the district court.”

Inasmuch as the case summaries submitted by the State Welfare Department in connection with the problem uniformly show an absence of any reasonable basis that the parents of the Indian children involved are ready, willing and able to assume and properly discharge their responsibilities in connection with the welfare of said children, the care, custody and control of the Department may be considered “permanent,” and so within the intent and purview of the law.

We, therefore, conclude that the contract herein involved, and executed between the State Welfare Department and the Bureau of Indian Affairs, does not provide a sufficient basis for exercise by the Department of the custodial care of, and the furnishing of the enumerated services to, the category of certified Indian children, as typified in the case summaries submitted to this office. This conclusion is, however, qualified and supplemented as follows: It is our considered opinion that appropriate corrective action can, and should be, taken under any one of a number of existing statutory provisions to regularize and validate the welfare services now and hereafter furnished by the State Welfare Department to the mentioned category of Indian children. See NRS 128.020 (Jurisdiction of District Courts); NRS 62.040, 62.200 (Juvenile Court); NRS 159.040-159.090 (Guardianship); NRS 423.140 et seq. (Nevada State Children’s Home); NRS 424.070 (Foster Homes—Placement of Child for care, adoption); and NRS 425.040 (Aid to Dependent Children—assistance by State Welfare Department).

The third and last question involved in this inquiry, as stated, is: whether the courts can, under existing law, designate the State Welfare Department as guardian of the person of a child, whether Indian or otherwise, placed in, or coming within, said Department's custodial care.

We have already indicated the existing present deficiencies in, and the legal requirements for, valid exercise of custodial care by the Department. Assuming, therefore, valid exercise of custodial rights, it is only necessary to determine whether the courts can designate the Department as legal guardian of the person, for the exercise of such custodial rights over an Indian child.

The relevant statutory provisions requiring consideration on this point are NRS 159.040-159.090 (Appointment of Guardians for Minors). All of these provisions contemplate only the appointment of an individual (or individuals) as guardian of the person of a child, and do not provide any authority for the appointment of the State Welfare Department in such capacity. A previous opinion of this office reached the same conclusion. See Opinion of Attorney General, No. 48-595, March 24, 1948. (Welfare, State Department—Guardianship).

NRS 159.110 constitutes an amendment to the law to provide that the State Welfare Department may petition for the appointment of a guardian of the estate of any incompetent person who is a recipient of assistance from any division of the Department. Declaring that the court may, in its discretion, waive furnishing of the bond usually required, this section contains the words, "by any person appointed as a guardian under this section." Op. Atty. Gen. No. 48-595 (1948). Consequently, in our opinion, this statutory provision also fails to supply any legal basis for appointment of the State Welfare Department as guardian of the person of a minor. Our further inquiry has not developed any other relevant law to the contrary, and we therefore conclude that there is no present, existing authority for the appointment of the State Welfare Department to act in such capacity.

In line with our conclusion on this point we invite attention to the offer of assistance contained in the letter, dated December 23, 1958, from the Assistant Area Director, Phoenix Area Office (Bureau of Indian Affairs, in connection with the finding of a suitable person who is willing to serve as guardian for an Indian minor, where such appointment is considered desirable or otherwise indicated by the Department.

There appears to be no necessity for comment on any other provisions of Contract No. 14-20-450-773.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-14 Nevada Tax Commission—The statutory law does not relieve the assessor of the duty to assess the lands within his county, but in the interest of equalization provides him with aids to determine valuation, prepared by the commission, which he is required to use.**

CARSON CITY, February 27, 1959

HONORABLE R.E. CAHILL, *Secretary, Nevada Tax Commission, Carson City, Nevada*

DEAR MR. CAHILL: In your letter to us of February 4, 1959, you state:

Some question has arisen as to the interpretation of certain provision of NRS 361.325. The particular portion in question is subsection 2b which

states that the Nevada Tax Commission shall . . . “classify land and fix and establish the valuation thereof for assessment purposes.”

This has always been interpreted by the commission to mean that land should be defined by classes and valuation established for each class but not for each parcel of land to be assessed on the roll. The present policy is carried out as indicated in our latest Bulletin 101, a copy of which is attached to this letter.

The question now arises as to whether this should be interpreted as requiring the commission to fix the valuation of each individual parcel of land on the roll, leaving no discretion in the hands of the county assessor but to place it on the roll as assessed by the commission.

We would appreciate your interpretation of this particular provision, particularly in respect to the two theories outlined above.

You have supplied this office with “Nevada Tax Commission Bulletin No. 101, Instruction to County Assessors,” dated July 1, 1958, supplied, we understand to all county assessors at that time by the commission, and intended to fully discharge the statutory obligation due from the commission to the assessors under the law.

This bulletin contains other material, not pertinent here, for in this inquiry we are concerned only with the duty of the commission respecting the assessment of land. The bulletin contains a statement that it constitutes authorization and direction to the assessors for the fiscal year beginning July 1, 1958, and closing June 30, 1959.

This bulletin classifies land, with reference to variations in value per acre, as to location, use, production capacities and limitations of adequate water or want of proper drainage, and classifies arable land for tax purposes, as aforesaid, from \$80 to \$30 per acre. The classification also makes provision for different classification of wild hay, pasture, arable and grazing lands, the latter being divided into four subclassifications. The grazing lands are given a valuation of from \$6 to \$1.25 per acre. Other land classifications are also made.

Each of the classifications of land in the bulletin is described as to quality or limiting characteristics, by which a local officer will be able to classify taxable lands within his tax district, and thus arrive at a valuation for tax purposes. To quote the bulletin in respect to the classifications that have been employed, as a directive to the assessors, would serve no useful purpose. Sufficient to say that the distinguishing characteristics as between classifications are set out, leaving the local classifications as to parcels of one or many owners, within a county, to the discretion of the county assessor.

#### QUESTION

As to land taxation only, in supplying such a bulletin as a directive to county assessors, has the Nevada Tax Commission, discharged its statutory duty?

#### OPINION

We disclaim any intent to detract from the excellence of the monumental work of the Statute Revision Commission, and at the same time we advance the point that in the process of revision, the reorganization of material, and the loss of sequence, i.e., the order and time in which the changes occurred, that the legislative intent becomes dimmed and not so clearly delineated. By reason of this fact, we refer to the significant statutory changes, from the statutes of a legislative session and the significant statutory changes made, considered chronologically. We shall in due time refer to the significant provisions as carried over in the Nevada Revised Statutes.

In general, the duties of the assessor except as modified by special enactment, respecting the assessment of real and personal property within his county, are stated in

NRS 361.260. NRS 316.260, subsection 1, provides as follows:

1. Between July 1 and December 31 in each year, the county assessor, *except as otherwise required by special enactment*, shall ascertain by diligent inquiry and examination all real and personal property in his county subject to taxation, and also the names of all persons, corporations, association, companies or firms owning the same. He shall then determine the full cash value of all such property and he shall then list and assess the same to the person, firm, corporation, association or company owning it.

The obligation generally of the assessor to assess all taxable property, within his county, both real and personal, is thus established. We are now concerned with the question of whether or not by special enactment is it provided otherwise as to real property. In other words, has the county assessor been relieved of such duty as to real property lying within his county? To answer this, we review the session laws appertaining to the question, in sequence.

Chapter 177, Statutes of 1917, page 328, creates the Nevada Tax Commission. Section 5 thereof gives the power and places upon the commission the duty to assess all intercounty public utilities and franchises and provides for the apportionment between the counties concerned. This section also accords the power to assess all livestock. The power to assess real property or to classify it for purposes of assessment, except as to the utilities heretofore mentioned, is not granted in this section to the commission. This section also provides that the commission shall transmit to the several assessors “the assessed value found by it on such classes of property as are enumerated in this section, together with the apportionment of each county of such assessment.”

Chapter 188, Statutes of 1929, beginning at page 341, amends, among others, section 5 of the original act, but makes no significant changes that are pertinent here.

Chapter 179, Statutes of 1939, page 279, accords to the Tax Commission the power and duty to “establish the valuation for assessment purposes of all livestock in the state; and to *classify land and to fix and establish the valuation thereof for assessment purposes.*” (Italics supplied.) It will be noted that the duty to “classify land,” did not formerly exist, and that the language is to “classify” land and not to assess land.

Chapter 52, Statutes of 1945, page 78, again amends section 5 of the act, and after providing for the assessment of public utilities, as formerly provided, provides that all other property shall be assessed by the county assessors “except that the valuation of land, livestock, and motor vehicles, shall be established for assessment purposes by the commission as provided in section 7 of this act.” In the said section 7 it again provides that the duty of the commission, among other things, is to “classify land and fix and establish the valuation thereof for assessment purposes.” It will thus be observed that the duty to fix the value of motor vehicles, for tax purposes, is placed upon the commission.

Chapter 336. Statutes of 1953, page 576, amends, among others, sections 5, 6 and 7, but the language of former statutes respecting the duty of the commission in respect to land assessments, remains the same, and provides that the commission shall “classify land and fix and establish the valuation thereof for assessment purposes.”

The language and provisions with which we are concerned have been brought forward in NRS 361.325, 2, (a) and (b), in the following language:

2. After the adjournment of the state board of equalization and on or before the 1st Monday in June of each year, the Nevada Tax Commission shall:

(a) Fix and establish the valuation for assessment purposes of all livestock, mobile homes, and motor vehicles in the state; and

(b) Classify land and fix and establish the valuation thereof for assessment purposes.

Chapter 223, Statutes of 1957, page 313, for the first time brings mobile homes within the purview of the types of taxable property, upon which the commission is delegated the duty to fix values for tax purposes.

Upon the above authorities it will be observed that the duty, devolving upon the commission is to “classify land and to fix and establish the valuation thereof for assessment purposes.” The duty is to “classify” land and not to assess it. And the duty to assess all taxable property within the county “except when otherwise required by special enactment” is that of the county assessor.

The duty devolving upon the commission to “classify land and to fix and establish the valuation thereof for assessment purposes,” is a duty that may be performed by an entity far removed from the land. It is a duty to prepare a document as an aid to assessors by which the many classification of land for assessment purposes may be clearly marked out and each classification clearly distinguished from all others, by all aids that dermine land values, both as to qualities of excellence and limitation. The duty of the assessor remains to determine into which classifications the acreage owned by John Doe may fall, which constitutes the actual assessment, and this is a duty requiring discretion, which to be soundly exercised requires immediate observation of and familiarity with the land lying within the county. The commission “classifies” land generally and the assessor assesses it by aid of the classification supplied.

This would be determinative of the matter, except that heretofore we have mentioned only the classification of agricultural and range land, made by the commission. Since the mandate of the Legislature does not limit the classification to agricultural and range land, and since other land lying within cities is of greatly varying values, depending upon use, location, and other factors, requiring as to valuations much more than theoretical and static rules and requiring close observations of one qualified to judge within the community, the commission has set up one classification as “special,” but leaving the discretion with the assessor, as to the assessment that may be placed thereon for taxation purposes. In this manner the commission meets the mandate of the Legislature but does not assume to tie the hands of the local assessors, upon a matter in which it is conscious of and concedes that the assessor may act more accurately and intelligently. In this respect the commission has provided the following:

#### SPECIAL

Special land is that land which by reason of character alone might be placed in one of the following five classes, but which by reason of location or use is, in the opinion of the assessor, of greater value per acre than land similar in character to any of the classes listed below, such land shall be entered under a roll of separate classifications as “Special.”

Chapter 179, Statutes of 1947, page 619, is compatible with the conclusion reached that the forms and classifications are to be supplied by the commission to the assessor to the end that there by “equalization of property values between counties and within counties,” by aid of the chief valuation consultant, employed by the commission, but that the assessments shall be made by the assessors by utilization of such aids.

These conclusions are also supported by the laws of equity jurisprudence, doctrine of specific performance, under which doctrine it is declared that all land is unique, in that a true counterpart to a parcel of land does not exist anywhere and from this fact it is deduced that damages for breach of contract to sell land, are never adequate and do not compensate and that hence one under valid contract to sell land should be required to convey and specifically perform his contract. Since all land is unique that land classified by the commission as “special,” should not be encumbered with rules respecting the manner of evaluation for assessment purposes, but that the value of such land for assessment purposes be left entirely to the discretion of the assessor.

In short, we have concluded that those types of property, both real and personal, such as classifications of agricultural land, motor vehicles, mobile homes and livestock, which from their nature are capable of classification for tax purposes, have, in the interest of uniformity and equalization, been placed in the jurisdiction of the State Tax Commission for purposes of permitting the commission to require their assessment by the local officer, according to values, rules and classifications, and that the assessment of other property, except utilities of an intercounty nature, is left exclusively within the jurisdiction of the assessor.

For the reasons heretofore given, the question as propounded is answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-15 Welfare Department, State—NRS 431.010 is susceptible of interpretation satisfying requirement of Federal Social Security Act for claim to federal matching of public assistance payments made to persons in group care facilities in State of Nevada. Opinion No. 58-401, Attorney General, issued August 4, 1958, clarified, and, as regards any conflict, amended and corrected.**

CARSON CITY, March 2, 1959

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, Post Office Box 1331, Reno, Nevada*

DEAR MRS. COUGHLAN: Reference is made to your letter dated February 9, 1959, wherein you request a review of Opinion No. 58-401, issued August 4, 1958, on the subject of Public Welfare Group Care Facilities.

Such review is presently requested by you on the basis of some question on the part of the San Francisco Regional Office of the Department of Health, Education and Welfare, Social Security Administration, as to whether or not the interpretation on Opinion No. 58-401 of NRS 431.010 satisfactorily meets federal policy, and the federal standard-setting authority requirement. Annexed to your aforementioned letter is a copy of a letter, dated November 26, 1958, from said federal agency, expressing said question in the light of applicable federal policy and regulations which are indicated in clarification of the requirement of state authority and responsibility and exercise of jurisdiction over the establishment and maintenance of adequate standards for private or public institutions providing facilities to individuals receiving public assistance. Involved is a claim for federal matching of public assistance payments made to persons in group care facilities in the State of Nevada.

QUESTION

Can NRS 431.010 be so interpreted as to meet the requirement of the Federal Social Security Act, namely, that, if a state makes public assistance payments to individuals in group care facilities, there must be a standard-setting authority which covers any such group care facility established for the purpose of giving room and board to four or more persons, and services as they are needed by such residents?

OPINION

To start with, it is, of course, assumed and understood that adequacy in statutory

provision of authority and powers, are not, in and of themselves, sufficient basis for claiming federal matching of public assistance payments made to persons in group care facilities in the State of Nevada. Interpretation, application, and compliance with, and enforcement thereof, in accordance with such statutory requirements is necessary to support any such claim for federal matching funds.

It is our considered opinion that the provisions of NRS 431.010-431.120 should, and must, be interpreted, applied and enforced so as to attain and secure the following results, legislatively intended, directed, and authorized thereby:

(1) State Welfare Department adoption, amendment, promulgation and enforcement of reasonable rules, regulations and standards with respect to group care facilities as licensed by said department. (NRS 431.020)

(2) With the advice of the State Board of Health in matters pertaining to health, the State Welfare Department shall formulate standards for the operation and maintenance of group care facilities; standards of care conducive to the health and general welfare of persons residing in such facilities; standards for the licensing, operation and maintenance of group care facilities, so as to secure practices and policies on their part designed to provide adequate protection of the health, safety, physical, moral and mental well-being of persons accommodated therein; adequate staffing by qualified personnel to render the type of care and services necessary in the facility; and, physical adequacy of such facility for accommodation, care and services necessary and intended therein. (NRS 431.030)

(3) No person shall operate a group care facility (as defined in NRS 431.010) without a license from the State Welfare Department. (NRS 431.040)

(4) Applications for licenses shall be submitted to the State Welfare Department and issued by said department only after investigation into the premises, facilities, qualifications of personnel, methods of operation, policies and purposes of any person proposing to engage in the operation of a group care facility, and the facility shall be subject to inspection in behalf of the department, by the fire department of the locality in which the facility is located. (NRS 431.050)

(5) Inspections by the department and other proper authorities, as often as necessary, of every licensed group care facility to assure compliance with all applicable rules, regulations and prescribed standards. (NRS 431.070)

NRS 431.080 (Suspension, revocation of licenses; refusal to renew), NRS 431.090 (Appeal from department decisions and orders to State Welfare Board), NRS 431.100 (Provisional licenses; issuance; conditions), NRS 431.110 (Applicability of Chapter: exclusion of institutional facilities otherwise regulated or governed), and NRS 431.120 (Penalties), while all germane, require no comment in this opinion other than that they amply demonstrate the scope of jurisdiction and extent of power vested in the State Welfare Department by statute with respect to group care facilities intended for the accommodation and care of recipients of public assistance.

Certainly, the foregoing statutory provisions, and the requirements set forth therein, if attained and maintained, are sufficient to satisfy federal law, policies and regulations, as defined and set forth in the letter dated November 26, 1958 from the San Francisco Regional Office of the Department of Health, Education, and Welfare, Social Security Administration, hereinbefore mentioned.

We have left for final consideration NRS 431.010 and the interpretation and application that shall be given to it. Subsection 2, thereof, provides:

Group care facility means an establishment maintained for the purpose of:

(a) Furnishing food and shelter, in single or multiple facilities, to four or more *aged, infirm, or handicapped adult* persons, unrelated to the proprietor; and

(b) Providing personal care or services which meet some need beyond basic needs of food, shelter and laundry. (Italics supplied.)

The conjunctive word “and” separating (a) and (b) above is to be construed to mean that (b) adds to and further modifies the provisions or requirements in (a).

In clarification of federal requirements (cited as Section 2(a) (10) of the Social Security Act), the letter from the San Francisco Regional Office of the federal agency (supra), makes reference to the Handbook of Public Assistance Administration, Part IV, Section 8220, page 3, and quotes as follows therefrom:

Therefore, for the purposes of this amendment, an institution is an establishment which furnishes (in single or multiple facilities) food and shelter to four or more persons unrelated to the proprietor, and, in addition, provides some treatment or services which meet some need beyond the basic provisions of food, shelter and laundry.

Obviously, except for the qualifications indicated by the words italicized by the writer, in our state law, the requirements contained in the state law and the federal regulation not only correspond in substance, but are, for all intents and purposes, set forth in identical language.

As expressed in NRS 431.010, a “group care facility” means an establishment maintained for the purpose of (a) accommodating in single and multiple facilities, for or more aged, infirm or handicapped adult persons unrelated to the proprietor, for furnishing of food and shelter; and (b) provision of personal care or services beyond the basic needs of food, shelter and laundry. As we interpret these provisions, the “group care facility” covered by NRS 431.010, must satisfy the following requirements:

(1) Be adequately suited, and maintained for the shelter, feeding, laundry and furnishing of personal care or services necessary to, and usually required by, aged, infirm or handicapped persons;

(2) That, in order to qualify as such group care facility under the licensing provision, the establishment (in single or multiple facilities), among other requirements already indicated, must be physically sufficient to accommodate four or more adult persons, of the categories enumerated.

We therefore conclude that any establishment found to satisfy these two requirements, may be licensed as a “group care facility,” if the applicant is also qualified and the other required standards met.

The fact that there may be less than four adult residents of the kind mentioned in such facility at the time when coverage is determined is irrelevant and immaterial. It is the physical adequacy of the establishment to provide shelter, meals, laundry and personal care and services to four or more adults who are either aged, infirm or handicapped, which is determinative of whether or not such establishment qualifies for licensing as a “group care facility” under NRS 431.010 et seq.

Once determined as adequate and qualified, and, therefore, licensed, by the State Welfare Department as a group care facility, the requirements as to inspections, investigations and compliance with all prescribed standards and regulations, as contained in other statutory provisions (see supra) would have to be satisfied and enforced, so long as such facility was maintained and operated to provide group care to the described classes of recipients of public assistance. And this would be so, even though at any given time there were resident in such facility less than four adult persons who were aged, infirm or handicapped, and recipients of public assistance.

It is possible to conceive of a situation where a licensed group facility, under some circumstances, might not have any adult public assistance recipients resident therein. In such case, though not exempt from compliance with the conditions and requirements of its existing license, inspections and investigations of such facility might be less frequently than otherwise, or even suspended completely. But, certainly, prior to further referral or placement of an adult public assistance recipient as a resident in such facility,

it would be incumbent upon the department to satisfy itself that all standards, policies, practices, personnel and other requirements of a licensed group care facility still obtained and were satisfied and being complied with.

Our inquiry, therefore, results in the following conclusions:

1. NRS 431.010, subsection 2 (a) and (b) has no application to establishments other than those providing food, shelter, laundry and some needed additional personal care or service to adult persons who are aged, infirm or handicapped, and recipients of public assistance.

2. Said statute requires that a group care facility, in order to qualify and be licensed as such, shall be suited, maintained, and physically adequate for the accommodation of four or more aged, infirm or handicapped adult persons, unrelated to the proprietor, and recipients of public assistance, for the purpose of providing shelter, meals, laundry and some additional personal care or service.

3. The fact that there may be less than four public assistance recipients resident in such facility at the time of coverage is immaterial and irrelevant; it is the physical adequacy and suitability (and qualification under other standards and requirements) of the facility to provide shelter, meals, laundry and needed additional personal care and services to four or more adult public assistance recipients who are aged, infirm or handicapped, which is determinative of whether or not such establishment qualifies for licensing as a group care facility.

4. Once licensed by the State Welfare Department as a group care facility, all requirements as to inspections, investigations, maintenance, of prescribed standards, operational policies, practices, and regulations must be enforced and complied with, so long as such facility is licensed to be maintained for group care of adult public assistance recipients, notwithstanding the fact that at any given time there might actually be resident in such licensed facility a number less than four adult, aged, infirm or handicapped persons, who are recipients of public assistance. In other words, once qualified and licensed as a group care facility by the State Welfare Department, jurisdiction over such establishment extends to all matters set forth in NRS 431.020-431.120, and is continuous and unaffected by any reduction in the number of adult residents, recipients of public assistance, in such facility to less than four persons.

We trust that the foregoing clarifies Opinion No. 58-401 of this office, issued August 4, 1958. To the extent that the conclusions hereinabove set forth render it necessary, Opinion No. 58-401 is hereby amended and corrected.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-16 Corporations—Foreign corporations must publish annual statement of business whether or not actually doing business in Nevada to remain in good standing.**

CARSON CITY, March 4, 1959

HONORABLE JOHN KOONTZ, *Secretary of State, Carson City, Nevada*

DEAR MR. KOONTZ:

QUESTION

Must a foreign corporation, qualified to do business in the State of Nevada in

accordance with Chapter 80 NRS, but not, in fact, actually doing business within the State of Nevada, publish a statement of its last year's business as required by NRS 80.190?

OPINION

NRS 80.190 reads in part as follows:

All foreign corporations doing business in this state shall, not later than the month of March in each year, publish a statement of their last year's business in some newspaper selected by the corporation and published in the State of Nevada \* \* \*.

Insofar as the question before us is concerned, the act of March 28, 1901, formerly 1844 and 1845 N.C.L. 1929, as amended, and now NRS 80.190, is unchanged. All amendments from 1901 to date involve time or manner and place of publication only.

On March 28, 1938, in response to an inquiry from the Secretary of State, this office by letter advised, in part, as follows:

Your letter of March 28th inquiring whether a foreign corporation qualified to do business in the State of Nevada but which has transacted no business in the state is required to publish a statement to that effect in view of the statute requiring all foreign corporations doing business in the State of Nevada to publish as annual statement of their last year's business.

We are of the opinion that it will be necessary for the corporation mentioned in your query to publish the statement as required by law, even though it did no business whatever within the state; \* \* \*.

There are a number of statutory requirements of Chapter 80 NRS with which a foreign corporation must continue to comply in order to have the privilege of exercising its powers and immunities and to carry on business within this State. For example, NRS 80.110 reads, in part, as follows:

Every foreign corporation doing business in this state shall, on or before July 1 of each year, file with the secretary of state a list of its officers and directors, a designation of its resident agent in this state \* \* \*.

Whether actually doing business or not a foreign corporation must file its annual list, pay its filing fee and designate its resident agent in order to receive a certificate authorizing it to transact and conduct its business within this State for the next succeeding year.

The phrase contained in NRS 80.190, "doing business in this state," along with the same language in NRS 80.190, above quoted, must be interpreted as if it read "in order to be qualified to do business in this state."

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-17 Agriculture, State Department—Plant Industry Division.  
Disproportionate differential of scheduled license fees as between nursery  
business establishments and peddlers selling nursery stock, as contained in  
proposed amendments of law, deemed illegal because confiscatory and**

**prohibitive, and an unreasonable an unjustifiable exercise of police licensing power; also, violative of guarantees of the Federal Constitution—Proposed requirements pertaining to maintenance of nursery stock and employment of personnel qualified to provide proper information concerning care of nursery stock regarded as unreasonable invasion of property and in restraint of trade; also within the prohibitions of Federal and State Constitutions pertaining to equal protection of the law and deprivation of property without due process of law.**

CARSON CITY, March 4, 1959

MR. LEE M. BURGE, *Director, Division of Plant Industry, Department of Agriculture, Post Office Box 1209, Reno, Nevada*

DEAR MR. BURGE: Reference is made to your letter of January 27, 1959, wherein you ask the opinion of this office on certain questions, hereinafter stated, relating to certain provisions under consideration for inclusion in a proposed amendment to NRS 555, et seq., to be submitted for enactment by the Legislature.

#### FACTS

The proposed amendment is purportedly designed to effectuate protection of the general buying public and the nursery and related industries in the State from diseased, insect-pest infested and poor quality nursery stock. To achieve this objective, it is deemed necessary, and section 3 of the proposed amendment provides for the issuance of licenses by the Director, Division of Plant Industry, State Department of Agriculture, to every person who sells nursery stock, with certain specified exemptions however to such license requirement. The nursery license fee, as proposed in section 5 is scheduled to be (a) \$25 per fiscal year, with specified increases on the basis of additional sales yard, store or sales locations in operation at other than the registered place of business in the State, acreage in production of nursery stock, and number of agents acting on behalf of a licensed nursery outside the county in which the nursery is located; (b) a peddler's nursery license fee of \$50 or \$500, depending on the validity of imposition of either of these. Another provision of the proposed amendment, namely, section 6, subsection 4, contains a requirement that nurseries shall maintain the nursery stock on a year-round basis, and shall have in attendance a qualified nurseryman to care for nursery stock and to properly inform the buying public on the care of nursery stock.

#### QUESTIONS

1. Would a \$500 nursery peddler's license be legal in view of a scheduled fee of \$25 required of resident-nurserymen to sell nursery stock?
2. If said \$500 nursery peddler's license is valid, would such requirement infringe upon the right of municipalities to establish and collect peddling fees?
3. Would the proposed requirement that nurseries shall maintain nursery stock on year-round basis and keep in attendance a qualified nurseryman to care for such stock and to provide proper information to the buying public on the care of nursery stock be valid?

#### OPINION

“In the absence of any constitutional prohibition or restriction, it is within the undoubted power of the legislature to impose a tax upon employments, occupations, or

vocations, or to authorized municipal authorities so to do.”

4 Dillon, Mun. Corp. (5th Ed.), Sec. 1410; 25 Cyc. 599; 3 McQuillan, Mun. Corp. 986; City of Newton v. Atchison, 1 Pac. 288; Pollock v. Farmers’ L. & T. Co., 39 L.Ed. 1108; Ex parte Cohn, 13 Nev. 424; Ex parte Robinson, 12 Nev. 263; Ex parte Taylor and Rounds, 35 Nev. 504; Ex parte Noyd, 48 Nev. 120, 227 Pac. 1020; Clark Co. v. Los Angeles City, 70 Nev. 219, 265 P.2d 216; Southern Nevada Life Underwriters Assn. v. City of Las Vegas, Nevada, Case No. 4042, filed May 26, 1958; NRS 266.600.

“The power of a state to license occupations and privileges is derived both from its police power and its power to tax. \* \* \*. Its power in either respect may be delegated by legislative act to its political subdivisions. The extent of the power so delegated is, however, wholly dependent upon and limited by the delegating statute. Whether the delegation be of regulatory power under the police power of the state or be of the sovereign power of taxation is, of course, a question of statutory construction. If the grant be of regulatory power only, it does not include the power to license for purposes of revenue. Such power is granted only where the grant plainly appears from the delegating statute.”

Clark Co. v. Los Angeles City, 70 Nev. 219, 221, 265 P.2d 216, citing 9 McQuillin, Mun. Corp. (3rd Ed.) 56 et seq., secs. 26.28, 26.29; Gray on Limitations of Taxing Power, p. 716, sec. 1439; Cooley on Taxation (4th Ed.), secs. 72, 124, 125, 1798; 20 C.J.S. 1213 (Counties, sec. 279); 53 C.J.S. 473, 479 (Licenses, secs. 9, 10c (2)).

It is necessary and important to distinguish between the imposition of a regulatory license fee and the levy of a tax for revenue purpose.

The two powers are separate and distinct, and controlled by different principles. The two powers are for different governmental purposes. Either may be exercised by exacting a license fee. \* \* \* The purposes for which the police power may be exercised is for the protection of the lives, health, morals, comfort and quiet of all persons and the protection of property within the State, and a statute or ordinance enacted under such power must be designed to prohibit or regulate those things which tend to injure the public in such matters. On the other hand, an ordinance which provides for a license and the payment of a license fee without regulatory provisions of any kind is solely a revenue measure and not within the police power. \* \* \*

Lamere v. City of Chicago, 391 Ill. 552, 63 N.E. 2d 863, 866, quoted in Southern Nevada Life Underwriters Assn. v. City of Las Vegas, Nevada, Case No. 4042, filed in Nevada Supreme Court, May 26, 1958.

Ordinarily, a license fee or tax, whether under the police power or under the taxing power, may legally be imposed, only in such amount as, under the circumstances, is just and reasonable.

If the fee or tax imposed is the exercise of the police power for purposes of regulation, as a general principle, the amount which may be exacted may include and must be limited and reasonably measured by, the necessary or probable expense of issuing the license, and of such inspection, regulation, and supervision as may be lawful and necessary. If it is manifest that the amount imposed is substantially in excess of, and out of proportion to, the expenses involved, it generally will be regarded as a revenue measure, and be held unreasonable and void as a regulation under the police power, 53 C.J.S. 516-518 and footnote citations; 33 A.J. 366-3670.

Up to this point, our inquiry has been directed to tracing, in general fashion, the distinctions between licenses for regulation and licenses for revenue, and some constitutional, statutory and judicial limitations and restrictions on states and municipalities with respect to the requirements of licenses, issued in the exercise of police powers. Wherever possible, we have developed our inquiry by reference to

principles and their application, as supported by appropriate authority, in the light of the specific matter and questions with which this opinion is concerned.

Inasmuch as the proposed legislation being considered involves the contemplated regulation of the nursery and related industries through issuance of licenses imposing fees in substantially different amounts as between regular nursery establishments, and peddlers engaged in the nursery business, consideration will next be given to the extent and scope of the power to license, as it specifically pertains to peddlers.

It will suffice to state that a peddler “\* \* \* is one who goes from place to place and from house to house carrying for sale and exposing to sale goods, wares and merchandise which he carries, or, better, he is an itinerant, solicitant vendor of goods who sells and delivers to consumers the identical goods which he carries with him \* \* \*.” 21 R.C.L. 181-182.

Because of the experience of the abuses and mischief growing out of, and connected with, peddling, relief was sought from early times both in England and America in legislative action, for regulation of the occupation of peddling, such legislation being predicated on the police power of a state to guard the welfare of the people. 21 R.C.L. 187, citing *Emert v. Missouri*, 156 U.S. (L.Ed.) 430; *Com. v. Fox*, 218 Mass. 498, 106 N.E. 137, *Ann.Cas.* 1916A 1236, Note, 129 A.S.R. 276; *Morrill v. State*, 38 Wis. 428, 20 *Am.Rep.* 12, *r’vs’d* on other grounds, 154 U.S. 626, 14 S.Ct. 1206, 23 U.S. (L.Ed.) 1009; Note, 58 A.S.R. 466; and see *Constitutional Law*, 6 R.C.L. pp. 183, 199.

The universal method \* \* \* has been to require all persons who wish to engage in the trade in the state or community, as the case may be, to secure a license. \* \* \* Of course, this exercise of the police power by the state to be valid must be a reasonable exercise, for if it is unreasonable it is contrary to the fourteenth amendment to the federal constitution. \* \* \* In each case the test must be this: on the facts of the case, can the legislature be said to have acted unreasonably. \* \* \* Peddling is a lawful business only insofar as it does not endanger the health, morals, or general welfare of the people, and therefore it is immune from prohibition only in case such would be an unreasonable exercise of the police power, an unreasonable step to take to protect the public \* \* \*. 21 R.C.L. 187-188, and citations.

The regulation of peddling may also be effected by exercise of the taxing power. Peddlers should be made to contribute their share to the government, and a tax based on this theory of contribution is perfectly legal. 21 R.C.L. 189, et seq. “\* \* \* But when an attempt is made to go further and impose a tax on peddlers plainly for the purpose of protecting local resident merchants from competition, it seems that such attempt results in creating a law that is unreasonably discriminatory and therefore unconstitutional. \* \* \*.” 21 R.C.L. 191 and citations.

It has been held that a grant from the State authorizing municipal regulation of peddling will not authorize prohibition of that occupation. 21 R.C.L. 192, citing *Ottumwa v. Zekind*, 95 Ia. 622, 64 N.W. 646, 58 A.S.R. 447, 29 L.R.A. 734. “And a grant of authority to impose fees for the purpose of revenue will not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose. \* \* \*.” 21 R.C.L. 192; see also, 53 C.J.S. 518; 33 A.J. 367; *Peo. v. Jarvis*, 19 App.Div. 466, 46 N.Y.S. 596; *Peo. v. Grant*, 121 N.W. 300; 25 Cyc. 611.

Whether the amount of a license fee or tax is reasonable is a question of law for the court \* \* \*.

33 A.J. 365. Judicial determinations provide no definite and certain criterion. *McQuillin*, 9 *Mun. Corp.* (3d Ed.) 88-92 and footnote citations.

In analyzing the extent and scope of the power to license peddlers we find, in general, certain definite and well recognized constitutional restrictions, namely: (1) Interference with interstate commerce. Ex parte Taylor and Rounds, 35 Nev. 504; (No interference found.) Ex parte Robinson, 12 Nev. 263; (2) Inequality of taxation-restraint of trade. State v. Williams, (1912) 158 N.C. 610, 40 L.R.A. (N.S.) 279, 73 S.E. 1000; Ideal Tea Co. v. Salem, (1915) 77 Or. 182, 150 Pac. 852, Ann.Cas. 1917 D 684; State v. Lancaster (1884) 63 N.H. 267; Re Schecter, (1884 C.C.) 4 Inters. Com. Rep. 849, 63 Fed. 695; Ex parte Hawley, (1908) 22 S.D. 23, 15 L.R.A. (N.S.) 138, 115 N.W. 93; Pacific Junction v. Dyer, (1884) 64 Iowa 38, 19 N.W. 862; State, ex rel. Greenwood v. Nolan, (1909) 108 Minn. 170, 122 N.W. 255; Brooks v. Mangan, (1891) 50 N.J.L. 389, 13 Atl. 240; State v. Mitchell, (1902) 97 Me. 66, 94 Am.St.Rep. 481, 53 Atl. 887; (3) Unnecessary invasion of property rights, and therefore an unreasonable exercise of police power. State v. Park, 42 Nev. 386, 178 Pac. 389. Also, in general, on all of these matters, see 21 R.C.L. 193-201, sec. 1, 14th Amend., and Art. IV, Sec. 2, U.S. Const.

It is, of course, true that any peddler license requirement, whether a police or a taxing measure, does in fact operate to restrain trade. That they are upheld can only be justified on the ground that they are reasonable. If, however the license requirement has the effect of causing an unreasonable restraint of trade, it would, undoubtedly, be held to be a violation of the Federal Constitution.

\* \* \* By the constitution the ownership of property is protected, the right to buy, sell, barter and exchange property is a necessary incident to its ownership, and is as much protected by the constitution as is the ownership itself, and the occupation of peddling would fall within its protection. Of course, the right to sell by peddling is not absolute, but is subject to the police regulation of the state. A regulation which goes beyond reasonable police purposes and operates merely to fetter the occupation would be clearly bad, for it would be a taking of property without due process of law. Likewise a tax on peddling, though justified if reasonable, would be unconstitutional if so heavy as to be unreasonable, for this, too, would be a taking without due process. Although it is a fact that often one of the purposes of a requirement of a license from peddlers is to protect local tradesmen, yet the property of one citizen may not be taken purely for the purpose of prospering another, hence any restriction placed on peddlers solely for the purpose of protecting local tradesmen would be invalid as a violation not only of the privileges and immunities clause and the equal protection clause, but also of the due process clause of the constitution.

21 R.C.L. 197-198 and footnote citations mentioned. See also 6 R.C.L. 258, et seq. and citations mentioned, sec. 1, 14th Amend., and Art. IV, sec. 2, U.S. Const.

On the basis of the foregoing review of relevant principles and authorities, we therefore submit it as our considered opinion:

1. That a \$500 nursery peddler's license fee would not be legal in view of a scheduled fee of \$25 required of resident nurserymen to sell nursery stock.

Such a fee would be unreasonably disproportionate, confiscatory, and prohibitive, and violative of constitutional guarantees of equal protection of the law, privileges and immunities of all citizens, the due process clause, and an unreasonable restraint of trade.

2. A \$50 nursery peddler's fee (alternately mentioned in the proposed legislation) as against a scheduled fee of \$25 required of resident nurserymen to sell nursery stock could probably be reasonably justified on the basis of difficulty in supervision of peddlers, entailing a greater administrative burden and expense, and, if so, such fee of \$50 might probably be held legal as within the discretionary and reasonable exercise of the police power.

3. Inasmuch as we have indicated that a \$500 fee in the circumstances would be invalid, it would seem to be unnecessary to express any opinion as to the effect of such a fee, if presumed valid, on the right of municipalities to establish and collect peddling fees. The question would probably be a moot one, not only on the basis of our conclusion, as stated herein, but also a matter of actual fact. The amount is probably so prohibitory that no peddler nurserymen would seek and pay for such a municipal license.

4. The proposed requirements that a nursery stock, on a year-round basis, be maintained, and for a qualified nurseryman to care for such stock and to be in attendance to furnish proper information to the buying public, would, in our opinion, be held invalid, as an unreasonable exercise of police power in the circumstances; also it would be invalid as an unreasonable interference and invasion of private property, and an unreasonable restraint of trade. For all of these reasons, it would also probably be held to be a taking of property without due process of law, contrary to both State and Federal Constitutions.

We trust that the foregoing advice and opinion may be helpful to you in connection with this subject.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-18 Welfare Board, State—Board is policy-making group—  
not authorized to receive custody order. Welfare Department is so authorized.  
The court order should expressly grant broad discretion to department.**

CARSON CITY, March 6, 1959

HONORABLE MARVIN F. SETTLEMEYER, *Chairman, Nevada State Welfare Board, Post  
Office Box 1331, Reno, Nevada*

DEAR MR. SETTLEMEYER: Reference is made to your letter dated February 23, 1959, requesting the opinion of this office upon the following questions:

1. Is existing law sufficient to warrant petitioning the court to place custody of a child with the State Welfare Board?
2. If so, would the vesting by court order of such custody with the State Welfare Board be equivalent to statute provisions for commitment to the State Children's Home?
3. Would the vesting of a child's custody with the State Welfare Board give the board authority to place such child in either the State Children's Home or in a foster home under the supervision of the State Welfare Department and to move the child as necessary between the two types of care without the necessity of seeking further orders from the court?

OPINION

It is, of course, assumed that the care, custody and control of any child under 16 years of age, as contemplated within the scope of the foregoing questions, would be sought on the basis of proceedings in the district courts for termination of parental rights. NRS 424.070, 424.080, and 128.020.

With this as a premise, we next direct our attention to the first submitted question.

Our examination of applicable statutes leads us to the conclusion that your first inquiry must be answered in the negative. In our opinion the State Welfare Board was established by the Legislature, and under existing law is expressly restricted and limited to certain enumerated powers, chiefly, the formulation of policies and the prescribing of rules and

regulations for administration of the various programs under the jurisdiction of the State Welfare Department (NRS 422.140), and the Nevada State Children's Home (NRS 423.040). Existing law does not contemplate that the district courts would be authorized to place custody of any child in the Board, which is essentially a policy-making group.

The more appropriate and authorized agency to petition for, and have custody of any such child, is the State Welfare Department, legislatively charged and empowered, administratively, to provide services and care to children, directly, or through agents. (NRS 42.270 (8), (9)). See also, NRS 128.110 and 128.120, authorizing vesting of custody or control “\* \* \* in some person *or agency* qualified by the laws of this state to provide services and care to children, or to receive any children for placement. \* \* \*.” (Italics supplied.)

Our further opinion is necessarily conditioned and qualified by our foregoing answer to your first question. As so qualified, our inquiry resolves itself into a determination as to whether, custody of a child having been placed with the State Welfare Department by a district court, such custody would then authorize the placement or admission of the child in the State Children's Home, by the Department, so long as it was deemed necessary or advisable.

The relevant and applicable statutory provisions for a determination of this question are as follows:

NRS 423.030, entitled “Declaration of legislative intention” provides as follows:

1. It is the intention of the legislature that:
  - (a) The Nevada state children's home shall become an agency of the state welfare board and shall be on an equal basis and footing with the old-age assistance and child welfare divisions.
  - (b) The superintendent of the Nevada state children's home and the state welfare director shall serve on an equal footing and shall coordinate the work of their departments through the state welfare board.
2. The legislature further expresses its desire that the cooperative efforts of these agencies, by and through the superintendent and the director, shall work to the benefit of the public welfare of the State of Nevada.

NRS 423.040 entitled “State welfare board: Policy; meetings with superintendent,” provides as follows:

1. The state welfare board shall be the policymaking board of the Nevada state children's home. \* \* \*

NRS 423.140 entitled “Limitations on admission of children to home,” provides as follows:

No child shall be admitted to, received into or ordered committed to the Nevada state children's home who is insane, idiotic, or so mentally or physically deformed as to be incapable of receiving the elements of an education, or who has any contagious disease.

NRS 423.150 entitled “Limitation on admission of whole orphan,” provides as follows:

1. Upon complying with the provisions of this chapter, all whole orphans under 14 years of age may be admitted to the Nevada state children's home.
2. For the purposes of this chapter a whole orphan is a child both of

whose parents are deceased.

NRS 423.170 entitled "Orphans declared wards of state; age of majority of wards," while germane as to children falling within such category, is not particularly of interest or pertinent to our present inquiry.

NRS 423.200 entitled "Admission of dependent children to home," provides as follows:

In addition to the other purposes for which the Nevada state children's home is established, the Nevada state children's home shall receive dependent children as defined by NRS 201.090, other than orphans, when such children are committed to the care of the Nevada state children's home by a district court in this state.

NRS 201.090 defines "dependent child" and "delinquent child" in a very comprehensive fashion, under 14 paragraphs, which conceivably would apply to any child, of whom the State Welfare Department had custody, and who might benefit from placement in the Nevada State Children's Home.

NRS 423.210 is concerned with the procedure for commitment of a dependent child, the necessity for the entry of an order of commitment by a district court, and the liability of parents and the county from which the child was committed for the support of such child while in the Nevada State Children's Home, and that the failure of the parents of said child to make such support payments, as directed and when able, for a period of one year shall be deemed prima facie evidence of abandonment of the child by the parents.

NRS 423.250 entitled "Releases and discharge," insofar as pertinent to our inquiry, provides as follows:

1. Whenever the superintendent shall deem it for the best interests of any child in the Nevada state children's home or of the state, he may discharge any child therein.

2. Upon receipt of a certificate of the district judge of the county from which any orphan or any child is admitted, under the provisions of NRS 423.200, was sent that any parent or guardian is competent to resume the guardianship of such child, the superintendent shall release the child and return him to the guardian. The guardian shall be required to pay all expenses incident to the removal and return of the child to his guardian. \* \*

In light of the foregoing statutory provisions, we reach the following conclusions:

1. That authority exists for the closest coordination and cooperation between the State Welfare Department and the Nevada State Children's Home, so as to secure the maximum benefits for the public welfare of the State.

2. That there does not appear to be any legal restriction for placement in the Nevada State Children's Home of any child, whose custody has been awarded to the State Welfare Department by order of a district court, in proceedings had for termination of parental rights.

It is, therefore, our considered opinion, with reference to the second of your questions, that our answer must also be in the negative, unless the custody order made by a district court, by express terms, authorized the placement or admission of the particular child in the State Children's Home, for such period as might be deemed necessary, or advisable, within the exercise of sound discretion by the State Welfare Department.

It is also our further opinion, in answer to the third and final question submitted to us, that a district court's custody order could contemplate and provide for the varying types of care which might be most beneficial to a child at any given time, and that the State

Welfare Department could, by the terms of such court order, be charged with the responsibility and granted the commensurate power to determine the appropriate type of care which a child should have at any given time, thus obviating the necessity for seeking further orders from the court.

We trust that the foregoing answers to your inquiry will prove helpful to you in the matters which motivated your inquiry to us.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-19 Optometry, State Board of—The fitting and adapting of contact lenses is forbidden to other professions than physicians, surgeons or optometrists, unless performed in the immediate presence of physicians or surgeons. NRS 636 construed.**

CARSON CITY, March 9, 1959

EDWIN C. STRENG, O.D., *President, State Board of Optometry, 318 First National Bank Bldg., 15 East First Street, Reno, Nevada*

DEAR DR. STRENG: We are in receipt of your letter of February 26, 1959, wherein you ask the following question:

QUESTION

May anyone other than a physician, surgeon or optometrist fit or adapt contact lenses without the physical presence of a physician, surgeon or optometrist, duly licensed under the laws of the State of Nevada?

OPINION

The answer to the interrogatory is in the negative.

The statutory law is clear and requires no construction. It is capable of no other interpretation.

NRS 636.025 provides in part as follows:

The acts hereinafter enumerated in this section, or any of them, whether done severally, collectively or in combination with other acts not hereinafter enumerated, shall be deemed to constitute practice of optometry within the purview of this chapter.

6. The fitting or adaptation of contact lenses to the human eye except under the direct personal supervision of a physician, surgeon or optometrist licensed in the State of Nevada.

NRS 636.390 provides:

This chapter shall not be construed to apply to physicians and surgeons duly licensed to practice in this state.

NRS 636.345 provides:

A licensee shall be authorized and entitled to practice optometry in this state subject to the provisions of this chapter.

The implied prohibition, of course, is clear that no one is authorized to practice optometry in this State, unless duly licensed as such, save the exception above mentioned.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-20 Budget Director—Legislature. Per diem and travel expenses of legislators payable under NRS 218.220 is predicated on legislators actually incurring expenses in official capacity.**

CARSON CITY, March 10, 1959

HONORABLE NEIL D. HUMPHREY, *Director of the Budget, Carson City, Nevada.*

DEAR MR. HUMPHREY: Your letter of February 26, 1959, requested the opinion of this office on the following facts and question:

FACTS

During the Forty-ninth Session of the Nevada Legislature, Senator John H. Murray of Eureka County suffered a severe heart attack while in Elko, Nevada, on legislative business at the Industrial School for Boys. Since that time he has been confined to the hospital in Elko, Nevada.

QUESTION

Is Senator Murray legally entitled to his per diem during the legislative session while he remains in the hospital in Elko, Nevada, and absent from said session?

OPINION

It is noted your question is directed to the per diem allowance of Senator Murray during the legislative session, and does not refer to the compensation allowed a member of the Legislature under NRS 218.210.

The pertinent section of the Nevada Revised Statutes is set forth as follows:

218.220 Per diem and travel expenses of legislators.

1. Notwithstanding the provisions of NRS 281.170 or any other law, the per diem expense allowance and the travel expenses of senators and assemblymen duly elected or appointed and in attendance at any session of the legislature shall be allowed in the manner set forth in this section.

2. If a senator or assemblyman travels daily from his home to sessions of the legislature, he shall be allowed for each mile between the capital and his home, for each day the house of the legislature to which he belongs is actually convened or for each day he travels to the capital on official legislative business, travel expenses at the rate of 10 cents per mile traveled.

3. If a senator or assemblyman does not travel from home daily but

takes up a temporary residence in the vicinity of the capital for the duration of the legislative session, he shall be allowed a per diem expense allowance of \$15 for each day he is away from his home and for the entire period that the legislature is in session.

4. Claims for expenses made under the provisions of this section shall be made in the same manner as other claims are made against the state, and shall be allowed and paid from the legislative fund once each week.

The foregoing section clearly provides for reimbursing members of the Legislature for their expenses in attending daily sessions of the Legislature, any other law notwithstanding. If a legislator travels daily between his home and the capital to attend legislative sessions, he is entitled to 10 cents per mile traveled. If, in the alternative, he establishes temporary residence in the vicinity of the capital, he is entitled to \$15 for each day he is away from his home and for the entire period the Legislature is in session. The purpose of this section is to provide one of two ways for reimbursing a member of the Legislature for expenses incurred in attending the session, with one exception—the legislator leaving his home to attend a legislative session with intentions of establishing temporary residence in the vicinity of the capital is entitled to travel expense and per diem on that initial trip and on the final trip home at the conclusion of the session (see Attorney General Opinion No. 56-147 of February 10, 1956). Could it be logically said a member is entitled to either 10 cents per mile or \$15 per day for expenses if in fact he incurred no expense? We think not. If a member within the first category of commuting daily does not make the daily trip to attend the session, he does not incur any expense. He, therefore, is not entitled to the allowance of 10 cents per mile. It follows that if a member is absent from his home and from the vicinity of the capital, and not on official business, he cannot attend a session, and therefore cannot incur any expense in his official capacity.

Senator Murray's trip to Elko was in his official capacity and on legislative business. His official business concluded at the same time as that of the other members of the Legislature making that trip. His illness does not give added life to his official business in Elko once that business has concluded. In light of the foregoing discussion the expense he incurs subsequently is not expense incurred in attending the sessions of the Legislature. We conclude that Senator Murray is not entitled to per diem after the official business was concluded in Elko. His illness, however, does not preclude his entitlement to travel expense between Elko and his home in Eureka, as he would be entitled to that had he been stricken or not.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-21 County Officers—Travel by private conveyance—where several officers travel in one automobile only one payment may be made.**

CARSON CITY, March 11, 1959

HONORABLE ROSCOE H. WILKES, *District Attorney, Lincoln County, Pioche, Nevada*

FACTS

DEAR MR. WILKES: Four county officials of Lincoln County “motored from their respective homes in Lincoln County to Carson City, Nevada, and Reno, Nevada, on

county business. The four men rode in the same vehicle belonging to one of the four county officers. The four officers returned home by the same means of conveyance.”

QUESTION

When two or more county officers or employees are away from their respective offices on county business which necessitates traveling by private conveyance and when the county officers use only one car, is each officer entitled to mileage expense or may mileage expense be paid to one only, the owner of the car?

OPINION

Section 1 of NRS 245.060 reads as follows:

When any county or township officer or any employee of the county shall be entitled to receive his *necessary traveling expenses* for the transaction of public business, such expenses shall include his actual living expenses, not to exceed \$10 per day, but the amount allowed for traveling by private conveyance shall not exceed the amount charged by public conveyance. Where it appears to the satisfaction of the board of county commissioners that *travel by private conveyance is more economical*, or where it appears that, owing to train, airplane or bus schedules or for other reasons, travel by public conveyance is impracticable, or in case a part of the route traveled is not covered by public conveyance, the board of county commissioners, in its discretion, is authorized to allow for traveling by private conveyance an amount not to exceed 10 cents per mile so traveled. (Italics added.)

Unquestionably, it was the intention of the Legislature, in enacting this statute, to provide for or to reimburse county or township officers, and employees, for their actual living and traveling expenses incurred in the transaction of public business.

In our judgment, it was not the legislative intent, in enacting this statute, to create a means whereby such public officers and employees could increase their compensation while traveling for the purpose of transacting public business. The manner of travel utilized by the Lincoln County officers in this instance is commendable in that it produced substantial savings, which should, in our opinion, inure to the benefit of the taxpayers.

It is, therefore, the opinion of this office that the board of county commissioners in this instance may pay 10 cents per mile one time for each mile traveled to and from Carson City. It is discretionary with the county board as to whether this be paid to the owner of the car or be prorated among the individuals who may have contributed to the expenses of the trip.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-22 Labor Commissioner—Initiative Petition—Right to Work Law—Unsuccessful attempts since 1952 by initiative petition to repeal right-to-work law (which was initiated by petition of the people in 1950, rejected by the Legislature in 1951, and enacted by the people in 1952), are not to be considered in computing the 3-year period within which the Legislature may not annul, set aside or repeal the said law as provided by Article 19, Section 3 of the Nevada Constitution.**

CARSON CITY, March 16, 1959

HONORABLE GEORGE S. JOLLY, *Labor Commissioner, State of Nevada, Carson City, Nevada*

DEAR MR. JOLLY: We are in receipt of your inquiry of this date wherein you state a question appertaining to the construction to be placed upon Sec. 3 of Art. XIX of the Constitution as regards Assembly Bill No. 359, of the current legislative session.

A.B. No. 359, would amend the so-called "Right-to-Work" law (NRS 613.230-613.300) (Statutes 1953, Ch. 1, p. 1).

QUESTION

Is it within the constitutional power of the Legislature to amend Section NRS 613.230-613.300 at this time?

OPINION

It will first be necessary to give the history of the "Right to Work" law, which we recite briefly as follows:

In 1950, an initiative petition was signed by the requisite number of voters to place the same before the Legislature as provided in Sec. 3 of Art. XIX. The initiative petition, being the so-called "Right to Work" law, was filed with the Secretary of State and by him placed before the Legislature which convened in January 1951. The Legislature declined to take any action thereon and as a consequence the matter was submitted to the electorate in the next general election of November 1952. The electorate approved the measure in that election of November 1952. From the date of the canvass of the votes of that election, the "Right to Work" initiative became the law of the State.

We are informed by the Secretary of State, this date, that the subsequent history of the matter is as follows:

After approval in November 1952, an initiative petition to repeal the so-called "Right to Work" law was signed by the requisite number of voters, and filed with the Secretary of State. Thereafter the Secretary of State submitted the said petition to the Legislature which convened in January 1953. The Legislature, which convened in January 1953, declined to take any action upon the said petition and as a consequence it was certified by the Secretary of State to the electorate for action at the general election of November 1954. The electorate voted "no" and by so doing declined to repeal the said law.

Thereafter, prior to the legislative session to convene in January 1955, an initiative petition to repeal the "Right to Work" law was signed by the requisite number of voters and filed with the Secretary of State. Thereafter, the Secretary of State submitted the said petition to the Legislature, which convened in January 1955. That Legislature declined to take any action thereon, and, as a consequence, it was certified by the Secretary of State to the electorate for action at the general election of November 1956. The electorate voted "no" and by so doing declined to repeal the said law.

As heretofore stated, A.B. No. 359 would amend a portion of that law. The question then more narrowly stated is as to the time when the three-year period mentioned in Sec. 3 of Art. XIX shall begin to run, whether it begins to run from the date of approval by the people or from the date the people last declined to repeal.

A portion of Sec. 3 of Art. XIX of the Constitution of Nevada, reads as follows:

If said initiative measure be rejected by the legislature, or if no action be taken thereon within said forty (40) days, the secretary of state shall submit same to the qualified electors for approval or rejection at the next ensuing

general election; and if a majority of the qualified electors voting thereon shall approve of such measure it shall become a law and take effect from the date of the official declaration of the vote; *an initiative measure so approved* by the qualified electors shall not be annulled, set aside, or repealed by the legislature within three (3) years *from the date said act takes effect.* (Italics supplied.)

We are clearly of the opinion that it is the former, i.e., the three-year period mentioned, begins to run from the date of the approval by the people, and not from the date that the people declined to repeal, for the language is, “an initiative measure so approved,” etc., and shall not be annulled, etc., “from the date said act takes effect.”

The question is therefore answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-23 Public Officers—Statutory salary considerations do not preclude public employees (including officers) from receiving “fringe benefits.”**

CARSON CITY, March 17, 1959

HONORABLE KEITH L. LEE, *State Controller, Carson City, Nevada*  
HONORABLE NEIL D. HUMPHREY, *Budget Director, Carson City, Nevada*

GENTLEMEN: Reference is made to your letter of March 9, 1959, wherein you propounded the following question:

Does Opinion 59-2 of this office, dated January 28, 1959, apply to elected officials and to unclassified personnel whose salaries are set by statute?

OPINION

Opinion 59-2, referred to above, held that a terminating employee of the State is entitled to a lump sum payment for his accumulated annual leave.

The term “employee” as used in that opinion includes elected officials and unclassified personnel whose salaries are fixed by statute. To hold otherwise would lead to absurd results. It would lead to the conclusion that all elected officials of this State and public officers whose salaries are fixed by statute are not employees within the meaning of NRS 284.350 and NRS 284.355, and, therefore, are not entitled to annual leave or sick leave. Such a distinction between public officers and employees has never been drawn nor do we see any reason to now make this distinction.

To further illustrate, let us examine and compare the Public Employees Retirement Act (NRS, Chapter 286). That act specifically provides that the term “employee” includes public officers (NRS 286.040). Appointed public officers in the unclassified service with a salary fixed by statute are within the provisions of the Act. Likewise elected officials with salaries fixed by statute may elect to become a member of the system. Can it be said that the public officer or elected official, having contributed his monthly share for the prescribed period and the State, or subdivision thereof, contributing an equal amount, that thereby that official or officer has for many years been receiving more than his salary as fixed by statute? Emphatically no. The Legislature has merely provided for a fringe

benefit similar to the fringe benefits an employer provides an employee in private industry. The benefits are contingent. If the "employee" does not fulfill the conditions, he is not entitled to the benefits. So is it with accumulated leave in the form of a lump sum payment. Here, as under the retirement system, before the employee is entitled to benefits, his employment or service to the State must come to an end. In addition he must fulfill certain conditions such as having been in service for a prescribed minimum length of time and have accumulated annual leave. If he does not fulfill the conditions, upon termination of employment he has no right to a lump sum payment.

Let us go further. The Governor of Nevada has a salary fixed by statute. Is this the limit of his benefits of a monetary nature derived from the State? We think not. He is furnished with an automobile, a home and other benefits. Are these but subterfuges to circumvent the statutory amount of his salary? Of course not. All of these benefits are in addition to his salary and form a part of his total compensation.

For the reasons stated we conclude that the term "employees" as used in NRS 284.350 and in our Opinion 59-2 of January 28, 1959, embraces elected officials and public officers of the State of Nevada. If a problem is present with reference to payments of lump sums for accumulated annual leave to certain public officers and elected officials, we feel it is a budgetary problem and not a legal one. We make one further observation. The terminal leave pay should not be paid until after the officer or employee terminates his employment. It is noted that certain officers were paid in 1958 when their terms of office expired in January 1959. However, those officers were entitled to said payments although made prematurely.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-24 Public Schools—Refer to Opinion No. 59-4 dated  
January 30, 1959.**

CARSON CITY, March 20, 1959

HONORABLE BYRON F. STETLER, *State Superintendent of Public Instruction, Carson City,  
Nevada*

DEAR MR. STETLER: Your letter of February 26, 1959, requested our opinion based on the following facts and questions:

FACTS

On January 30, 1959, this office released Opinion No. 59-4, which held in essence that annual contract salaries of employees of the school board are expenditures within the purview of NRS 387.320 and as such must be published in the form prescribed by the State Board of Education. That opinion did not dispose of the question of whether the entire salary for the year should be reflected in the first quarter publication of the list of expenditures, or just that portion actually paid.

On the 14th day of June, 1957, the State Board of Education adopted certain rules for the publication of said expenditures. Rule No. 1 provided that the yearly individual salaries of all personnel (employed by the school district) shall be included in the publication of expenditures of the first quarter. Certain employees, notably teachers, are employed on a yearly contract basis which raises the following questions.

## QUESTIONS

1. Is the yearly contract salary of an employee to be considered an expenditure of the immediately preceding quarter and published as such, or shall only that portion of the contract salary actually paid during the immediately preceding quarter be published?
2. Does Rule No. 1, as stated above, exceed the authority granted to the Board of Education under NRS 387.320?

## OPINION

The questions, as stated above, will be answered only by properly defining “expenditures” as used in NRS 387.320. The meaning of the term must be governed by its context. It must have an interpretation consistent with its use in the statute and uniform in its application. Did the Legislature mean expenditures actually made as distinguished from expenditures contemplated? If they meant the latter, then, to be consistent, the Legislature, we think, would have provided that the publication of expenditures be made at the commencement of each quarter for the expenditures for the following quarter. The Legislature did not so provide. To the contrary, it is provided by law that the publication of the list of expenditures be published to reflect the expenditures *made during the previous quarter*. We, therefore, are of the opinion the Legislature intended that the term “expenditure,” as employed in NRS 387.320, to mean expenditures actually made. (Italics supplied.)

The purpose for the publication of expenditures is to make the financial outlay of the school districts a matter of public information. It would serve no purpose if the publication of expenditures be presented in such a manner to confuse or mislead the public. If the publication indicates all expenditures actually made during the previous quarter and reflects therein the full yearly contract salary of an employee, it is in effect giving two different meanings to the term “expenditures” because only a portion of that yearly contract amount has actually been paid. The remainder is contingent on the employee fulfilling his obligations under the terms of the contract. If he doesn’t, then that individual receives no further pay and the publication of the list of expenditures previously made is incorrect. Therefore, the publication fails to serve its purpose.

Having analyzed the term “expenditure” as used in NRS 387.320, we can arrive at but one conclusion—the Legislature intended the publication of the list of expenditures to mean money actually paid, expended or disbursed. A yearly contract salary should be included in the publication only to the extent of what has actually been paid. We conclude, with respect to question 1 above, that only that portion of the yearly contract salary actually paid be reflected as an expenditure made during the previous quarter.

Our answer to question 2 must be apparent. The Legislature has delegated to the Board of Education the power to prescribe the form for publishing the expenditures. If, in prescribing the form, the Board of Education goes beyond that and prescribes the substance of that publication and thereby contravenes the legislative intent of what constitutes expenditures, the Board of Education has exceeded its authority. We answer question 2 affirmatively.

This opinion in no way alters what we said previously in Opinion No. 4 of January 30, 1959. The State Board of Education could allow all salaries to be lumped together if such is the form it wishes to prescribe.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-25 Constitutional Law—An elected member of the Legislature may, after adjournment, resign his legislative office and accept appointment to a civil office of profit with the executive department, if such office was not created or emoluments thereof increased by the Legislature to which he had been elected. Subsequent legislative increases in salary or other benefits would not render his incumbency illegal.**

CARSON CITY, March 23, 1959

HONORABLE GRANT SAWYER, *Governor of Nevada, Carson City, Nevada*

DEAR GOVERNOR SAWYER: Mr. Barnum has asked that we express an opinion in writing that we have expressed orally, respecting an appointment that is under consideration, and the effect of the provisions of Section 8 of Article IV of the Constitution, upon the power to make the appointment, and of the appointee to hold the office, under certain given facts, as follows:

FACTS

Mr. X was duly elected in November 1958 as a member of the 49th Session of the Legislature (comprising the years 1959 and 1960) and is at the date hereof serving in that capacity.

Mr. X is being considered for appointment to a civil office of profit under the executive branch of the State Government, which office has not been created or the emoluments of which will not have been increased during the present legislative session.

QUESTIONS

1. Would the appointment of Mr. X, to the executive office of profit under the State Government, for which he is being considered, after the close of the present legislative session, and after his resignation from the legislative branch of government, be barred by the provisions of Section 8 of Article IV of the Constitution?

2. If the answer to the above interrogatory is in the negative, would the appointive authority of the executive branch of government be required to remove Mr. X from the said office for which his application is being considered, if after his appointment thereto and during the term for which he has been elected to the legislative assembly, or within one year thereafter, the emoluments thereof have by legislative act been increased?

OPINION

The questions as stated assume the resignation of Mr. X from the legislative branch before acceptance of the civil office for profit under the executive branch. By this assumption we have eliminated a primary objection to acceptance of the office in the executive branch, namely, that objection founded upon the provisions of Section 1 of Article III, which provides as follows:

Three separate departments; separation of powers. The powers of the Government of the State of Nevada shall be divided into three separate departments—the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

Since the assemblyman would be out of legislative office before acceptance of the civil office for profit in the executive department, he would not be barred by the provisions of Section 1 of Article III of the Constitution.

We now ask would he be barred from acceptance of the office by the provisions of Section 8 of Article IV? Section 8 of Article IV of the Constitution provides as follows:

Senators and assemblymen ineligible to certain offices. No Senator or member of Assembly shall, during the term for which he shall have been elected, nor for one year thereafter be appointed to any civil office of profit under this State which shall have been created, or the emoluments of which shall have been increased during such term, except such office may be filled by elections by the people.

In order for this section to bar one who has served in the current legislative session from accepting an office in the executive department, for a term of one year beyond the term for which he has been elected, one or both of the two conditions must be present, viz:

1. The office must have been created by a legislative term, for which the legislator has been elected;

2. Or the emoluments of which shall have been increased during such term.

If both of these conditions are absent, in a given case, the bar does not exist, and the individual is not disqualified from accepting the office of the executive branch of government for which he is being considered for appointment. We therefore answer question No. 1 in the negative, and conclude that he may under the given conditions be tendered the appointment.

See Attorney General's Opinion No. 56-212 of September 21, 1956, in harmony herewith.

We now approach question No. 2 which supposes that Mr. X accepts such an appointment under the given conditions, and that thereafter, during the term for which he has been elected, or within one year thereafter, the Legislature increases the salary of other emoluments of the office which Mr. X has accepted with the executive department of government. Is Mr. X thereby rendered an illegal incumbent of the office requiring his resignation or removal? The answer to this question is in the negative.

This Section 8 of Article IV of the Constitution being punitive and prohibitive must be strictly construed, to include no more under its provisions than are clearly and expressly intended, and, since the prohibition goes to the appointment and not to the incumbency, we are of the opinion that an appointment properly and legally made could not and would not become illegal by subsequent developments, which changes and developments were in no respect under the control or domination of the officer in question.

This Section 8 of Article IV is clearly intended to prevent an individual of positive and persuasive personality from dominating a legislative body for his own selfish ends, either by creating an office or by increasing the emoluments thereof, but it is not intended to interfere with or impede the appointive authority from making appointments of the type here under consideration, in the absence of both of these factors. The answer to question No. 2 is in the negative.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-26 Constitutional Law—Statutory provisions construed as exercise of State's police power and held not so clearly unreasonable or arbitrary**

**as to contravene guarantees, inhibitions or prohibitions contained in State and Federal Constitutions.**

CARSON CITY, March 23, 1959

HONORABLE GRANT SAWYER: *Governor of Nevada, Carson City, Nevada*

DEAR GOVERNOR SAWYER: A.B. 135, which amends Chapter 643, NRS, by creating new provisions relating to licensing and conduct of barber schools, the payment of certain fees by operators of barber schools, notice to applicants upon the board's refusal to issue or renew the license or the board's revocation or suspension of the license, and other matters relating thereto, has been passed by the Legislature, and presently is before you for appropriate action.

This office is in receipt of your verbal request for our opinion as to the validity and constitutionality of the measure, which have been expressly and seriously questioned by certain interested persons who recommend veto thereof.

OPINION

This opinion is not concerned with the wisdom or desirability of A.B. 135, as regards those provisions which will be examined herein, but is strictly limited to the consideration and determination of the validity and constitutionality of the act as legislative regulation in the exercise of the State's police power. (Separation of Powers, Art. III, Sec. 1, Nev. Const.) The analysis made contemplates, assumes, and is predicated upon the following:

1. The constitutional guarantee, both state and federal, concerning equal rights, the due process of law, freedom of contract, the right to pursue a lawful business, and the right to possess and enjoy the use of property. (Art. I, Sec. 1, Nevada Constitution; Fourteenth Amendment to U.S. Constitution.)
2. That in the construction of statutes, it is well established that, where possible, construction or interpretation should be favored which will give effect to the intention of the Legislature. (*Schneider v. Duer, et al* (1936), 184 A. 914.)
3. That there is a presumption in favor of the validity and constitutionality of any legislative enactment. (*King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221.)
4. That where a statute is valid in part and void in part, such legislation should be sustained, unless severance of the invalid part is impossible because the void part of the act underlies or permeates the entire act. (*Schneider v. Duer, et al, supra.*)

The right to engage in lawful, useful and productive labor is "property" within the meaning of the due process clause of State and Federal Constitutions, subject only to such restriction and limitation as may be imposed by legitimate exercise by a state of its inherent police powers in aid of public health, morals, safety or welfare.

Because of its intimate relation to the public health, the conduct of the beauty and barbering businesses have been generally considered as endeavors or enterprises properly subject to legislative control and regulation in the exercise by states of their police powers. Such control and regulation has generally been effected by subjecting them to certain requirements, including, among other things, eligibility for, and procurement of, a license, permit or certificate.

However, it does not follow that a legislature may impose unreasonable and arbitrary

or capricious exactions of such occupations which have no relation to the public health. To do so, should be, and very often has been, held to be violative of the guarantees contained in State and Federal Constitutions, as specified and enumerated at the outset herein.

The foregoing naturally suggests that, in any analysis and determination of a question of the kind here involved, a proper criterion or test is: Reasonableness and necessity to insure protection of the public's health, safety, or welfare.

An examination of A.B. 135 discloses two provisions which, in similar legislation in other states has been subjected to legal question. These are:

1. Section 7, paragraph 4, which forbids everyone who owns, manages, operates or controls a barber school, or part or portion thereof, from making any charge for service rendered by the students to the public.

2. Section 11, paragraph 5, which empowers the State Barber's Health and Sanitation Board to approve and, by official order, to establish the days and hours when barbershops may remain open for business on the basis of agreements signed and submitted to the board by any organized and representative group of barbers constituting at least 70 percent of the barbers of any county.

As to the second of these two matters, it should be noted at once that it is already existing law under NRS 643.050 (5), and does not constitute new legislation as contained in A.B. 135.

While authorities are divided, the majority and better view is that statutes so providing are invalid both on the ground that they are violative of the constitutional provisions against delegation of legislative authority, and also, as lacking in any reasonable relation or connection in the promotion of public health, and, therefore, an invalid exercise of the police power. The cases reflecting the different views are cited in 98 A.L.R. 1094. See also, *Hollingsworth v. State Board of Barber Examiners* (1940), 217 Ind. 373, 28 N.E.2d 64; *State Board of Barber Examiners v. Cloud et al.* (1942), 44 N.E.2d 972.

As regards the general fixing of minimum prices for the services of barbers, a review of the cases on this point shows no conclusive uniformity in the decisions. See *State Board of Barber Examiners v. Cloud et al.*, cited supra, at page 976, where cases holding such statutes valid and invalid are listed. Our consideration of these decisions was suggested as conclusively establishing the invalidity and unconstitutionality of A.B. 135. In our opinion, however, interesting though these cases are because related to the matter at hand, they can hardly be considered either in point or controlling on the question specifically involved herein, namely, the validity and constitutionality of the provision in A.B. 135 that a barber school shall "make no charge for service rendered by the students to the public." (Section 7, paragraph 4.)

In this connection, it should be noted that barbering and beauty operators, shops, etc., have been held to be closely akin, because concerned with the conduct and performance of similar kinds of business and work, and, therefore, susceptible of, and subject to, similar types of regulation. See 56 A.L.R.2d 903, et seq.; 7 A.J. 615, sec. 5, *Barbers and Beauty Specialists*; *State v. Ross* (1937), 195 S.C. 472, 194 S.E. 439.

But, see 98 A.L.R. 1088, 1090 where the matter of classification of beauty parlors and the general practice of barbering is annotated, and a number of cases cited which hold that the differences between the two furnish a reasonable basis for separate classification, so that the fact that beauty and hairdressing establishments are not also regulated will not invalidate a statute or ordinance regulating barber shops.

It should also be noted that there is no similar or corresponding prohibition with respect to the making of charges for service rendered to the public by students in beauticians' schools in Chapter 644 of NRS.

A review of the cases on the question as to whether charges can be made for services

rendered to the public by students in barber and beauty schools discloses conflicting authorities and views. See 56 A.L.R.2d 879, 901 et seq., where the cases on this point, as they pertain to the field of cosmetology, are analyzed as follows:

(1) *State ex rel. Mitchell v. Thompson's School of Beauty Culture* (1939), 226 Iowa 556, 285 N.W. 133 (holding that insofar as the statute required operators of schools to compel students render gratuitous services to the public when they undertook to secure practical experience while working under the supervision of a licensed cosmetologist, it was unconstitutional and amounted to an improper exercise of the police power. The court specifically pointed out that to require the work of such students to be rendered gratuitously would be an arbitrary interference with private business and the right to contract guaranteed by the Constitution, and would impose undue and unnecessary restriction upon lawful occupations in violation thereof.)

(2) *Mansfield Beauty Academy, Inc. v. Board of Hairdressers* (1951), 326 Mass. 624, 96 N.E.2d 145 (where such a prohibition was impliedly held to be invalid. In this case, the court held that insofar as the statute provided that no hairdressing and manicuring school should directly or indirectly make any charge for *materials* in connection with the practice of hairdressing or manicuring by students, it was unreasonable and void, there being no rational connection between the promotion of the public welfare and the interdiction of such a charge.)

See also, *Philadelphia School of Beauty Culture v. State Board of Cosmetology* (1951), 78 Pa. D & C 111 (where the court similarly held that a statutory provisions prohibiting a school of beauty culture from making any charge for *material* used by its students in giving clinical treatments illegal and void as not having any real reasonable or substantial relation to the public health and safety or to any other legitimate police power or purpose, and, therefore, violative of the state constitution by interfering with the plaintiff's freedom to use and enjoy its property, and depriving it of property without due process of law and the equal protection of the law, in violation of both State and Federal Constitutions.)

But, see *Toebe Academy of Beauty Culture v. Kelly* (1941), 239 Wis. 103, 300 N.W. 476 (where the statute involved contained no express provision forbidding a school to charge for services rendered, but limited the charge to no more than the reasonable cost of the *material* used. The State Board of Health, which was charged with responsibility and authority under the act, established a list of the services offered and the reasonable cost of the materials used in connection with each specific service. On such basis, a rule was promulgated setting forth the charges that were authorized to be made of the public to whom such services were rendered.

Under these circumstances, the court held that such statute was not a "price-fixing statute," but constituted an exercise of the state's police power to prevent imposition upon the public and evasions of other provisions of statutes regulating beauty parlors and schools of cosmetology.

In reaching this conclusion, the court took note of the licensing requirement for anyone desiring to engage in the practice of cosmetology; and the further requirement that licenses could only be had by, and granted to, qualified persons; and that, under the language of the statute, of a beauty school so-called practices the cosmetic art it becomes a beauty parlor, the services being rendered by students rather than by operators and apprentices. Noting the fact that the statute prohibited a student from procuring a license because unqualified, the court at page 479, 300 N.W.,

justified its decision as follows:

A consideration of these several sections leads us to the conclusion that a school of cosmetic art may not charge for the services rendered by its students. It is apparent from the language of the section that schools of cosmetic art have customarily charged for the materials consumed in the rendition of the service. By charging an exorbitant price for such materials, the schools derived a substantial revenue therefrom. Such part of the charge as was more than a reasonable charge for the materials, manifestly became a charge for the services rendered. To prevent such an evasion of the rule, the statute authorized the board to establish reasonable prices for the materials, which it has done. Under the rule if the price charged is insufficient to cover the reasonable cost of materials, the school is entitled to a hearing and in the event that it deems the order made unlawful or unreasonable, it may be reviewed by certiorari in accordance with well established practice.

Turning now to barber schools, a Note in 20 A.L.R. 1111, 1114, cites the case of *Moler v. Whisman* (1912), 243 Mo. 571, 40 L.R.A. (N.S.) 629, 147 S.W. 985, Ann.Cas. 1913 D 392 (where the court held that under the state constitution, a section of a statute prohibiting a student or apprentice or his instructor in a school for barbers, from making any charge for the services of the student or apprentice, was invalid). In this case, the court said:

If students of the barbers' trade be compelled to labor *two years* without pay, and without their instructors receiving any remuneration for their services \* \* \* it is difficult to see why they would not clearly be deprived of the gains of their own industry, as prohibited by our organic law \* \* \*. The practice of boys or young men apprenticing themselves to skilful mechanics, artisans, or professional men in order to qualify themselves for useful trades and professions is almost as old as civilization itself \* \* \*. It is true, as announced in *Ex parte Lucas* (1901) 160 Mo. 218, 61 S.W. 218, that the barber trade, because of its intimate relation to the public health, is a proper subject of legislative control, under the general police power of the State; but it does not follow that the legislature may impose arbitrary or capricious exactions upon the students of that occupation, which have no relation to the public health. The legislature having recognized the legitimacy of this profession, cannot destroy it under the guise of regulation." (Italics supplied.) (See also *Edwards v. State Board of Barber Examiners et al* (1951), 231 P.2d 450, 72 Ariz. 108.)

*Brazier v. State Board of Barber Examiners* (1943, Okla.), 141 P.2d 563, holding that a rule prohibiting barber colleges from charging persons receiving services *the cost of materials* used in connection therewith, invalid. The rule, in the court's opinion, could not be deemed "reasonable" as designed to prevent unlicensed students from engaging in barbering because the benefit of such charge would inure to the student, such benefit being that the school would remain open. This, the court concluded, did not amount to "payment" within the statute prohibiting the unlicensed practice of barbering.

But, see 98 A.L.R. 1088, 1091, and the following cases upholding the validity of statutory prohibitions of barber schools from charging of customers for services rendered by students to the public:

*State v. Conragan* (1934), 54 R.I. 256, 171 A. 326 (where the court held that a statute containing such a prohibition does not deprive the owners of barber schools of property without due process of law, being reasonable and necessary to the public protection and from unauthorized barbers).

Schwarze v. Clarke et al (1940, Okla.), 107 P.2d 1018 (holding that under a statute regulating the practice of the trade of barbering and defining the practice, where a student performs any of the enumerated practices for payment either directly or indirectly, he is undertaking the practice of “barbering” and is subject to the laws forbidding the practice of barbering profession without a certificate. And, that where the regulatory board is authorized to adopt reasonable rules governing the conduct of barber schools, a rule of the board that students should not be allowed to charge compensation for services rendered in any barber school is reasonable and necessary to insure to the public protection from untrained and unauthorized barbers, and is not violative of constitutional provisions against deprivation of property without due process of law or as creating a “monopoly.” Such a rule is not capricious, unreasonable or oppressive and does not abridge the constitutional rights of the owner of such school or college, or violate the state constitution or the 14th Amendment to the Constitution of the United States, the court further held.

In Alper et al. v. L.V. Motel Assn., No. 3989, filed May 14, 1958, our own Supreme Court quotes approvingly as follows:

In Pastone v. Pennsylvania, 232 U.S. 138, 146, 34 S.Ct. 281, 58 L.Ed. 539, the opinion of Mr. Justice Holmes states: “But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or might be considered to define those from whom the evil is mainly to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.” And later: “Obviously, the question so stated is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong in its facts.” (Other cases to the same effect cited.)

On the basis of the foregoing analysis of applicable law and principles, we, therefore, reach the following conclusions:

1. That there is a division of authorities with respect to minimum or price-fixing agreements, some states holding them valid, other states invalid.
2. That as regards statutory provisions of the kind provided in NRS 643.050 (also contained in A.B. 135), with respect to opening and closing agreement, the majority view is that such regulation is invalid; a minority of the states have, however, sustained such regulations.
3. That, as regards the making of a charge of the public *for materials*, used by students in beauty and barber schools in connection with services rendered by them, any such statutory prohibition would probably be held violative of state and federal guarantees of property and an improper and invalid exercise of police power.
4. That, if Section 7, paragraph 4, of A.B. 135 were to be construed and applied so as to prohibit the making of a reasonable charge *for materials* so used by barber school students, it would, therefore, probably be held violative of the aforementioned state and federal constitutional guarantees, and probably also void as an invalid exercise of the State’s police power.
5. That construction and application of Section 7, paragraph 4, of A.B. 135, so as to give it the legislative meaning and intendment that barber colleges are prohibited from

making any charge *for materials* used by students in services rendered to the public, is contrary to the express language employed therein, and, therefore, unnecessary.

6. That under Section 6 of A.B. 135, the board would have the authority and power to adopt necessary and reasonable rules and regulations in clarification of this aspect of the matter, so as to preclude any prohibition of a charge *for materials* used by barber school students.

7. That the requirement that before any charge can be made for barbers' services rendered to the public a person shall be certified as qualified and licensed cannot, as a matter definitely settled by law, be considered so arbitrary, unreasonable and capricious, as to be held an improper and invalid exercise of the State's regulatory police power for the protection and promotion of public safety, health and welfare. That any contrary view would necessarily operate in derogation and nullification of the requirements established in the interest of the public's safety and health, that only qualified person, so certified and licensed, shall practice the barbering trade and render such services to the public; that the contrary view would, in effect, invest a barbering school with the character of a licensed barber shop with licensed operators. This, of course, is not the intention, purpose or case, as regards the character and kind of services performed or rendered to the public by a barber college. Any classification based upon such factual differences is certainly not an unreasonable one under a state's police power. And any corresponding and commensurate restriction and limitation on benefits authorized for each of said different classes, also cannot conclusively be held to be arbitrary, capricious and unreasonable, in the present state of the law.

8. That while A.B. 135 contains no "severability clause," even if Section 7, paragraph 4, and Section 11, paragraph 5, were hereafter to be held void by our courts, the other provisions would be held valid as a proper exercise of the State's police power.

Finally, it is our considered opinion that, while there may be some question concerning the validity and constitutionality of the specific provisions herein discussed, the general presumption in favor of the validity of any legislative enactment is sufficient to justify its approval, especially in view of the fact that, even if judicially hereafter held invalid and void, they are, in fact, severable, and the remaining provisions of the measure are clearly valid as legislative regulations under the police power.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-27 Nevada School of Industry—Superintendent by law may enter inmates of school in boxing matches with boys of other schools. Neither State of Nevada nor superintendent liable for injuries sustained by inmates of school or opponents engaging in boxing matches for recreation.**

CARSON CITY, March 24, 1959

MR. IRVIN AMBLER, *Superintendent, Nevada School of Industry, Elko, Nevada*

DEAR MR. AMBLER: Your letter of March 17, 1959 stated that you have been asked to enter the boys at the Nevada School of Industry in several boxing matches with boys from other schools. Before entering into such matches you have requested our opinion on the following questions:

QUESTIONS

1. Does the Superintendent of the Nevada School of Industry have the right by law to enter the boys of that school in boxing matches with boys from other schools?
2. If he does possess that right by law, what is his liability in the event one of the boys is injured during the matches?

OPINION

The following opinion is based on two assumptions, namely, the boys entering such boxing matches do so on a voluntary rather than a compulsory basis, and the purpose of such matches is for athletic recreation and not for profit.

NRS 210.090 provides that the superintendent shall cause a program of study to be adopted which corresponds so far as practicable with the program of study in the elementary and high schools of this State. It is well accepted that a balanced program of study includes both mental and physical training. This is evident from the fact that physical education classes are a part of the curriculum in all schools. We do not think the Legislature ever intended that the program of study as provided in NRS 210.090 be limited to the point of excluding physical recreation for the inmates at the school of industry. Furthermore, under NRS 210.070 which enumerates the power and duties of the superintendent, it is provided that he shall make rules and regulations for the government of the school and the preservation and enforcement of order and discipline. The participation of young men in the field of athletics is an integral part of growing up. It gives them a natural outlet for their boundless energy and gives them a clean and wholesome subject upon which they may focus their attention. This results in good government and discipline in the school. We conclude that the superintendent possesses the right by law to enter the inmates of the school of industry in boxing matches with boys from other schools.

With reference to question No. 2 above, where a person voluntarily participates in a lawful game or contest, he assumes the ordinary risks involved so as to preclude recovery from the promoter or operator of the game or contest for injury or death resulting therefrom. *Parmentier v. McGinnis*, (Wis.) 147 N.W. 1007, 7 A.L.R.2d 707. The fact that these boys may be minors does not necessarily alter the above-stated principle. The court said in *McLeod Store v. Vinson*, (Ky.) 281 S.W. 799, "An ordinary boy of that age (17 years) is practically as well advised as to the hazards \* \* \* of games of skill and endurance as is an adult and if injured while voluntarily engaged therein stands on a different footing from an infant of tender years."

While a voluntary participant in a game or contest assumes the ordinary risks incident thereto, he does not assume the risks of injury from the violation of the duty owed to him by the promoter or operator. Therefore, the Superintendent of the Nevada School of Industry should take all precautions to see that the matches are properly supervised and conducted. If this is done, we are of the opinion that you would not be liable for any injury suffered during the boxing matches by a voluntary participant.

With reference to the liability of the State of Nevada in the foregoing situation, the rule is well settled that unless it has assumed such liability by constitutional mandate or legislative enactment, the state is generally immune from tort liability because of its sovereign character. This is the rule generally with respect to agencies and political subdivisions of the state. 160 A.L.R. 17 et seq.; also see Nevada Constitution, Article IV, Section 22.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-28 Constitutional Law—The Legislature does not have the power to require a duly organized water district to supply water without regard to payment therefor to residents of a particular area, such mandate being in conflict with both Sections 8 and 15 of Article I of the Nevada Constitution.**

CARSON CITY, March 26, 1959

HONORABLE GRANT SAWYER, *Governor of Nevada, Carson City, Nevada*

DEAR GOVERNOR SAWYER: Pursuant to your request of March 24, 1959 we have reviewed Assembly Bill No. 442 with respect to constitutionality, which bill has passed both Houses of the Legislature and is now before you. The bill has for a summary the following: "Requires that Las Vegas water district continue to supply water to Parkridge Acres."

The bill including the title, being short, is quoted in full as follows:

An Act requiring the Las Vegas valley water district to continue to supply water to the area known as Parkridge Acres; providing penalties; and providing other matters properly related thereto.

Whereas, The Las Vegas valley water district has supplied, through the Pure Water Co., water to the residents of the area on the eastern outskirts of Las Vegas known as Parkridge Acres; and

Whereas, The directors of the Las Vegas valley water district threaten to, or have, cut off the water supply of such area because of nonpayment of bills by the Pure Water Co.; and

Whereas, The residents of such area are without fault and are not responsible for the action of the directors; and

Whereas, An adequate supply of water to such area is essential to the health and welfare not only of the residents of such area but also to the residents of the entire southern portion of the state; and

Whereas, It is a proper function of the state to protect the health and welfare of its people; now, therefore,

*The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:*

Section 1. The Las Vegas valley water district, created pursuant to chapter 167, Statutes of Nevada 1947, as amended, shall continue to supply water to the residents of the area known as Parkridge Acres in amounts sufficient to supply all their needs.

Sec. 2. The directors of such district shall undertake any contract, agreement, construction or other step necessary to provide such water supply and to provide adequate financing for such supply.

Sec. 3. If the Las Vegas valley water district terminates the supply of water to such area after the effective date of this act, or, having done so prior to such date, fails to reinstate such service, any director voting for or approving such action shall forfeit his office and shall be punished by imprisonment in the county jail for not more than 6 months or by a fine of not more than \$500 or by both fine and imprisonment.

Sec. 4. This act shall become effective upon passage and approval.

FACTS

There are certain facts and background material that are pertinent, briefly stated as

follows:

We have been informed by the President of the Las Vegas valley water district that twenty-three homes are involved, known as "Parkridge Acres" subdivision. A private corporation was formed under the laws of the State of Nevada entitled "Pure Water Co." This company has undertaken to supply water to the 23 homes, and to do this has installed used defective pipe to conduct the water into the area. The Pure Water Co. buys the water upon a meter reading from the Las Vegas valley water district. The Pure Water Co. collects about \$125 per month from the 23 users and by reason of its defective equipment, suffers a loss of approximately 80 percent of the water that it purchases upon meter reading. The company therefore incurs an indebtedness of about \$500 per month to the Las Vegas valley water district. The said water company is now indebted to the district approximately \$15,000, a part of this sum having been reduced to judgment. The water service to the residents of the Parkridge subdivision has not been discontinued, nor will it be. However, the said corporation is hopelessly insolvent and its indebtedness to the water district grows from month to month.

#### QUESTION

Would Assembly Bill No. 442 be constitutional, if approved?

#### OPINION

The authority for the creation of the Las Vegas valley water district is chapter 167, Statutes of 1957, page 553. This statute has been amended by Ch. 130, Stats. 1949, p. 208; Ch. 307, Stats. 1951, p. 477; Ch. 425, Stats. 1955, p. 872; and Ch. 401, Stats. 1957, p. 772.

In a letter of March 19, 1959, directed to Honorable B. Mahlon Brown, Senator of the county of Clark, touching upon the constitutionality of A.B. 265, we advised that it was not within the power of the Legislature to change the statutory law in such a manner as to place the rate fixing power of this utility (Las Vegas valley water district) under the jurisdiction of the Public Service Commission, and remove it from the local board of directors elected by the people, for the reason that the local board of directors had, pursuant to statute issued and sold revenue bonds in the amount of \$8,700,000, and that to so change the rate making power was to impair the obligation of contracts made between the district and the bondholders.

Section 15 of Article I of the Constitution of the State of Nevada, provides the following:

Bill of attainder; ex post facto law; obligation of contract. No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed.

Section 8 of Article I of the Constitution of the State of Nevada, in part provides as follows:

No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself, *nor be deprived of life, liberty, or property*, without the due process of law; \* \* \*. (Italics supplied.)

It is well established that the prohibition against deprivation of life, liberty or property, has application to a state legislative body. See: 16 C.J.S. Art. 308, page 1327, (Constitutional Law) from which we quote:

A state legislature has no power to impair the obligation of the contracts made by a municipal corporation in the course of its nongovernmental transactions even though the state constitution gives the legislature plenary powers in the regulation of the affairs of such corporations.

That to require the water district to furnish water to a private corporation without reference to collection of moneys due from that corporation for services rendered, would be to encumber and burden the water district, which burden of necessity would be borne by the users of the water supplied by the district not situate within that part of the district known as "Parkridge Acres." Such users of necessity would be required to pay a higher rate than would be the case if there were no free users. Such would constitute a deprivation of property without due process of law, in violation of Section 8 of Article I.

That to require the water district to give away without compensation, the only service that it has for sale to the public, would be in effect to render the district less solvent, which would in effect render its obligations, including its bonds, less secure, and less desirable, and less certain of full performance, thereby impairing the obligation of its contracts, in violation of Section 15 of Article I.

For the foregoing reasons the question is answered in the negative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-29 Public Schools—Disposition of school district property by sale or lease. Validity and scope of statutory authority and power of boards with respect to unsuitable or unneeded school property examined, and criteria suggested defining basis for proper exercise of power, and fixing length of any lease of such property for private purposes.**

CARSON CITY, March 26, 1959

HONORABLE JOHN TOM ROSS, *District Attorney, Ormsby County, Carson City, Nevada*

DEAR MR. ROSS: Reference is made to your letter dated March 11, 1959, in which you request the opinion of this office with respect to the legal authority, powers, and responsibilities of a school district board in the leasing of unused school buildings.

FACTS

Your letter sets forth the statutory provisions dealing with the foregoing matter, namely, NRS 393.220 and 386.350, but you indicate that the specific problem appears to be the determination of the scope and extent of the statutory power granted to sell or lease real property within the statutory authority and powers expressly granted to school district trustees. You note the conflict that exists in the decisions of cases where the question has been considered, and further state that the problem here involved is additionally complicated by the fact that the board of trustees desires to enter into such a lease of school property (for which there exists no contemplated future use of either the building or the land) for revenue purposes only. Apparently, also, the factual situation is not one in which an unsuccessful attempt to sell the real property has been made, thus necessitating, as the next best alternative, leasing of same.

Your letter further requests our opinion on the related and subordinate question as to whether, if the board is found to have the authority and power to enter into a lease of said

real property in the circumstances outlined, there is a general time limitation as to the term for which said lease can be made.

Your inquiry, and our opinion, will, therefore, be concerned specifically with the following questions:

1. (a) What is the extent of the statutory authority and power vested in a board of trustees of a school district to sell or lease real property?
- (b) What, if any, restrictions or limitations are there with respect to any exercise of said statutory authority and power?
2. Assuming a school district board of trustees may lease improved real property for which there exists no present planned or contemplated future use, is there any general restriction or time limitation with respect to the term for which a lease of said real property may be made?

#### OPINION

Insofar as relevant to the matter under consideration, the following constitutional provisions, or excerpts therefrom, may properly be examined:

Constitution of the State of Nevada, Article XI, Education:

Section 1. The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements \* \* \*.

Sec. 2. The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year \* \* \* and the legislature may pass such laws as will tend to secure a general attendance in each school district upon said public schools.

Sec. 3. \* \* \* all property given or bequeathed to the state for educational purposes, *and all proceeds derived from any or all of said sources* shall be and the same are hereby solemnly pledged for educational purposes, and shall not be transferred to any other funds for other uses \* \* \*. (Italics supplied.)

Sec. 6. In addition to *other means* provided for the support and maintenance of \* \* \* common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund \* \* \*. (Italics supplied.)

It may reasonably be concluded from the foregoing that there is, in fact, no constitutional infirmity or contravention in the statutory grant of authority and power vested in trustees to sell or lease real property belonging to a school district if deemed necessary or for the best interest of the school district. (NRS 393.220.) Express language contained the above cited excerpts from our State Constitution may fairly be construed as, at least, not prohibiting the disposition of school property, and the derivation of revenue or proceeds from such disposition, and the application of same, as prescribed, to public school needs, and no other purpose. (NRS 393.320.)

We conclude, therefore, that NRS 393.220 constitutes a valid grant or delegation of authority and power in general. Some qualification of this conclusion must, however, be noted as regards the sale or lease of real property which was acquired by "dedication" for school purposes only. Unless the "dedication" of such real property was granted in such terms, as to preclude a forfeiture and reversion thereof to the grantor if, or in the event that, it were not used for school purposes, any sale or lease thereof by a school board would probably be held invalid or void, as "ultra vires." (47 A.J. 347.) Even where such a restriction or limitation did exist, however, relief could probably be obtained by

application to the courts, which have often permitted disposition by analogous application of the doctrine of “cy pres,” as in the field of charitable or other trust property. (See Note, 40 A.L.R.2d 556, et seq.; San Francisco Unified School Dist. v. San Francisco, 54 C.A.2d 105, 128 P.2d 696; Mahoney v. Board of Education, 12 C.A. 293, 107 P. 584.)

The scope and extent of the authority and powers of school district trustees, next engages our consideration.

It is, of course, well settled that school district trustees have such powers, and such powers only, as are conferred upon them by the Legislature, either expressly or by necessary implication. (See 47 A.J. 324 et seq., McCulloch et al. v. Bianchini et al., 53 Nev. 101, 292 p. 617; Hard v. DePaoli et al., 56 Nev. 19, 41 P.2d 1054.)

NRS 386.350, entitled “General Powers of Board of Trustees,” provides as follows:

Each board of trustees is hereby given such reasonable and necessary powers, not conflicting with the constitution and laws of the State of Nevada, as may be requisite to attain the ends for which the public schools are established and to promote the welfare of school children.

A careful reading of this statutory provision reasonably shows that the authority and powers thereby conferred upon, and vested in, school district trustees, are sufficiently general and plenary to permit disposition by sale or lease of any real property belonging to a school district for which there exists no present, planned, or contemplated future use.

However, the primary and fundamental test with respect to any disposition of public property, such as school property, by sale or lease, is: Is such disposition authorized by law; is it in the public interest; and would it promote or subserve a public purpose, rather than a private purpose? (See 24 R.C.L. 583, 584, sec. 34, Use of property for other than school purposes.)

In our opinion, the intent and construction of NRS 393.220 does not require the trustees of a school district to sell or lease property not presently suitable or needed for school purposes. Rather, it vests a discretionary power in school district trustees to do so if, and when, they should determine “that the sale or lease of real property belonging to the school district is necessary or for the best interest of the school district \* \* \*.” (6 Ops. Atty. Gen 297, Cal.)

The determination to dispose of school property by sale or lease, because no longer suitable or needed for public purposes, rests, therefore, with school district boards. The decision is a serious one warranting due study and deliberation of both the present and foreseeable prospective needs of the community for such property for school purposes, and exercise of responsible judgment balancing these considerations against the benefits in revenue which might be derived by sale or lease of the property. Also to be considered is an estimate and determination of the anticipated growth of the community requiring corresponding increase in educational facilities.

In other words, since school property is public, or trust, property, specifically acquired and intended for school purpose use, a school district board, in discharge of its trust responsibilities, would only be justified in disposing of such school property if, and when, it could substantially be shown that retention thereof had become incompatible with such maintenance and use, and such sale or lease, upon the terms and conditions proposed, would, in fact, be in the best interest of the trust and school district. (See Los Angeles City School District v. Odell, 1927, 254 P. 570, 200 C. 637; Madachy v. Huntington Horse Show Asso., 192 S.E. 128, 111 A.L.R. 1046, 1048 and annotation immediately following, beginning at page 1051, et seq., Atlas L. Ins. Co. v. Board of Education, 1921, 83 Okla. 12, 200 P. 171; McQuillin, Mun. Corp., 2d Ed., Revised Vol. 3, sec. 1243 (1141), et seq. and sec. 1247 (1145), which states that though lease or use of corporate public property it usually authorized, the “public interest is to be kept steadily in view”; 47 A.J. 346 et seq.; 24 R.C.L. 583, 584; 40 A.L.R.2d 556, 561 and page 621, where the application of the “cy pres” doctrine to charitable or trust property is discussed;

78 C.J.S. 1198, 1223 et seq.; Merritt Independent School Dist. No. 2 of Beckham County v. Jones, 249 P.2d 1007, Mahoney v. San Francisco Board of Education, 107 P. 584, 12 Cal. App. 293; Colwell v. City of Great Falls, 1945, 117 Mont. 126, 157 P.2d 1013, citing many authorities to the effect that if not required or not an interference with public use, public property can be disposed of for private purposes; Blazer v. Dallas City, 171 Ore. 441, 137 P.2d 991, 994.)

Our review of the cases preponderantly shows that the majority and better present view is that municipalities and school boards generally have the constitutional or statutory discretionary power, express or necessarily implied, in the public interest, to dispose of unsuitable or unneeded public property by sale or lease, where not otherwise expressly prohibited, in accordance with our foregoing analysis. The evident and real difficulty, amply shown by a general lack of uniformity in the decisions of the various jurisdictions, arises from the particular exercise of the power in different circumstances, and where there is no express or specific statutory grant or limitation as to its exercise, especially as regards the term which may be fixed in any lease of public property for private purposes.

Such, precisely, is the situation under consideration. We have, as has been indicated, a constitutionally-valid grant of express legislative authority and power vested in school boards to sell or lease school property which, with due regard to the public interest, is, or might be, determined to be unsuitable, or presently and prospectively no longer needed for its original public purpose. A lease, and not a sale, is contemplated. However, there is no express limitation contained in NRS 393.220 as to the length of the term for which a lease may be made of such public property for private use. Some states, probably as a result, and in consequence, of the uncertain views, interpretations and decisions of municipalities, school boards and courts, have seen fit to specify and fix some period which is authorized in leases of public property for private purposes. Our neighboring State of California, for example, has so resolved the matter and the difficulty indicated, by providing as follows:

The governing body of any school district may sell or lease for a term not exceeding 99 years, without a vote of the electors of the district first being taken, any real property belonging to the school district, which is not or will not at the time of delivery of title or possession be needed for school classroom buildings by the district owning it. (Stats., 1943, c. 71, p. 674, section 18601, West's Annotated California Codes, Education.)

The absence of any express statutory provision with respect to the duration or length of a term for which a lease may be made, as in NRS 393.220, certainly increases the responsibility imposed upon school district boards with respect to their exercise of the discretionary power to dispose of public property which may be unsuitable or no longer needed for school purposes, by sale or lease. The absence also further emphasizes the obligation and importance that a school board, in exercising such discretionary power, only so dispose of public trust property when substantially warranted and justifiable. (47 A.J. 346)

And, as regards the fixing of the term of any lease, it can be reasonably be implied that a school board should be able to demonstrate that at the time of exercise of such power, the specific public property involved was not only unsuitable or no longer needed for school purposes, but that also, as a matter of fact and sound judgment, there would, presumptively, be no such need of the particular property for school purposes, for the entire period or term of the proposed lease. Moreover, that the leasing thereof was in the public interest, in order to derive revenue therefrom which could be applied to school needs then actually existing, or, prospectively, reasonably anticipated. In other words, a school district board should be able to justify its leasing of the public property for the proposed specified term in any given lease on the basis that such property would

otherwise “\* \* \* remain idle and utterly worthless and \* \* \* a mere encumbrance on the board of education \* \* \*” for the term of the proposed lease. (111 A.L.R. 1051-1052) To the extent, at least, it can be stated as reasonably certain that such a term in a lease would be held valid.

Having thus defined the framework and scope and extent of a school board’s authority and powers, the lack of uniformity in the decisions of the various cases on the matter become, it is believed, more understandable. Such definition should further indicate why it is impossible to prescribe, or establish, any general or maximum period in the making of any lease of school property. Each case should, and must, be determined on the basis of its particular facts.

This conclusion stated, it is only necessary to add that, a valid statutory grant of authority and power *to sell* having been conferred by NRS 393.220, any term in a lease, regularly made and justifiable in accordance with the criteria herein suggested, cannot, as a matter of law, be held invalid. (See NRS 393.230-393.310; 47 A.J. 346; Williams v. McKenzie, 1924, 203 Ky. 376, 262 S.W. 598; Garrett v. Board of Education, 109 W. Va. 714, 156 S.E. 115; Chicago v. Tribune Co., 1910, 248 Ill. 242, 93 N.E. 757; 133 A.L.R. 1241, 1250 et seq.; 111 A.L.R. 1051, 1054, citing various cases; 11 A.L.R.2d 168; 78 C.J.S. 1202, 1221 et seq.) The authority and power to make an absolute conveyance of public property must certainly be deemed to include the authority and power to make less than an absolute conveyance, or a lease for any period of years which can be reasonably be justified in any given case, on the basis of the criteria outlined herein.

Though obvious, it will, nevertheless, bear statement that any lease of school property for a use which would be prejudicial to the main purpose for which the property was acquired would be improper, and invalid. (See Presley v. Vernon Parrish School Board, 1932, 19 La.App. 217, 139 So. 692; 47 A.J. 344 et seq.)

Where some doubt is felt as regards the period to be fixed in any proposed lease, it is suggested that appropriate provision for its termination in a reasonable period after receipt of notice to that effect to be given by the school board, as lessor, might be a practical means of resolving such doubt.

Also, in order to preclude question concerning the validity of any sale or lease contract agreement, it would seem to be advisable that delivery or possession of the property to purchaser or lessee, respectively, be effected within the term of office of the trustees making such sale or lease; since delivery or possession after expiration of trustees’ terms of office, has, in some instances, been held invalid, on the ground of being an improper infringement upon, and curtailment of, the authority and powers pertaining to the successors in office. (See 43 A.J. 70, Sec. 252; 47 A.J. 378, Sec. 117.)

On the basis of the foregoing analysis, therefore, our answers to the specific questions hereinbefore stated are:

1. (a) The valid statutory authority and power vested in school district boards to sell or lease real property, not suitable or no longer needed for school purposes, is a general one, and its exercise in the interests of the public and the school district, discretionary and not mandatory.

- (b) The only restriction or limitation on such authority and power to dispose of school property by sale or lease is, that a school board determine on a substantial basis, that at the time of exercise of such power, and in its sound judgment, such public property was either unsuitable or no longer, presently or prospectively, reasonably required for school purposes, and that its disposition by sale or lease, and the resulting revenue derived thereby, which could be applied to school purposes and needs, would better serve the public and school district’s interests.

2. As regards the term that may be fixed in any proposed lease of school property, a school board should, on the basis of the particular circumstances involved with respect to such property, be able to justify its

action by a showing that the property was either unsuitable or no longer needed for school purposes; also, that in the exercise of responsible and sound judgment on its part, it had been reasonably determined that there would not be any such need for the entire period covered by the fixed term of the proposed lease; and, finally, that in the public interest, the resulting lease revenue derived could be applied to school needs, actual or prospective, as against such property remaining idle, utterly worthless or unproductive, and a mere encumbrance on the school district board.

If so exercised, we conclude that there is no apparent restriction or limitation on the discretionary power of school boards with respect to any term or period of duration of a lease of school property for private purposes, under the provisions contained in NRS 386.350 and 393.220.

We trust that the foregoing will furnish some clarification of the matter, and prove of some assistance to you in connection with the problem which has led to our foregoing opinion.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-30 Insurance, Department of. Statutory Construction—  
Commissioner of Insurance not authorized to license company to indemnify  
against loss, damage or liability arising from failure of debtor to discharge a  
secured obligation, encumbering either real or personal property.**

CARSON CITY, March 30, 1959

HONORABLE PAUL A. HAMMEL, *Insurance Commissioner, Carson City, Nevada*

Attention: MR. LOUIS T. MASTOS, *Chief Deputy Insurance Commissioner*

DEAR MR. HAMMEL: We have your letter of March 24, 1959, respecting the licensing of Mortgage Guaranty Insurance Corporation. With the letter you have delivered for our examination:

- (1) Restated Articles of Incorporation of the Mortgage Guaranty Insurance Corporation.
- (2) By-laws of the Mortgage Guaranty Insurance Corporation.
- (3) A photostatic copy of the application for annual license made to your department by Mortgage Guaranty Insurance Corporation.

Your request is as follows:

“Prior to our granting such a license, we ask your department to render an opinion as to the legality of such action on our part under NRS 681.030, Class 2, paragraph 6 and related subsections thereunder, or under Paragraph 7(c).”

We have carefully read the above designated documents. The corporation in question has the corporate powers requisite to being licensed in this type of operation. The corporation appears to be well designed, from the standpoint of the content of the Articles

of Incorporation and the by-laws.

By the provisions of its application and the provisions of its Articles of Incorporation it is clear that the corporation seeks to be licensed to insure against failure of debtors to pay their obligations, in secured real estate transactions as distinguished from unsecured types of indebtedness.

We therefore find no fault with the structure of the corporation for the license that it seeks, but are only required to pass upon the sufficiency of the Nevada law to permit the issuance of the license sought.

#### QUESTION

Is the insurance department of the State of Nevada authorized to issue a license to a duly constituted insurance corporation which would permit it to insure creditors against loss by reason of the failure of their debtors to discharge their indebtedness in that limited type of contract in which there is an indebtedness secured by title to, or mortgage upon, or interest in, real or personal property.

#### OPINION

Chapter 681 NRS classifies insurance.

Class 2 thereunder is casualty, fidelity and surety insurance. Subdivision 6 of NRS 681.030 thereunder is fidelity and surety insurance. By the provisions of NRS 681.030, subdivision 6, (b), (1), the following is provided:

6. Fidelity and surety.

(a) \* \* \*

(b) Becoming surety on, or guaranteeing the performance of, any lawful contract except the following:

(1) A contract of indebtedness secured by title to, or mortgage upon, or interest in, real or personal property.

By the provisions of the above subsection it is clear that "fidelity and surety" insurance does not include the type of contract referred to under (b), (1) above, which is the type of insurance for which the applicant seeks a license.

Under NRS 681.030, 7, miscellaneous types of insurance are set forth and distinguished.

Under NRS 681.070, 7, (c), it is provided:

(c) Insurance against loss or damage which may result from the failure of debtors to pay their obligations to the insured and insurance of the payment of money for personal services under contracts of hiring.

It will be observed that the latter part of this subsection 7, (c), respecting the payment of indebtedness for personal services is that type of obligation which would ordinarily be unsecured. It therefore appears that this entire subsection (c) is intended to be inclusive only of those contracts of indebtedness that are unsecured.

It is a well known and established principle of statutory construction that the whole statute must be construed together, to deduct therefrom the legislative intent. See: Sec. 4703, Statutory Construction by Sutherland, under "Whole Statute" interpretation.

Subsection 7 (c), above quoted, standing alone, is susceptible of either of two constructions, i.e., it could be construed as applicable to all debts, secured and unsecured, or it could be construed as limited to unsecured debts.

However, subsection 6 (b), (1), clearly excludes from "fidelity and surety" insurance, all secured real property transactions.

To hold that this applicant corporation might be licensed under the “miscellaneous” classification in subdivision 7 (c), would be contrary to the provision that it may not be licensed under subdivision 6, (b), (1), which would not be warranted when one reflects that the classification of both is under one heading denominated “Class 2.” Such a construction would be by singling out a part of the statute to the neglect of the major classification, and therefore be unwarranted.

For the reasons given it is our opinion that the Legislature intended that no insurance be authorized in this State which would seek to indemnify against damage, loss or liability arising out of failure of a debtor to discharge his secured obligation, appertaining to either real or personal property.

The answer to the interrogatory is in the negative.

We return all documents submitted to us for our examination.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-31 Dairy Products and Substitutes—State Dairy Commission’s authority to fix price for sale of fluid milk and cream, and to prohibit sale of butter and fresh dairy by-products below cost, is constitutional.**

CARSON CITY, March 31, 1959

HONORABLE GRANT SAWYER: *Governor of Nevada, Carson City, Nevada*

DEAR GOVERNOR SAWYER: You have asked this office for its official opinion on the constitutionality of price fixing in the milk industry. The Legislature has passed and there is now before you for approval or disapproval A.B. 150, which would amend certain sections of Chapter 584 of NRS, which chapter is entitled “Dairy Products and Substitutes.”

QUESTION

The problem may be stated in two questions:

1. Does the Legislature have the authority, under the Nevada Constitution, to empower the State Dairy Commission to fix prices at which fluid milk or fluid cream, or both, may be sold by producers, distributors and retailers of the same?
2. Does the Legislature have the authority, under the Nevada Constitution, to prohibit the sale of butter, or fresh dairy by-products, by a distributor or retailer below cost?

OPINION

The State Dairy Commission was created by Chapter 387, Statutes of Nevada 1955, page 736, and amended by Chapter 184, Statutes of Nevada 1957, page 264. The original act, as amended, may be found in NRS 584.325-548.690, inclusive.

The amendment of 1957 provided the authority for price fixing with this language:

Chapter 584 of NRS is hereby amended by adding thereto a new section which shall read as follows:

Each stabilization and marketing plan may contain provisions fixing the price at which fluid milk and fluid cream may be sold by producers,

distributors and retailers and regulating all discounts allowed by producers, distributors and retailers.

This amendment has become NRS 584.577.

Section 14 of A.B. 150, as enacted by the Legislature, prohibits distributors or retailers from selling butter or fresh dairy by-products below cost. It is to be noted that the Commission is not empowered to fix prices for such dairy by-products.

In our opinion, if the Legislature has the authority, under our Constitution, to authorize the State Dairy Commission to fix prices at which fluid milk or fluid cream, or both, may be sold by producers, distributors and retailers of the same, then it certainly has the power to prohibit the sale by said producers, distributors and retailers of butter or fresh dairy by-products below cost.

It is common knowledge that the effect to the seller of a sale of fluid milk or cream for less than the price fixed can be accomplished indirectly by selling the fluid milk or cream for the established price and by selling the butter or fresh dairy by-products at less than cost. In this manner the seller, while technically complying with the law which has established the price for the sale of fluid milk or cream, actually evades the law, undercuts his competitor, and gains an advantage. It seems to us that it is futile for the Dairy Commission to establish a fixed price for fluid milk or fluid cream for the purposes set forth in the law so long as its action can be circumvented by a combination sale of fluid milk and fluid cream and butter and fresh dairy by-products, where the said milk or cream is sold at a fixed price and the by-products for less than cost.

In 1937 the Supreme Court of Kansas considered a similar situation. *Limpp v. Dodge*, 73 P. 2d 1001. Here the court held that an operator of a cream station, who paid the posted price for cream, but in addition thereto, gave the sellers of cream the right to purchase gasoline at his filling station less than that charged nonsellers of cream, was in violation of the law, stating that such procedure was a scheme and a subterfuge to evade compliance with statutory provisions.

New York State passed a statute to meet this situation. Section 312(e) of the New York Agriculture and Market Act of 1933 provides:

After the board shall have fixed prices to be charged or paid for milk in any form \* \* \* it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price \* \* \*, and no method or device shall be lawful whereby milk is bought or sold \* \* \* at a price less or more than such price \* \* \* whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

We now turn to the principal question, the constitutionality of the price fixing authority given to the State Dairy Commission by the Legislature.

22 American Jurisprudence, Section 77, dealing with price fixing, states:

Regulations fixing the prices at which milk is to be purchased or sold have been recognized in a number of recent cases as within the constitutional power of the legislature, to the extent that they are not so arbitrary, discriminatory, or irrelevant to the legislative purpose as to amount to an unwarranted interference with individual freedom. This power is upheld as necessary to save producers and the consuming public from price cutting so destructive as to endanger the supply. The fact that the regulations may produce special benefit or advantage to the dairy farmers or

milk producers does not render such legislation unconstitutional as class legislation. The power to fix prices may be delegated to a milk control board so long as the legislature sets the standard, leaving to the board its proper administrative function.

We are aware of no Nevada Supreme Court decisions on this question. Article I, Section 8, of the Constitution of Nevada, reads, in part, as follows:

No person shall be \* \* \* deprived of life, liberty, or property, without due process of law.

This language is identical with language contained in the Fifth and Fourteenth Amendments to the Constitution of the United States and, therefore, the decisions of the United States Supreme Court, holding that state laws imposing price control on milk do not violate the Federal Constitution, are in point.

There are many decisions of the United States Supreme Court on this question, too numerous to cite here.

In 1934 the United States Supreme Court had before it the case of *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505, 89 A.L.R. 1469. This decision is the leading case on this subject and the rule thereof has been followed by the United States Supreme Court and other courts.

The question for decision in the *Nebbia* case was whether the Federal Constitution prohibits a state from fixing the selling price of milk. We quote from Mr. Justice Roberts' opinion as found in 89 A.L.R. At pages 1474 and 1475 the learned Justice says:

Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the state of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862 and subsequent statutes, have been carried in to the general codification known as the Agriculture and Market Law. A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control. The producer or dairy farmer is in certain circumstances liable to have his herd quarantined against bovine tuberculosis; is limited in the importation of dairy cattle to those free from Bang's disease; is subject to rules governing the care and feeding of his cows and the care of the milk produced, the condition and surrounding of his barns and buildings used for production of milk, the utensils used, and the person employed in milking. Proprietors of milk gathering station or processing plants are subject to regulation, and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices. In addition there is a large volume of legislation intended to promote cleanliness and fair trade practices, affecting all who are engaged in the industry. \* \* \*

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for the government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. \* \* \*

At page 1476 we find the following language:

\* \* \* the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community. The state may control the use of property in various ways \* \* \*.

And finally, at pages 1483 and 1484, the court concludes:

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied \* \* \*. Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.

And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.

The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. \* \* \*

Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one

end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning provisions of the Agriculture and Markets Law here drawn into question.

The Nevada Legislature has, in clear terms, declared as follows:

NRS 584.390 The production and distribution of fluid milk and of fluid cream is hereby declared to be a business affected with a public interest. The provisions of NRS 584.325 to 584.690, inclusive, are enacted in the exercise of police powers of this state for the purpose of protecting the health and welfare of the people of this state.

NRS 584.395 The legislature declares that:

1. Fluid milk and fluid cream are necessary articles of food for human consumption.

2. The production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare.

3. The production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of Nevada is an industry affecting the public health and welfare.

4. It is the policy of this state to promote, foster and encourage intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices and improper accounting for milk purchased from producers.

NRS 584.400 It is recognized by the legislature that conditions within the milk industry of this state are such that it is necessary to establish marketing areas wherein different regulations are necessary, and for that purpose the commission shall have the administrative authority, with such additional duties as are herein prescribed, after investigation and public hearing, to prescribe such marketing areas and modify the same when advisable or necessary.

NRS 584.405 The foregoing statements in NRS 584.390 to 584.400, inclusive, of facts, policy and application of NRS 584.325 to 584.690, inclusive, are hereby declared a matter of legislative determination.

Section 2 of A.B. 150 would amend NRS 584.410, section 2, to read as follows:

To authorize and enable the commission to prescribe marketing areas and to fix prices at which fluid milk or fluid cream, or both, may be sold by producers, distributors and retailers, which areas and prices are necessary due to varying factors of costs of production, health regulations transportation and other factors in the marketing areas of this state; but the price of fluid milk or fluid cream within any marketing area shall be uniform for all purchasers of fluid milk or fluid cream or similar grade or quality under like terms and conditions.

Section 3 of A.B. 150 would amend NRS 584.415 by adding a section 3 to read as follows:

The terms and conditions under which producers, distributors and retailers may sell, purchase and distribute fluid milk or fluid cream shall be established by the commission for the purpose of insuring an adequate and continuous supply of pure, fresh, wholesome fluid milk and fluid cream to consumers at fair and reasonable prices in the several localities and markets of the state and under the varying conditions of the production and distribution.

Giving full weight to the legislative determination of policy and purposes, as set forth above, and applying the rule of the *Nebbia* case, we conclude that the State Dairy Commission Act, NRS 584.325-584.690, inclusive, as it now stands, and as it will be if A.B. 150 becomes law, does not violate the due process clause, or any other clause, of the Constitution of the State of Nevada.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-32 Jury Duty—Members of the State Fish and Game Commission are not exempt from jury duty. NRS 6.020 construed.**

CARSON CITY, April 1, 1959

MR. FRANK W. GROVES, *Director, Nevada Fish and Game Commission, Post Office Box 678, Reno, Nevada*

DEAR MR. GROVES: Your letter of March 19, 1959, requested our opinion on the following question:

Are members of the Fish and Game Commission exempt from jury duty when it would interfere with their attendance at official commission hearings?

OPINION

To answer the foregoing question it will be necessary to discuss the nature of the duty of a person to serve on a jury and the interpretation of the statute exempting certain named persons from jury duty.

The duty to serve on a jury is discussed in *American Jurisprudence*, Volume 21, page 62.

Jury service is not a right or privilege which may be claimed, but is an obligation imposed by law upon those who come within a designated class possessing the required qualifications. The State has an inherent and indisputable right to the service of citizens as jurors. Jury service is one of the burdens of citizenship, and not merely one of the privileges; it is a duty of all citizens to undertake this burden when called upon so to do unless they are exempted or entitled to be excused.

With reference to exemption from jury service, it is said at page 66 of the same source:

Such service is one of the general duties and burdens of citizenship and any exemption from such general duty and service should be strictly construed. Therefore, in order that one summoned as a juror may avail himself of an exemption he must show that his case falls strictly within it.

Our Legislature has provided that certain persons shall be exempt from jury service. (See NRS 6.020.) Among those exempt are federal and state officers, physicians, morticians, locomotive engineers, ministers of the gospel, telephone operators, mail carriers, and members of fire departments. There is no doubt that members of the Fish and Game Commission are state officers as distinguished from state employees. (See 42 American Jurisprudence 884 et seq.) However, they are not state officers on a full-time basis. Their time for the most part is devoted to private business and earning a living, as they receive no compensation for the service they perform on the commission. Furthermore, it is noted that those various persons exempt by law from jury duty have one thing in common. They all serve the public in some capacity on a full-time basis. The inconvenience and hardship the public could suffer if those individuals are not available to serve in their professional work or occupation outweighs their duty to serve on the jury. That is why they are exempt.

Applying a strict interpretation to the exemption statute, we do not think the members of the Fish and Game Commission are exempt from jury duty. Certainly they, like members of other state boards and commissions, serve an important function, but to liberally construe the exemption statute, would result in depriving juries of some of the most qualified individuals in our State. This certainly was not the result the Legislature intended in enacting the statute exempting certain persons from jury duty.

We realize the situation could arise whereby a member of the commission is subject to jury duty at a time he is called upon to attend an official meeting of the commission, but generally this won't happen. As a rule, courts are in session during the week and the commission meetings are on the weekends.

We conclude that the members of the Fish and Game Commission are not entitled to be exempt from jury duty as a matter of right.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-33 Constitutional Law—Statutory provisions prohibiting outdoor advertising by hotels, inns, motels, or motor courts, and imposing other exactions upon such businesses, construed as exercise of state's police power, held reasonable, and not arbitrary or capricious, so as to contravene guarantees, inhibitions or prohibitions contained in State and Federal Constitutions. Such business enterprises are affected with a public interest, and any regulation aimed at controlling or eliminating certain commonly known abuses and evils connected with the conduct of such establishments, if based upon reasonable grounds and appropriate classification, must also be deemed valid.**

CARSON CITY, April 2, 1959

HONORABLE GRANT SAWYER, *Governor of Nevada, Carson City, Nevada*

DEAR GOVERNOR SAWYER: As requested, we herewith submit our opinion with respect to the constitutionality of A.B. 425, passed by the Legislature, and presently before you for

appropriate action.

#### OPINION

It is assumed that any question concerning the constitutionality of the measure indicated would be predicated on state and federal constitutional guarantees prohibiting class legislation, impairment of the freedom and obligation of contract, deprivation of property without due process of law, denial of the equal protection of the law, denial of the right to pursue a lawful business, and denial of the right to possess and enjoy the use of property or pursue a legitimate occupation or business. (U.S. Const., Amend. 14; Art. I, secs. 1 and 8, Nev. Const.)

The right to engage in lawful, useful and productive labor, or to engage in a lawful business, is, undoubtedly, "property" within the meaning of the due process clause of State and Federal Constitutions, subject only to such reasonable restrictions and limitations as may be imposed by legitimate exercise by a state of its inherent police powers in aid of public health, morals, safety, or welfare.

From earliest times, the business of conducting a rooming house, or innkeeping, though regarded as a legitimate one, in which all persons similarly situated are lawfully entitled to engage, has also been considered, so far concerned with the health, morals and welfare of the public, as necessitating and justifying regulation under the police power. (12 C.J. 928, 929; 14 R.C.L. 493; 11 A.J. 1063 et seq., Secs. 295, 296; 22 A.L.R.2d 774-802; State v. Norval Hotel Co., 103 Ohio St. 361, 133 N.E. 75, 19 A.L.R. 637; State v. City of Billings, 255 P. 11, 79 Mt. 25, 54 A.L.R. 1091; Cutsinger v. City of Atlanta et al., 142 Ga. 555, 83 S.E. 263; 28 A.J. 557-561, Secs. 29-35.) As viewed by authorities in general, where property is devoted to the business of a hotel and held out to the public as a place where transient persons will be received as guests for compensation, it is affected with a public interest, and the business and use are subject to reasonable public regulation, through exercise of police power, as permitted by State and Federal Constitutions. (State v. Norval Hotel Co., supra.)

Legislatures are deemed to possess a large measure of discretion in determining what the public interest requires and what means should be taken to protect such interests. "\* \* \* The field for the legitimate exercise of the police power is coextensive with the changing needs of society \* \* \*. All rational presumptions are in favor of the validity of an act of the legislative department of the government." (Merit Oil Co. v. Director of Division of Necessaries of Life, 319 Mass. 301, 65 N.E.2d 529, 532; State v. Norval Hotel Co., supra; In Re Bartz, 47 W.2d 161, 287 P.2d 119; King v. Board of Regents, 65 Nev. 533, 200 P.2d 221.)

However, the foregoing does not mean that a legislature may impose unreasonable and arbitrary or capricious exactions or requirements which have no substantial relation to the public health, morals, safety, or welfare. When public authorities have attempted to do so, the courts have generally, and properly, held regulation of such character violative of the state and federal constitutional guarantees herein-before mentioned.

It follows, therefore, that the determination of the validity of any regulation and exercise of the police power necessarily involves a factual analysis of the problem and the evil sought to be remedied which confronted the Legislature at the time that it acted with respect thereto, and whether or not the regulatory provisions adopted do, in fact, have a substantial relation to the public interest, so as to be deemed reasonable. This, uniformly, has been the test and criterion of the courts, in determinations as to the validity of any exercise of the police power. (Munn v. State of Illinois, 94 U.S. 113, 24 L.Ed. 77; Merit Oil Co. v. Director of Division of Necessaries of Life, supra; Ex parte Kazas, 70 P.2d 962, 22 C.A. 2d 161; State v. Yocum, 136 Fla. 246, 186 So. 448, 121 A.L.R. 270 and Note at p. 275, et seq.; Adams v. Miami Beach Hotel Assn., 77 So.2d 465; Ex parte Nash, 55 Nev. 92, 26 P. 2d 353; Alper et al. v. L. V. Motel Ass'n., No. 3989, filed May 14, 1958, Nevada Supreme Court.)

The problem, and pertinent circumstances relating thereto, confronting the Legislature in connection with its passage of the regulation in question, can fairly be stated as follows:

The economy of Nevada, particularly in the two counties most largely populated, is substantially dependent upon the tourist trade, necessitating the availability of considerable facilities in rooms for their accommodation. As a result, there is a large concentration of hotels, motels, inns, and motor courts in such localities, with inevitable keen competition among those engaged in such businesses for the patronage of the tourists visiting such counties. Experience has shown that some operators of such businesses have, and continue to resort to unfair and fraudulent practices, in the advertising means employed by them, in diverting such tourist patronage from their competitors to themselves. In trying to combat such unfair business practices, other similar establishments are drawn in to similar practices with the result that this industry, of substantial economic importance to such communities, is seriously affected financially, and generally criticized and held in disrepute by tourists who have been victimized by the unfair and gouging practices of some. The unfair practices principally involved are: misleading, deceptive and fraudulent outdoor sign advertisements respecting the availability of, and prices charged for, accommodations, and (during the height of the tourist season and holidays or busy weekends), the requirement that patrons rent and pay for accommodations desired, for a specified number of days, notwithstanding that they will not require the same for such period of time. As stated in *Adams v. Miami Beach Hotel Asso.*, supra: "It is common knowledge that travelers are often confronted with a sign proposing comfortable lodging at very modest prices but find that all rooms at advertised prices are taken and that only available lodging is two or three times the price advertised."

It may be fairly presumed that it was known to the Legislature that efforts on the part of the industry itself to eliminate such unfair practices had substantially failed, as had also the efforts of local public authorities to "police" such violations on the part of some of the owners or operators of these establishments. The substantial welfare and interest of both the community and the traveling public can reasonably be deemed to be involved and affected by such unfair and fraudulent practices, if unregulated and allowed to continue.

Viewed against the foregoing background and experience, we next consider the provisions of the legislatively-proposed regulation and its reasonableness as an exercise of police power in relation to protection of the public interest under such circumstances.

The circumstances prevailing at the time of enactment of a statute are to be considered in determining whether a classification is arbitrary or unrelated to the object of the statute. The authority and the duty to ascertain the facts, which will justify classified legislation, must rest with the Legislature in the first instance, and not with the courts, and the decision of the Legislature in that respect is ordinarily conclusive on the courts. All presumptions and intendments favor the validity of a statute. Unconstitutionality must be clear, positive and unmistakably appear, and when legislation is questioned, the party doing so has the burden of showing it to be arbitrary; if any state of facts reasonably can be conceived that would sustain it, existence of that state of facts is presumed. That the legislation is not considered the wisest or most suitable means of accomplishing the objects of the statute is irrelevant in determining the constitutionality of the legislative enactment. The police power of the state is not limited to prohibition of acts which are *malum in se*, but if necessary to prevent the perpetration of fraud, the Legislature may enact laws prohibiting acts otherwise harmless in themselves. (*In Re Bartz*, supra; *Riggins v. Riggins*, 139 CA2d 712, 294 P.2d 751; *Subsequent Injuries Fund v. The Industrial Accident Commission*, 48 C2d 365, 310 P.2d 7; *Adams v. Miami Beach Hotel Asso.*, supra; *Merit Oil Co. v. Director of Division of Necessaries of Life*, supra; *State v. Norval Hotel Co.*, supra; *State v. City of Billings*, supra; *Semler v. Oregon State Board of Dental Examiners*, 148 Or. 50, 34 P.2d 311 *aff'd*. 294 U.S. 608-613; *People v. Griswold*,

213 N.Y. 92, 106 N.E. 929, L.R.A. 1915 D 538; State ex rel Hosack v. Yocum, supra; Cutsinger v. City of Atlanta et al., supra; Allinder v. Homewood, 254 Ala. 525, 49 So.2d 108, 22 A.L.R.2d 763; Dade County v. Gould, 99 So. 236; Raleigh v. Morand, 247 N.C. 363, 100 S.E.2d 870; 28 A.J. 560-561; Patsone v. Com. of Pennsylvania, 232 U.S. 138, 144, 34 S.Ct. 281, 282, 58 L.Ed 539; Alper et al. v. L.V. Motel Assn., supra; Separation of Powers, Art. III, Sec. 1, Nev. Const.; King v. Board of Regents, supra; Ex parte Nash, supra, 11 A.J. 1063 et seq. Sections 295, 296; 28 A.J. 560-561, Sec. 34).

Did the Legislature, on the basis of the regulations contained in A.B. 425, go beyond the proper exercise of the police power, so as to come within the inhibitions and prohibitions of State or Federal Constitutions? For the specific answer to this question, reference must, of course, be made to the regulations and classification therein contained.

The Act expressly: (a) prohibits outdoor sign advertising with reference to any rates at which rooms may be secured at such establishment; advertising which employs terminology with reference to special rates for rooms at such establishment; and advertising the corporate or fictitious name of such establishment, or membership in any organization, the name of which pertains to, or can be reasonably construed as pertaining to, the rate of rooms at such establishment; (b) requires owners or operators of hotels, inns, motels or motor courts within the state to post, in a conspicuous place in their offices and in every bedroom of such establishments, a printed schedule of their rates by the day for lodging in said accommodations, in accordance with the number of persons using same, or additional beds used; (c) requires the issuance by said establishment of receipts to patrons, reflecting the type of accommodation supplied, the number of persons occupying such accommodations and the rate charged each person therefor; (d) requires such establishments to maintain registration cards for each room, reflecting the same data as indicated in "(c)"; and (e) makes such provisions applicable to any such establishment in a county having a population of 25,000 or more persons.

On the basis of a review of relevant authorities, of which only a small number have herein been cited, it is our considered opinion that the foregoing statutory provisions, as set forth in (a), (b), (c), and (d), do have a reasonable relation to the proposed object or purpose, and problem, which the Legislature had in mind, and that they constitute a valid exercise of police power for the protection of the public against fraud and deception in such businesses, and are justified further in the public interest and welfare. In fact, there is good authority (of which said industry might well be advised), that legislative power and regulation might have gone even farther, and prescribed and fixed the rates which should be charged patrons utilizing the facilities of such establishments, as has been done in other times. (28 A.J. 560-561, Sec. 34.)

Regarding the prohibition set forth in "(a)" above, it may additionally be pointed out that regulation of any kind is, essentially, *pro tanto*, prohibition. Also, that while the courts have not always been of the same mind as to the validity of legislative prohibitions under the police power as regards accepted use and enjoyment of *private* property, there is general uniformity in the judicial determinations on this point as regards the use and enjoyment of even private property, "affected with a public interest," where the prohibition may be deemed reasonable and in the public interest and welfare. (Chas. Wolff Packing Co. v. Court of Industrial Relations 262 U.S. 522; Nebbia v. New York, 291 U.S. 502, 70 L.Ed. 940; Miami Laundry Co. v. Florida Dry Cleaning Co., 131 Fla. 1, 183 So. 759, 119 A.L.R. 956; Semler v. Oregon State Board of Dental Examiners, supra; Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563; D.S. Kresge Co. v. Ottinger, 29 F.2d 762; Roschen v. Ward, 279 U.S. 337, 49 S.Ct. 336, 63 L.Ed. 722.)

There remains, for separate consideration, the requirement indicated in "(e)," above.

Does such application of the provisions of the Act, only in counties having a population of 25,000 or more persons, constitute a reasonable legislative classification, or does such application contravene any state or federal constitutional prohibition, as a denial of equal protection of the law?

Our research of the law on this point has also led us to the considered opinion that it, too, is valid, and a proper exercise of the state's police power.

The majority and preponderantly accepted rule is, that a legislature may, within the equal protection clause, classify regulatory enactments with reference to the location where the evil aimed at is most harmful. Classification on the basis of counties or population does not constitute a contravention *per se*, of the constitutional guarantee of equal protection of the law. Statutes, based upon such classification have been construed as general statutes having uniform operation. Such classification has also been deemed valid as based on the practical necessities of administration in dealing with a population unequally distributed over the State. It is not a requirement of equal protection that all evils of the same kind be eradicated or none at all. That others, guilty of the same acts, may go unpunished, is not enough to invalidate a law, which otherwise reasonably defines those from whom, or the places in which, the evil aimed at, is mainly to be feared. "A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience." (*Patsone v. Com. of Pennsylvania*, *supra*, quoted approvingly by the Nevada Supreme Court in *Alper et al. v. L.V. Motel Assn.*, *supra*. See also, *Beasley v. Cahoon*, 109 Fla. 106, 147 So. 288; 16 A.C.J.S. 323 et seq., sec. 506, and footnote citations; *Allinder v. Homewood*, *supra*, and cases cited therein; *Schmidt v. City of Cornelius*, 316 P.2d 511, 211 Or. 505.) Express constitutional prohibition alone invalidates and precludes such classification, and we find none in the Nevada Constitution. (Art. IV, Sections 20 and 21, Nev. Const.) (See NRS 244.015, Five-Man County Commission authorized in counties having a population of 25,000 or more persons.)

Before concluding, note may properly be made that our opinion fully contemplates the due process clause of State and Federal Constitutions. Our research shows that none of the statutory provisions of A.B. 425 can be deemed to violate such constitutional guarantee. "\* \* \* In the language of the cases, the owner (of private property) by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulations to the extent of that interest, although the property continues to belong to its private owners and to be entitled to protection accordingly." (*Chas. Wolff Packing Co. v. Court of Industrial Relations*, *supra*.)

We therefore submit it as our considered opinion that all of the aforementioned statutory prohibitions of A.B. 425 are a reasonable legislative exercise of the state's police power, and that they do not violate or contravene any guarantees, inhibitions or prohibitions contained either in our State or Federal Constitutions. We approve the bill as to constitutionality.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-34 Public Employees Retirement Board—Beneficiaries, and, upon their death, their estates, have a vested right and interest in, and to, accrued pro-rata share of monthly payments or allowances, to and including date of beneficiary's death.**

CARSON CITY, April 3, 1959

MR. KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, Carson City, Nevada*

DEAR MR. BUCK: Reference is made to your letter dated March 9, 1959, in which you

request the opinion of this office on the questions hereinafter stated.

#### QUESTIONS

1. Under a retirement system providing for retrospective monthly payment of allowance "for the life of the beneficiary," would the death of such beneficiary prior to the end of the month operate to cancel the monthly allowance payment in full?

OR

2. Under the factual circumstances stated in "1" above, would the estate of a deceased beneficiary be entitled to receive the pro-rated share of the monthly payment allowance to the date of a beneficiary's death?

#### OPINION

NRS 286.580 provides for, and authorizes, conversion of service retirement allowances. NRS 286.590 sets forth five different options offered to members of the retirement system for conversion of allowances. A careful reading of all five options shows that payment of converted allowances are for the period measured by "the member's life," "life of the beneficiary," and "life of his spouse," insofar as pertinent to your inquiry.

Your letter indicates that allowances are paid monthly, checks for said allowance payments being mailed on the last business day of the month for which the check is issued.

The present, general rule of law is that retirement pension systems, at least when member of beneficiary has acquired a "pensionable status," should be liberally construed. At such point, member of beneficiary is generally conceded to have a vested right or interest in any particular payment due under a retirement pension plan or system. (98 A.L.R. 507; *Pearson v. Los Angeles County*, 1957, 319 P.2d 624, 49 C.2d 523; *Abbott v. City of Los Angeles*, 326 P.2d 484; *Hafey v. City of Berkeley*, 1958, 329 P.2d 711.)

It is also quite evident that the pension fund out of which payments are to be made to members or beneficiaries, constitutes trust moneys, and that there is imposed upon those persons charged with the responsibility of administering same, a duty to safeguard such funds, and to make payments therefrom only as authorized by law to those members or beneficiaries eligible thereunder.

The law expressly limits and measures payments, and the amounts of payments, as hereinbefore indicated, to the "member's life," the "life of the beneficiary," or the "life of his spouse." The cut-off date of any authorized payment to member, beneficiary, or spouse is, therefore, the date of death of any of these persons.

Since payment of pension or allowance is made on a monthly basis, and checks are, in fact, sent out on the last day of the month for which the check is issued, we reach the following conclusions on the questions here under consideration:

1. The death of a member, beneficiary, or spouse, prior to the end of the month would not operate to authorize the cancellation of the monthly payment of pension or allowance to such, or any of the foregoing, persons.

2. The estate of a deceased beneficiary or spouse would be entitled to receive payment of the pro-rated share of the monthly allowance payment to the date of a beneficiary's death.

We trust that the foregoing sufficiently clarifies and answers the specific questions referred to us in connection with this matter.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-35 Constitutional Law—Senate Bill Number 289, if approved, would be constitutional. S.B. No. 295, if approved, would be constitutional. S.B. No. 294, if approved, would be unconstitutional.**

CARSON CITY, April 6, 1959

HONORABLE GRANT SAWYER, *Governor of Nevada, Carson City, Nevada*

DEAR GOVERNOR SAWYER: Pursuant to your request of recent date that this department review as to constitutionality, Senate Bill Numbers 289, 294 and 295, now transmitted to your office for approval, we have made careful study of the bills and of constitutional provisions that appear relevant, and by this opinion set out our conclusions respecting the constitutionality of each of these bills.

QUESTION

Would Senate Bills Numbers 289, 294 and 295 be constitutional if approved?

OPINION

These bills are very similar and contain provisions respecting the manner the limitations upon and the limits of investment of the trust funds of three entities of government, hereinafter mentioned.

Senate Bill Number 289 appertains to the Nevada Industrial Commission; Senate Bill Number 294 appertains to the University of Nevada; and Senate Bill Number 295 appertains to the Public Employees Retirement Board.

All of these bill are similar in that:

(a) The governing body may employ investment counsel and may invest and reinvest trust moneys with the assistance of such counsel and as provided and limited;

(b) All investments made by the governing body are subject to review quarterly by the state board of finance, and if the state board of finance finds that the investment policies pursued by the governing body are not in the best interests of the fund or the State, the state board of finance may require the governing body to discharge the investment counsel employed by it;

(c) The governing body may invest and reinvest its trust funds within the limits set in the act, in:

(1) Bonds or other evidences of indebtedness issued by the United States of America, its agencies and instrumentalities;

(2) Bonds or other evidences of indebtedness which are issued by the Dominion of Canada, its provinces, municipal corporations, etc.;

(3) Bonds or other evidences of indebtedness issued by a sovereign state of the United States or of the District of Columbia.

(4) Bonds or other evidences of indebtedness which constitute a direct general obligation of any county, city, town, village, school district, sanitary district, park district or other political subdivision or municipal corporation of any state of the United States or District of Columbia, which meet certain enumerated specific requirements and tests, therein set out;

(5) Bonds or other evidences of indebtedness, of certain public utilities, which meet certain enumerated tests;

(6) Bonds or other evidences of indebtedness issued by a local improvement district, of this or another state of the United States, which meet certain enumerated tests;

(7) Bonds, debentures, notes and other evidences of indebtedness, issued and guaranteed by solvent private corporations which meet certain tests;

(8) Equipment trust obligations or certificates evidencing an interest in or lien upon transportation equipment, which meet certain enumerated tests;

(9) Preferred or guaranteed stocks or shares of any solvent institution or corporation, of any state, or the district or territory which meets certain tests;

(10) Non-assessable common stocks of private corporations, which meet certain tests, within the limits set both as to the percentage of the total fund to be invested in one corporation and in all corporations;

(11) Entire first mortgages on improved unencumbered real property, located in Nevada or any other state, which meet certain subjective tests, within the limits set as to the amount to be loaned to any one borrower, terms of repayment, etc.;

(12) Savings accounts in banks, which meet certain subjective tests, in amounts, percentages, etc.; as provided in the act.

We shall first consider the statutes and constitutional provisions particularly applicable to the Nevada Industrial Commission, and thereafter give like consideration to the other two entities named.

The original Nevada Industrial Commission Act is Chapter 111, Statutes of Nevada 1913, page 137. This Act was amended from time to time and as amended was reenacted by Chapter 168, Statutes 1947, page 569. As amended it is now contained in Chapter NRS 616.

The Nevada Industrial Commission Act has never been a burden upon the taxpayers of Nevada by support through ad valorem or other general taxation. It is pointed out in *State v. McMillan*, 36 Nev. 383, at 388, that the Act appropriated \$2,000 to the commission, with which to start its operation, contained an inference of repayment, and that the sum was repaid to the state treasury out of premiums collected from employers, covered by the Act. The sum that is now sought to be regulated as to its investment is a sum collected from employers, after deduction of cost of operation of the commission. Likewise the building which it now occupies and the building in process of construction is from funds obtained entirely in this manner. Chapter 177, Statutes 1923, page 315, authorized the commission to purchase the present building from such funds. See also, Attorney General's Opinion No. 55-86 of July 20, 1955, in which it is held that the building is tax exempt. In all respects then this fund in question may be said to be a "special fund," built up by an agency of the State in a proprietary capacity, in which the ad valorem, or other general, taxpayers, as such, are not interested.

\* \* \* \* \*

The Public Employees Retirement Act is Chapter 181, Statutes 1947, page 623, as amended from time to time. (Chapter 286 NRS.) Prior to the present legislative session, just closed, which considered, and may have passed certain statutes, already approved, the contribution by all employees of State Government (as well as certain employees of participating members of local government) whose salary was less than \$400 per month, was five (5%) percent of the salary, and as to those whose salary was over \$400 per month, the contribution by the employee was five (5%) percent per month on \$400. In addition there was a contribution for administrative purposes of twenty-five (25¢) cents per month. Such was the employee contribution as provided in NRS 286.410.

The contributions of the State to the Public Employees Retirement Trust Fund, under the Act, is provided by NRS 286.460. This section reads as follows:

286.460 Contribution of the state as a public employer.

1. Each department, board, commission, or other agency of the State of

Nevada, which pays salaries of its officers or employees in whole or part from funds received from sources other than money appropriated from the state general fund, is authorized and directed to pay public employer contributions, or the proper portion thereof, to the system from the funds of the department, board, commission or agency.

2. Public employer contributions for salaries paid from the state general fund shall be paid directly by each department, board, commission or other agency concerned, and allowance therefore shall be made in the appropriation made for each such department, board, commission or other state agency.

From the foregoing it will be observed that under subsection 1 provision is made as to the manner of payment of the contribution for an agency such as the Nevada Industrial Commission, whose funds are not derived from the state general fund; whereas in subdivision 2 provision is made for the contribution to the trust fund by agencies that receive an appropriation from the general fund. As to this latter group of departments, boards, commissions and agencies which would clearly include the Public Service Commission, the Tax Commission, the Insurance Department, the Labor Commission and the Department of the Attorney General, to mention only a few that quickly come to mind, the allowance for this item of contributions to the Public Employees Retirement System, are taken care of in the budget of the department, we are informed. It is budgeted for and from month to month as to each covered employee, paid to the Public Employees Retirement System by the State from the general fund and charged against the appropriate department, board, commission or agency.

Thus, we have a matching fund contributed by the State. When an employee resigns his public employment, without qualifying for retirement benefits, or when he dies in office, he or his estate as the case may be, may take from the fund without interest the amount contributed (not including the cost of administration, before mentioned), but he may not withdraw the sum that has been contributed in his account by the State. Neither may the State withdraw such sums, or any sums at any time, for any purpose, for that matter, from the Public Employees Retirement Trust Fund. Thus, sums that are contributed by the State to the trust fund for those employees who never qualify for retirement, augment the funds, and add to its actuarial solvency. Also the earnings from the fund, which this bill seeks to increase, add to the actuarial solvency of the system that has been established.

We have thus shown, and this is of great significance, that when money is from month to month contributed by the State to the Public Employees Retirement Trust Fund, it is completely beyond the domination and control of the State to withdraw. It is then in trust for the purposes of the Act, protected by the state and national constitutional guaranties which preclude legislation that impairs the obligations of contract for workers of the State already retired and relying upon this "fringe benefit," have a contract right to rely upon its continuance, which right is protected by constitutional prohibitions against impairment.

Both of the entities heretofore mentioned (Nevada Industrial Commission and the Public Employees Retirement System) are of statutory origin. Such is not the case as to the University of Nevada.

Article XI of the Constitution provides for education. Sections 4 to 10 thereof have reference to the University of Nevada. Section 4 reads as follows:

The legislature shall provide for the establishment of a State University which shall embrace departments of Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by law.

Section 6 thereof provides as follows:

In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

We now approach the question of the source of funds that are placed under the control of the Board of Regents of the University of Nevada, in addition to those funds provided by legislative appropriation under Section 6 of Article XI of the Constitution. NRS 396.330 makes provision for the acceptance, under the terms and conditions of the grants of the 90,000-acre grant, and the 72-section grant of the United States, prior to February 13, 1867. NRS 396.340 makes provision for the acceptance by the State of Nevada for its University, under the administration of its Board of Regents of annual college aid appropriations, by the United States, under an act of August 30, 1890, for the benefit of its College of Agriculture and Mechanic Arts.

NRS 396.370 provides that all rents, issues and profits (interests, etc.) from the sale of the 90,000-acre grant and the 72-section grant, may be used annually in the administration of the University, but that the principal from such sales shall constitute an irreducible item to be held to perpetuity as a permanent fund for investment.

NRS 396.380 provides as follows:

1. The board of regents of the University of Nevada are the sole trustees to receive and disburse all funds of the university for the purposes provided in NRS 396.370.
2. The board of regents shall control the expenditures of all moneys appropriated for the support and maintenance of the university and all moneys received from any source whatever.

NRS 396.420 makes provision for the acceptance and administration of property by the regents of the University, through administration of the estates of deceased persons as well as gifts inter vivos. This section provides as follows:

1. The board of regents shall have the power to accept and take in the name of the University of Nevada, by grant, gift, devise or bequest, any property for the use of the University of Nevada, or of any college thereof, or of any professorship, chair or scholarship therein, or for the library workshops, farms, students' loan fund, or any other purpose appropriate to the university.
2. Such property shall be taken, received, held, managed, invested, and the proceeds thereof used, bestowed and applied by the board of regents for the purposes, provisions and conditions prescribed by the respective grant, gift, devise or bequest.
3. Nothing in this chapter shall be deemed to prohibit the State of Nevada from accepting and taking by grant, devise or bequest any property for the use and benefit of the University of Nevada.

To summarize, then, the University of Nevada received money and property for its purposes, to be administered by its Board of Regents, from congressional appropriations, for the prescribed uses, from the proceeds from its 90,000-acre grant and its 72-section-grant, and through gifts inter vivos or by administration of estates of deceased persons. It has the proceeds of the two land grants to invest as principal sums to remain forever inviolate and the earnings therefrom to be available for annual expenditure. We have thus

traced the origin of its funds and the limitations placed upon the use of each.

Remembering the general rule that the Legislature possesses unlimited legislative power, except as expressly limited by the Federal and State Constitutions, (*Gibson v. Mason*, 5 Nev. 283) we turn now to the provisions of the State Constitution that may be seriously considered as invalidating the proposed acts. We know of no provisions of the Federal Constitution that appear pertinent as invalidating the proposed acts, or any of them.

Section 9 of Article VIII of the Constitution provides:

The state shall not donate or loan money, or its credit, subscribe to or be, interested in the stock of any company, association or corporation, except corporations formed for educational or charitable purposes.

That all three of the entities here in review are instrumentalities of the State Government, we have no doubt. However, the purpose of the provision as well as the concern of the framers of the Constitution respecting their financial inability to support a state government, must be kept in mind in determining whether or not the constitutional provision has application here. The framers were really concerned with whether or not a small population, struggling for a lack of capital equipment, could support a state government to cost in the neighborhood of \$1,000,000 per annum, and at the same time assume the indebtedness of the territory. Accordingly a number of safeguards were adopted, as for example a limit of ad valorem taxation, a maximum of state debt, that the State should operate on a cash basis, except as to its bonds. (Section 3 of Article IX. The words "cash basis" appear in the original constitution). The purpose of Section 9 of Article VIII, was therefore to protect the State as to its solvency, and keep the State upon a secure and solvent basis, and only this. (See: *Constitutional Debates and Proceedings*, p. 166 et seq.) The framers did not have in mind that under departments of government large sums would be accumulated in trust, and not available for the ordinary costs of government, which of necessity would be required to be invested. In harmony with this construction it has been held that his limitation has no application to those funds not collected by the ad valorem taxes. This is the special fund doctrine. The constitutional question under review in *Garrett v. Swanton*, (Calif. 1932) 13 P.2d 725, was the constitutional limit of state debt, and whether or not an obligation to be payable from a special fund, under a rent-purchase contract created an indebtedness, within the meaning of the constitutional prohibition. It was held: "Municipality incurs 'indebtedness' within the constitutional limitation when it may suffer loss if special fund from which indebtedness is payable is insufficient."

The "special fund" doctrine is again set out and applied in *Boe v. Foss*, (S.D. 1956) 77 N.W. 2d 1. In this case it is held that the constitutional prohibition against incurring debts beyond a specified maximum, is a prohibition applying to accounts or sums that are to be paid from general taxation, and do not apply to "special funds" as for example funds to be received from rent income of the facility.

The "special fund" doctrine is equally applicable to this protective provision of the constitution, designed to prevent the incurring of debt, or loss of state funds, by virtue of which the ad valorem or other general taxpayer would suffer loss.

The fund of the Nevada Industrial Commission we believe to be such a fund, which has not been built in any respect from an ad valorem tax upon the property of this State.

We are therefore of the opinion that for funds of the Nevada Industrial Commission to be in part invested in common and other stocks of private corporations, in order that such funds may produce a greater income, through dividend income as well as capital growth, as provided in S.B. No. 289, is not in violation of Section 9, Article VIII of the Constitution.

As to the constitutionality of S.B. 295, which provides for the investment of the trust funds of the Public Employees Retirement System, the matter is not so clear cut and is

somewhat more involved.

Although such fact casts very little light upon the question, it is true that in 1957 the State of Arizona passed such a law, which provides inter alia that a portion of the funds of the State Employees Retirement System might be invested in common stocks. See: Title 38, Arizona Revised Statutes, "Public Officers and Employees," Sections 38-201.

The State of Arizona has a constitutional provision similar to that of Nevada under review. Section 7 of Article IX of the Arizona Constitution provides the following:

Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company or corporation, except as to such ownerships as may accrue to the state by operation or provision of law.

A similar provision is found in Section 13, Article XII, of the Constitution of California. Also in Section 31 of Article IV of the California Constitution. A number of exceptions are then set out in the California Constitution.

We have found nothing in point, either by the Attorney General's office of either state or by the court of last resort of either, which would cast light upon the validity of S.B. No. 295.

In *Housing Authority v. Dockweiler*, (Calif. 1939) 94 P.2d 794 at 808, the court said: "Neither our state nor our federal constitution forbids changes, merely because they are such, in the nature or the manner of use of methods designed to enhance the public welfare; they require only that the new weapons employed to combat ancient evils shall be consistent with the fundamental scheme of Government of the Commonwealth and the Nation, and shall not violate specific constitutional mandates."

However, in view of the evils sought to be avoided by the constitutional provision, also the law of presumption of constitutionality (*King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221); and in view of the further fact that such funds as are contributed by the State of Nevada, by appropriation from general funds, are contributed in trust, beyond the power of the Legislature to repossess for other uses, and that certain persons now have vested rights in their pensions, by having been pensioned, (See: 98 A.L.R. 507), it is our opinion that this fund meets all qualifications of a "special fund," as beyond the power of the Legislature to diminish, and that therefore a bill providing that it be in part invested in common stocks of private corporations, for income augmentation purposes, is not in conflict with the provisions of Section 9 of Article VIII of the Constitution.

We are therefore of the opinion the S.B. No. 295, if approved, would be constitutional.

We now consider as to constitutionality, S.B. No. 294, which purports to authorize the Board of Regents of the University of Nevada to make investments of its moneys in certain funds.

Clearly moneys received by the University by legislative appropriation, for current expenses are not available for investment. With almost equal clarity congressional appropriations for aid to the college of agriculture or mechanical arts, are sums made available for current costs of operations and are not available for investment. Also sums available from gifts inter vivos to the University or by reason of the administration of estates of deceased persons are almost always gifts with conditions and restrictions, which restrictions are binding upon the governmental body of the University. Little is available from this source for unrestricted investment. This leaves then, moneys obtained by the sale of parcels from the 90,000-acre-grant and from the 72-section-grant. As to such principal sums which are to remain forever inviolate, the earnings alone being available for current use, the Legislature purportedly by this bill, would authorized the Board of Regents to invest in the manner prescribed by the bill.

However, the Legislature is equally without power to confer upon the Board of Regents any power, naturally appertaining to the office for which the individual members have been duly elected, as it is without power to divest the Board of Regents of powers naturally appertaining to the office. The powers of the Legislature and the Board of Regents are fixed by the constitution and it is beyond the authority of either to change, alter or modify the powers of the other. *State v. Douglass*, 33 Nev. 82, 110 P. 177; *King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221.

It could be urged that the proposed statute is permissive only. This is true, but since the Legislature is without power to confer any powers upon the Board of Regents, and since the bill purports to give consent to the Board of Regents, which is totally meaningless, the bill if approved could serve no useful purpose. In brief we take the position that the Board of Regents can do anything without the Act, that it can do with the Act. We take the position that if to invest in the manner outlined in the bill is forbidden by other provisions of the Constitution, the bill could not destroy the forbidding provisions of the Constitution. We shall reach this point presently.

If the bill were approved, and investments made as therein authorized, it would be the ordinary position of public officials that without the bill the authority would not exist. This then could lead to a conflict of authority. Under Section 4, subdivision 2, investment counsel could not be employed except with the consent of the state board of finance. Under Section 4, it is provided, that if the state board of finance so directs, the Board of Regents shall dismiss and discharge investment counsel, upon a finding by the state board of finance that the investment policies pursued by the board are not in the best interests of the University or the State. This then would require the Board of Regents to dismiss investment counsel, even though their views may be diametrically opposed to the views of the state board of finance. The Legislature may not divest the Board of Regents of its executive and administrative control. *King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221.

We do not by this discussion detract from the innate merits of the bill. The criteria of diversification of investments as to type, and as to companies, allowing only a small part in investments that might be thought to be semi-speculative, are good. We here are considering it only from the standpoint of constitutionality. This then leads to the question of whether the Board of Regents are under the law now existing, authorized to follow the provisions of this bill. In brief may the Board of Regents invest a portion of their funds in common or preferred stocks of private corporations, for the sole purpose of augmenting income of the funds involved and in no way to lend credit or promote a corporation for its own ends?

Under the "special fund" doctrine, and the derivation by the University of its funds, as formerly set out, it is clear that any funds that the University might have for investment purposes are not derived from ad valorem or other general tax, and it would therefore appear that Section 9 of Article VIII of the Constitution would not prevent such investment. This also is in keeping with the spirit of the constitutional provision, for it must be kept in mind that the framers of the Constitution were concerned with economy, financial solvency, and the economic impact of the tax burden upon the taxpayers. The provision was intended to prevent the State or certain key officers from lending credit or otherwise backing certain private corporations, at the expense of the general taxpayers. It was never intended to prevent the profitable investment by the State of its trust funds.

We therefore conclude that the regents of the University of Nevada could pursue the content of S.B. 294, if the board so desires, as to types of investments for trust funds, and other investment criteria therein contained, if the bill is permitted to die for want of approval.

We conclude that S.B. 289 (appertaining to trust funds of the Nevada Industrial Commission) if approved, would be constitutional.

We conclude that S.B. Number 295 (appertaining to trust funds of the Public Employees Retirement Board) if approved, would be constitutional.

We conclude that S.B. Number 294 (appertaining to trust funds of the University of Nevada) if approved, would be unconstitutional.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-36 County Public Hospitals—Statute mandatorily provides that county hospitals may be constructed, improved, repaired, or additions made thereto “only” upon bond issue voted upon and approved by people of county. Use of other county funds, through sufficient, for such purpose, in order to obviate delay of such election, held unauthorized, and illegal.**

CARSON CITY, April 7, 1959

HONORABLE A.D. DEMETRAS, *District Attorney, White Pine County Courthouse, Ely, Nevada*

DEAR MR. DEMETRAS: Reference is made to your letter, dated March 12, 1959, in which you request the opinion of this office on the question which is hereinafter stated.

FACTS

Your letter indicates that some county officials have raised the question as to the desirability, and legal justification and propriety of applying and expending certain moneys, accumulated in a County Surplus Building and Maintenance Reserve Fund on the basis of a special tax levy, for the construction or purchase of new hospital facilities. In this connection, your letter cites relevant statutory provisions that should be considered and which would appear to be determinative of the matter.

QUESTION

May the county commissioners legally use the County Surplus Building and Maintenance Reserve Fund for the erection or construction of a new hospital, or the purchase of other existing hospital facilities, thus obviating the necessity of an election authorizing a bond issue for such particular purposes?

OPINION

It must be taken to be well settled that county commissioners have only such powers as have been expressly granted to them, or which can be implied to be necessary and incidental to the purpose of carrying into effect powers so granted. (State ex rel. King v. Lothrop, Clerk, etc., 55 Nev. 405, 36 P.2d 355.) It is, therefore, proper and necessary to determine the nature and scope of the powers and authority which have been expressly conferred by the Legislature upon county commissioners, and any others which may reasonably be inferred as necessary or incidental to their exercise. Our inquiry shows the following to be possibly applicable, and relevant or pertinent:

- (1) NRS 244.160: General power with respect to the care of indigent sick, *only as is or may be provided by law*.
- (2) NRS 244.195: Power and jurisdiction to do and perform all other such acts and things as may be lawful and *strictly necessary* to the full

discharge of the powers and jurisdiction conferred on the board.

(3) NRS 244.265: Power and jurisdiction to make orders respecting the property of the county *in conformity with any law of the state*, and to take care of and preserve such property.

(4) NRS 244.270: Power and jurisdiction to lease or purchase any real or personal property *necessary for the use of the county*.

(5) NRS 244.445: In counties having in excess of 15,000 population, the additional power and jurisdiction to provide for the maintenance, repair, alteration, improvement and preservation of any other county or public improvements of any nature.

(6) NRS 244.285: Authorizing the board of county commissioners “to cause to be erected and furnished a courthouse, a jail *and such other public buildings as may be necessary*, and to repair, remodel or build additions thereto, and to keep the same in repair \* \* \*.”

(7) NRS 244.260: With the approval of the state board of finance, to “accumulate a fund, for a period not to exceed 10 years, for the purpose of constructing, making additions to, or repairing any and all buildings *which by law the board is authorized to build, repair, manage and control*, by the levy of an annual special tax \* \* \*.”

(8) NRS 244.385-244.425: (Applicable only when federal funds are involved.)

(Italics supplied.)

We next consider the statutory provisions with respect to the jurisdiction and powers of hospital trustees, as applicable and relevant to the question under consideration.

(1) NRS 450.030: Prescribes the requisite number of signatures of taxpayers in petitions authorizing county commissioners to levy an annual tax for the establishment and maintenance of a public hospital.

(2) NRS 450.040: Prescribes the number of signatures of taxpayers in petitions authorizing a board of county commissioners to call for a special election for the purpose of submitting the question of issuing bonds for such purpose to the qualified electors of the county.

(3) NRS 450.050: Relates to the administration, control and government of county hospitals erected prior to March 18, 1953. Also prescribes that, “the board of county commissioners is authorized and empowered forthwith to appoint a board of hospital trustees for such county hospital. Thereafter, all the provisions \* \* \* relative to the maintenance of hospitals \* \* \* and the administration and government of county hospitals \* \* \* shall be immediately applicable and controlling with respect to the future administration, control and government of such hospital in like manner and with the same force and effect as if an election had been duly held in accordance with the provisions of this chapter, and a majority of all votes cast had been in favor of establishing such hospital.”

(4) NRS 450.060: Acquisition of additional buildings, sites when board of hospital trustees takes over existing hospital.

In all counties where existing hospitals are taken over by a board of hospital trustees, as provided in this chapter, *additional necessary buildings and sites may be acquired only by holding an election and voting a bond issue according to the terms of this chapter, the same as if no hospital then existed*; but in counties having a population of 25,000 persons or more, in cases where buildings or parts thereof have been constructed but remain unfinished and unequipped, *the board of hospital trustees may complete the building or buildings or parts or parts thereof and furnish and equip the*

*same from the board's current receipts, without a bond issue. (Italics supplied.)*

(5) NRS 450.150: Powers and duties of board of hospital trustees: “\* \* \* in general, shall carry out the spirit and intent of this chapter in establishing and maintaining a county public hospital.”

(6) NRS 450.090: Authorizes county commissioners to act as ex officio members on a board of hospital trustees in those counties where in the 1948 or subsequent general elections, the vote cast for Representative in Congress was in excess of 19,000.

(7) NRS 450.240: Provides for the levy of a tax for maintenance, operation of county hospital, other institutions operated by board of hospital trustees. Further provides that “\* \* \* the supervision, management, government and control of the county hospital \* \* \* shall vest in and be exercised by the board of hospital trustees for the county public hospital, and the institution or institutions shall thereafter be operated by the board of hospital trustees. \* \* \* The board of county commissioners may not levy a tax for the care of indigents in the county public hospital as a hospital expense unless the levy and its justification are included in the hospital budget as submitted to the Nevada tax commission as provided by law.”

(8) NRS 450.250: Hospital fund: Expenditures, control by board.

1. The board of hospital trustees shall have the exclusive control of:

(a) The expenditures of all moneys collected to the credit of the hospital fund.

(b) *The purchase of the site or sites.*

(c) *The purchase or construction of any hospital building or buildings.*

(d) The supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose \* \* \*. (Italics supplied.)

(9) NRS 450.270: Relates to the issuance of bonds for the establishment of public hospital.

(10) NRS 450.280: Relates *to the issuance of bonds for the enlargement, maintenance, repair or reconstruction of public hospital.* Also further provides that the board of hospital trustees, by resolution, shall request board of county commissioners to levy an annual tax therefor and shall specify in the resolution the maximum amount of money proposed to be expended for any or all such purposes; “*and thereupon the board of county commissioners shall submit the question of issuing bonds therefore to the qualified electors of the county at the next general election to be held in the county.*” (Italics supplied.)

We have deliberately so extensively set forth relevant and applicable statutory provisions, not because they were all particularly essential to support the conclusions which we will hereafter indicate, but only to furnish some assurance thereby, if possible, that the matter has been carefully considered. The matter of finding a solution to the practical, and probably pressing problem of providing adequate hospital facilities to meet the public need, is a serious one, and the sincere and well-intentioned efforts of county officials to avoid the inevitable delay which would be involved in securing needed funds therefore through a bond election, is fully appreciated—especially when, as we are informed, there appears to be money available in the County Surplus Building and Maintenance Reserve Fund which could be applied to such purpose.

However, it is well to remember that more responsible government, and orderly action are, in the long view, most definitely assured and secured, and the public interest better protected, by compliance with the law as it is, even though it might appear to result in unreasonable or unnecessary delay and hardship. If the law as it exists has certain

unfortunate consequences, or is otherwise objectionable, the proper remedy is to work for its repeal, or amendment or modification, and not to take action which, because contrary thereto, would be illegal.

Apparently the reason for requiring bond elections and bond issues and sales, as a condition precedent to any construction or improvement of a county public hospital, is that such procedure and requirement does give the taxpaying public an opportunity to vote, not only on the amount of the expenditure involved, which obligation and burden must ultimately be borne by them, but also upon the interest the bonds shall bear, and the period of time within which they must be redeemed. Since the taxpaying public is generally without legal right or power (other than that which it can exercise at the polls in subsequent elections) effectively to restrict or limit the amount of taxes which may be levied against them for the purposes of ordinary county government, functioning and needs, it cannot be deemed too unreasonable that the law should assure them some voice and protection, when unusual or extraordinary expenditures are contemplated, such as a capital outlay for the construction of a new hospital, or its enlargement or alteration. (Opinion B—91, Attorney General, dated April 10, 1942.)

The intended application of moneys accumulated in the County Surplus Building and Maintenance Reserve Fund for the purpose of acquiring new or additional hospital facilities is not authorized by any express grant of power vested in the county commissioners. Also, on the basis of our review of the law, neither can such application of said moneys be necessarily implied, or found to be incidental, to the execution of any express power which the county commissioners presently have. The nature and scope of the jurisdictions and powers conferred upon, and vested in, county commissioners and hospital trustees, respectively, have been clearly and directly defined by the Legislature. Within their respective jurisdictions and spheres, the powers of county commissioners and hospital trustees are exclusive and controlling. NRS 450.060 expressly governs and controls the manner and means by which additional necessary sites and buildings for hospital purposes may be acquired, namely: by holding of a bond election, and approval of a bond issue by the voters and taxpayers.

The funds accumulated in the County Surplus Building and Maintenance Reserve Fund cannot, legally, be diverted from such fund and used in connection with the acquisition or purchase and erection of new or additional hospital facilities. Moneys legally earmarked for one fund and purpose cannot be transferred or used for another unauthorized purpose. The use of such moneys is expressly governed by NRS 244.285. The reference contained therein to “such other buildings as may be necessary,” cannot be construed as contemplating hospital buildings. According to well-established rules of statutory construction, such reference is “ejusdem generis,” meaning buildings of the same class as those expressly enumerated. In the instant case, such class would only include structures used or intended for general county government purposes, e.g., a garage or storehouse to store county equipment or supplies. If there existed any doubt concerning such construction (which there isn’t), such doubt would, moreover, be dispelled by the existence of other express statutory provisions specifically relating and applicable to “hospital” sites, constructions, buildings, repairs, enlargement, or alterations.

On the basis of the foregoing analysis and review, it is, therefore, our considered opinion that the county commissioners may not legally evade a bond election for the raising of funds to acquire additional sites for, or to construct, additional hospital facilities, by use of any part of the moneys accumulated in the County Surplus Building and Maintenance Reserve Fund.

We trust that the advise herein contained may prove helpful to you in resolving the problem, as described in your letter.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-37 County Commissioners—A Board of County Commissioners may buy from a merchant member thereof not to exceed \$30 per month in merchandise, by full compliance with the provisions of NRS 244.310.**

CARSON CITY, April 16, 1959

HONORABLE GEORGE G. HOLDEN, *District Attorney, County of Lander, Battle Mountain, Nevada.*

DEAR MR. HOLDEN: This is in response to your inquiry of January 29, 1959, in which you set out certain facts and request an official opinion of this office in respect thereto.

FACTS

In the general election of November 1958, Mr. Ivan T. Wilson, of Battle Mountain, who owns and operates the only pharmacy in Lander County, was elected to the Board of County Commissioners, and is now serving upon said board. The nearest other drug stores are located in Elko and Winnemucca.

Prior to the election of Mr. Wilson to the Board of County Commissioners of the county of Lander, the board has purchased drugs and other pharmaceutical products from wholesale companies and from jobbers for the use of the county hospitals located at Austin and Battle Mountain, have directed shipments to be made to the designated hospital and town with billing to the county, and the companies have entered a credit of 10 percent thereon to the account of Mr. Wilson, of the Wilson Pharmacy in Battle Mountain. There was no written contract thereon between the pharmaceutical houses and the pharmacy proprietor, but only the usages of trade warranted the procedure. The confusion and question arises, not from any discontent with the system employed or services rendered, but solely by reason of the election of Mr. Wilson to and present incumbency upon the Board of County Commissioners of Lander County. In good conscience, the question hereinafter set out has been raised by Mr. Wilson.

QUESTION

May the system herinabove set out respecting the entry of a credit to the Wilson Pharmacy, in the purchase of such pharmaceutical products by Lander County be continued during the incumbency of Mr. Wilson on the Board of County Commissioners of Lander County?

OPINION

NRS 244.310 provides the following:

Commissioner not to be interested in sales, contracts: Exception; penalty.

1. No member of the board of county commissioners shall be interested, directly or indirectly, in any property purchased for the use of the county, or in any purchase or sale of property belonging to the county, or in any contract made by the county for the erection of public buildings, the opening or improvement of roads, or the building of bridges, or for other purposes; but the board may purchase supplies for the county, not to exceed \$30 in the aggregate, in any 1 month, from 1 of their number, when not to

do so would be a great inconvenience, but the member from whom the supplies are purchased shall not vote upon the allowance of the bill.

2. A violation of this section shall be a misdemeanor punishable by a fine of not less than \$100 nor more than \$500, and shall be cause for removal from office.

In NRS 244.325 it is provided that except as otherwise provided or allowed by law, county commissioners shall have no interest in any contract or order for supplies, which contract is authorized by the board of county commissioners. Under subdivision 3 thereof, it is provided that contracts in violation of sections 1 or 2 may be declared void. Subdivision 4 provides for criminal punishment for violators.

NRS 244.315 makes provision for advertising for bids on all county contracts in which the aggregate sum exceeds \$1,000.

NRS 244.316 provides that in exceptional cases emergency contracts may be let for sums in excess of \$1,000 but not to exceed \$5,000, without advertisement for bids.

We entertain no question but that the operation above mentioned must fall under the same rules and regulations as would be applicable if a sale were made directly by Wilson Pharmacy, from merchandise in stock.

The statutes make no exceptions for small counties and the purpose of the regulations is clear, namely, that of preventing a county commissioner from using his influence upon the board to his own financial advantage and disadvantage of the county that he serves. For it is an axiom of the law that "no man can serve two masters."

It is, of course, true that many pharmaceutical orders for Lander County are in excess of \$30, and equally true that the order would seldom, if ever, be for as much as \$1,000. However, the rule is clear and the exceptions to its application are set out in the statutes mentioned and quoted. The rules of statutory construction require a strict construction of the exceptions that may be allowed in this case, to include no more by way of exception to the general rule that the Legislature clearly intended.

Boards of county commissioners are inferior tribunals of special and limited jurisdiction, and can exercise such powers only as are specially granted, and the mode of exercising the expressly granted powers is exclusive. *State v. Boerlin*, 30 Nev. 473. See also: *State v. McBride*, 31 Nev. 57.

In *Office Specialty Company v. Washoe County*, 24 Nev. 359, the court said:

It should ever be remembered that boards of county commissioners are created by law, derive their authority solely from the statutes, and in the exercise of their powers are restricted to the method prescribed by law. Whoever deals with them does so with full notice of the extent of their power, and the manner in which it can alone be executed. What such boards may do, and how they must proceed, is for the legislature—the law making agency for the people—to determine. That decision is final until repealed or modified by the same power that enacted it. It cannot be extended or ignored by any action of the boards or the courts.

In Attorney General's Opinion No. 75 of October 8, 1943, it was held that, "if a contract is made in violation of a statute the county has no authority to pay the claim."

For the reasons heretofore given, it is our opinion that the question as propounded must be answered in the negative. However, we are of the opinion that for orders of \$30 or less, per month, when there has been a compliance by the board of county commissioners with the provisions of NRS 244.310, under the previous system, including a payment of commission to Mr. Wilson, may if workable be continued, and that such system under such circumstances is authorized.

To this point we have determined that for orders of \$30 or less per month the previous plan of operation may be continued, and have determined that for orders of more than

\$30 per month the previous plan of operation would be in violation of the law. But since a number of companies may be concerned or involved and since one company or jobber will not know what has been involved by the county, during the month, in the aggregate, it becomes unworkable to pay any commission to the Wilson Pharmacy upon pharmaceutical products, with assurance that it is not beyond the prohibited amounts.

Since a number of suppliers are or may be involved, and since a number of orders are or may be involved, of uncertain total amounts when the order is placed, and since all sums of more than \$30 per month by the county are within the prohibition, we reach reluctantly the conclusion that safety demands that Mr. Wilson follow one of two alternative courses, viz:

(a) He may waive all commissions from the wholesale houses or jobbers with which he deals by a written communication to them and demand a reduced price for the county that he serves; or

(b) He may direct that the orders be placed in such a manner as to not reflect his account, or credit, in any manner whatever, either through another retail drug concern or directly to the county without any credit to or burden upon a retail drug concern of Nevada.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-38 Truckee-Carson Irrigation District—The TCID is a public or quasi-public corporation and is an instrumentality, subdivision or agency of the State.**

CARSON CITY, April 20, 1959.

HONORABLE PAUL A HAMMEL, *Insurance Commissioner, State of Nevada, Carson City, Nevada.*

Attention: LOUIS T. MASTOS, *Chief Deputy Insurance Commissioner.*

DEAR MR. HAMMEL: We have your inquiry, with supporting documents, dated April 3, 1959.

From the supporting documents it appears that certain of the employees of the Truckee-Carson Irrigation District are insured by a group life and accident and health policy, issued by the New York Life Insurance Company. Upon this policy the employees fully pay the premium by payroll deductions, nothing being paid by the employer. The number that are insured is in harmony with the statute. The sole question presented is whether or not this employer is an “instrumentality, subdivision or agency” of the State. If it is such, the policy that has been issued is authorized by the statutes and, if not, it is not authorized.

QUESTION

Is the Truckee-Carson Irrigation District an instrumentality, subdivision or agency of the State, within the meaning of the regulatory statutes?

OPINION

The TCID was organized pursuant to the provisions of Chapter 64, Statutes of Nevada 1919, page 84 et seq. Under the chapter the authority was conferred for the organization and government of the district, outlining among other things the manner of election of the governing body, and powers conferred thereon. Accordingly the district was organized and has operated for approximately forty years, having had conferred upon it the power, among other things, to serve as the fiscal agent for the United States in collecting the original construction costs and the annual operation and maintenance charges. See Attorney General Opinion No. 231 of December 17, 1956.

NRS 690.100 appertains to group life insurance policies. The section provides for such policies to be issued to employers for the benefit of the employees and their beneficiaries, and makes definite provision as to the payment of premiums thereon. Subdivision 2 thereof, in part, provides the following:

No policy may be issued on which the entire premium is to be derived from funds contributed by the insured employees, except this provision shall not be applicable to any policy or policies issued to the state or any instrumentality or agency thereof.

NRS 692.060 appertains to group accident and health insurance and provides that such policies may be issued to an employer and said section provides further:

“Employer” as used in this subsection may be deemed to include any municipal or governmental corporation, unit, agency or department thereof and the proper officers as such, of any unincorporated municipality or department thereof, as well as private individuals, partnerships and corporations.

As to group life insurance, then, the question clearly arises of whether or not the TCID is an instrumentality and agency of the State.

As to the accident and health insurance policy the question thus arises of whether or not the TCID is a municipal or governmental corporation, unit, agency or department thereof.

In 30 Am.Jur. Art. 61, page 894, the rule is stated as follows:

Although organized to conduct a business for the private benefit of the owners of land within its limits, it is generally held that an irrigation district is a public or quasi-public corporation. (Citing authorities.)

For the foregoing reasons, it is the opinion of this office that the question must be, and is, answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-39 Taxation—Ad Valorem on Patented Mine. Owner of a patented mine may escape taxation thereon only by strict compliance with the provisions of the statute.**

CARSON CITY, April 21, 1959

HONORABLE L. E. BLAISDELL, *District Attorney, Mineral County, Hawthorne, Nevada.*

DEAR MR. BLAISDELL: In your letter of April 9, 1959, you have propounded the following:

QUESTION

May the board of county commissioners lawfully strike from the tax roll an assessment against a patented mine within the county upon the filing of an affidavit of labor in form as prescribed in NRS 362.050, if said affidavit is filed after the session of the County Board of Equalization has ended?

OPINION

NRS 362.020 provides:

1. Every patented mine shall be assessed at not less than \$500, except where \$100 in development work has been actually performed upon such patented mine during the federal mining assessment work period ending within the year for which the assessment is levied.
2. The tax assessment shall be in addition to the tax on the net proceeds of the mine.

NRS 362.040 provides:

At the next succeeding session of the county board of equalization or of the state board of equalization, the owner of such patented mine may appear before any such board, in person or by agent or attorney, and upon presentation of an affidavit that at least \$100 in development work has been actually performed upon the patented mine during the federal mining assessment work period ending within the year for which the assessment has been levied, the board shall strike from the roll the assessment against the patented mine named in the affidavit.

County boards of equalization meet during the month of January of each year. NRS 361.340, 3.

The State Board of Equalization must complete its work on or before the 3rd Monday in February of each year. NRS 361.380, 1.

Since all patented mines in the State are taxable unless excused in the manner provided by law, and within the time allowed by law, and since it appears from the facts given that the application to be relieved of assessment upon a patented mining claim was not made within the time allowed by law, the assessment cannot be stricken from the tax roll.

In order to gain the privilege of being excused from payment of the tax, assessed according to law, the owner of the patented mining claim must make timely application to the County Board of Equalization or the State Board of Equalization, or forever hold his peace.

The question is answered in the negative.

Another question presents itself, brought about by the changeover to the establishment of the fiscal year beginning July 1 and ending June 30, rather than a calendar year. We are of the opinion that NRS 362.040 should be construed in such a manner as to permit the owner of a patented mine to present proof of labor thereon to the County Board of Equalization meeting in January or the State Board of Equalization meeting to the 3rd Monday of February of each year, performed during that entire fiscal year ending June 30 immediately proceeding.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-40 Departments of Food and Drugs and Weights and Measures—Affirmative exercise of federal jurisdiction and power over interstate commerce of flour held preemptive, exclusive, and presently prohibitory of any state regulatory action directed to prevent shortages in weight and misbranding of such food commodity. Such state regulation and control, in present state of law, construed as open to objection as to constitutional validity. Remedial and corrective action held as presently resting with Congress, or U.S. Secretary of Agriculture, to revise and adopt new regulations regarding authorized variations from the stated weight and branding of flour, due to normal, estimated loss from evaporation of moisture content.**

CARSON CITY, April 21, 1959

MR. E. L. RANDALL, *Chief Chemist, Departments of Food and Drugs and Weights and Measures, P.O. Box 719, Reno, Nevada.*

DEAR MR. RANDALL: Reference is made to your letters, respectively dated March 2, 1959, and April 7, 1959, and accompanying background material, receipt of which are hereby acknowledged. You therein request the opinion of this office on certain questions which will hereinafter be stated.

#### FACTS

Since at least 1953, there is considerable concern, based upon the results of surveys, that much flour, shipped throughout the country, including the State of Nevada, was and is short-weight. Because of the widespread and serious nature of the problem, the matter has been the subject of consideration at National Conferences of Weights and Measures Officials since 1953. Various committees were appointed as a result, to investigate and report their findings and recommendations. One of these committees included several representatives of the flour industry, but it appears that they were not authorized to speak on behalf of, or to bind, the industry to any remedial program. An interim report was submitted in 1954, and another report was made in 1955. There is a current committee still working on the problem which continues to exist.

The investigations of all the committees, including the present one, based upon various types of surveys, has resulted in the following findings.

- (1) Considerable flour was short-weight at the mills.
- (2) Weighing equipment used by packers was inadequate and unreliable.
- (3) Checking of weights by checkers was too infrequent and unreliable.
- (4) Package weight records, including check-weight records, were inadequate.
- (5) The moisture factor, as it affects flour weight, is over-emphasized by the industry.

The most recent survey of flour weights at the packer, or mill, level, resulted in a finding that twenty (20%) percent of the flour was short-weight at that point. Interstate

shipment of such flour would be in violation of federal law. Similar surveys, conducted in Massachusetts, Utah and Montana, are in line with this finding.

Representatives of the industry have taken the position that no guarantee of full flour weight at the retail level can be given. It appears that the addition of water to wheat, to the extent of approximately fourteen (14%) percent moisture content, is necessary for proper milling to facilitate the separation of so-called "mill feed." The industry contends that any method for elimination of such moisture content, after milling, whether by use of drying equipment or longer period of storage prior to shipment and distribution, would be too costly. "Overpacking," to compensate for loss of weight through evaporation of said moisture content, is also asserted to be too costly, and, therefore, is also unacceptable to the industry.

Present federal law and regulations allow for variations in weight resulting from, or due to, unavoidable moisture loss through ordinary and customary exposure, after the food is introduced into interstate commerce, to conditions which normally occur in good distribution practice.

However, when the flour reaches a state's jurisdiction, state officials have no way of determining:

- (1) What is a reasonable loss;
- (2) Whether there was a loss at all, or if the flour was, in fact, packed short-weight.

The lack of uniformity in state laws on the matter, the inadequacy of federal controls, and possible conflict with federal law and regulations, are additional complicating factors.

The net result of all of the foregoing circumstances is that consumers are estimated to be paying for from two to five (2-5%) percent water, at the price of flour, whenever they purchase this food commodity.

#### QUESTIONS

I. May a state, in the exercise of its police power, *generally* adopt appropriate regulatory measures with respect to the inspection, weight-control, and labeling or branding of food, drugs and commodities shipped into the state?

II. (a) *Generally*, as regards interstate commerce of food commodities, would the regulatory measures mentioned in "I" above fall within the exclusive jurisdiction and power of the Federal Government?

(b) Has the Federal Government so far exercised its interstate commerce powers and jurisdiction in this field, and upon such matters, as to exclude appropriate regulatory measures, as mentioned in "I" above, on the part of the states?

III. (a) Can Nevada, under presently existing state law, require interstate shipments of flour to be full-weight at the time of arrival in Nevada?

(b) Can appropriate regulations to such effect be promulgated under present Nevada Weights and Measures or Food and Drug Laws?

#### OPINION

Article I, Section 8, United States Constitution, conferring upon Congress the power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, grants all of the authority which the Federal Government has over commerce. The respective powers of Congress and the states thereunder have been classified as follows:

- (1) That in which the authority of Congress is exclusive.
- (2) That in which the power of the state is exclusive.
- (3) That in which the state may act in the absence of legislation by Congress.

The line of division between Congressional and state power over commerce should be regarded as a question for judicial decision, dependent upon provisions contained in the Federal Constitution. (11 A.J. 10 et seq.)

In general, it is true that if the transportation or importation of goods from one state to another is such as to affect alike all states, thus requiring uniformity of regulation, Congress alone can provide the needed regulations. In such cases, federal power is exclusive, and states may not act even though Congress has not exerted its legislative authority, the silence of Congress in such cases being deemed equivalent to a declaration that the particular commerce shall be free from regulation. (See 11 A.J. 13, Section 10, and footnote citation of authorities.) Where the power of Congress over interstate and foreign commerce exists it is deemed to be superior to, and to dominate over, the powers of states; in such cases, the power of Congress is deemed adequate to meet the varying exigencies that might arise, and to protect the national interest by securing the freedom of interstate and foreign intercourse from local control. Correlatively, Congressional authority is deemed sufficient to provide for the welfare or necessities of the inhabitants of the states, as affected by interstate commerce, and federal authority and power may be exercised either in aid of, or without reference to, the particular policy or law of any given state. (See 11 A.J. 13-14, and footnote citation of authorities.) In short, the regulatory power of Congress over interstate commerce may not be limited, qualified, or impeded by state action, or by a compact between states. (Same, p. 14, footnote citations.)

Nevertheless, federal authority over interstate commerce may not be pushed to such an extreme as to destroy the distinction which the commerce clause establishes between commerce among the several states and the internal concerns of a state. (See same, p. 14, and footnote citations.) The exercise by Congress of its power to regulate interstate commerce is not absolute, and is also subject to limitations and guarantees, as contained in the Federal Constitution. And the validity of any exercise by Congress of its power over interstate commerce is as much dependent upon the type of regulation as its subject matter. (See same, pp. 15-16, and footnote citations.)

There is a further limitation on any exercise by Congress of its power to regulate interstate commerce, as established by a preponderance of judicial decisions, namely: "The power of Congress must be considered in the light of our dual system of government, and may not be extended to embrace effects upon interstate commerce so indirect and remote that to do so, in view of our complex society, would effectually obliterate the distinction between what is national and what is local, and would create a completely centralized government." (See same, Section 15, p. 17, and footnote citations.) Ad decision is only possible on the basis of the particular facts in each individual case; and the question, in many cases, is necessarily one of the degree of regulation. (Same, p. 17, and footnote citations.)

States retain exclusive control over commerce which is completely internal, which is carried on between one person and another in a state, and which does not extend to or affect other states. Such power is plenary, and Congress has no right to interfere. As regards such internal commerce, states have the power and are competent to adopt any protective regulatory measures of a reasonable character in the interest of the health, safety, morals, and welfare of their people. "When, by reason of the fact that interstate transportation has terminated, objects of commerce get within the sphere of state legislation, the state may exercise its independent judgment and prohibit that which

Congress did not see fit to forbid.” (See same, pp. 19-20, and authorities cited in footnotes.)

In the absence of Congressional legislation, states may constitutionally enact inspection laws, and generally, laws of internal police, even though the enactments may have an incidental effect upon interstate commerce. (Same, sec. 23, p. 23, and footnote citations.) The states never surrendered their “police power” when they conferred upon Congress the general power to regulate commerce. And when states adopt regulations which may be necessary or reasonable for the welfare and safety of the people residing within their states, such exercise of the “police power” must be deemed not only the exercise of a reserved power, but the discharge of a governmental obligation owed to their people. (See same, sec. 94, pp. 85-86, and footnote citations.)

For better understanding of our problem and the serious administrative difficulties connected with it, we must next consider the question: What constitutes “interstate commerce?” The answer to this question must be sought in the various judicial determinations rendered by the courts whenever state regulations, enacted under state “police powers,” have been challenged as unduly impinging, trammeling, trenching upon, or burdening such “interstate commerce.”

It must suffice herein to state that, on the basis of judicial construction and determination, it is presently well-settled that the “commerce clause” of the Federal Constitution, and protection thereunder, must be deemed to apply and continue so long as the article in interstate commerce is in the original package in which it is introduced in the state. (See 11 A.J. 51, sec. 56, and footnote citations.) So long as the article remains in its original receptacle or container, in which it was brought into the state, the importer thereof is protected in his right of sale of said article. The right is not personal but may be exercised through an agent of the importer and extends to sales to consumers, as well as to wholesale or retail dealers. (Same, p. 51 and footnote citations.)

The general import of the judicial decisions on the matter seems to be that “an original package is that package which, according to custom respecting the particular articles shipped, is usually delivered by the vendor to the carrier for transportation and delivered as a unit to the consignee. It is the package, as a unit, which was delivered by the shipper to the carrier at the initial place of shipment in the exact conditions in which shipped.” (See 11 A.J. 53-54 and footnote citations; 26 A.L.R. 971.) It is immaterial whether the package is suitable for wholesale or retail trade, or whether it is shipped to a dealer or to a consumer. And, where an aggregation of articles or packages is, for convenience in shipping, packed and shipped in a larger package or receptacle, the larger package or receptacle, and not the individual articles or packages, constitutes the original package, even though the larger receptacle is unfastened or uncovered. (See same, sec. 60, p. 55, and footnote citations.)

As a general rule, a receptacle is regarded as an original package only until it is broken or so treated for purposes of sale by the importer as to render it a part of the mass of the property of the state. The protection afforded by the original package doctrine ceases if the imported article is sold; if the container is opened and smaller packages removed therefrom and offered for sale; if the original packages are put up for sale and so dealt with as to make them a part of the common mass of the property of the state; or, it has even been held, if the recipient of the package has an unexecuted intention to open it and sell the contents. (See same, p. 56, and footnote citations.)

It should, however, be noted that the “original package” doctrine has, in more recent cases, been recognized as artificial rather than sound, and that the test created by such doctrine is not inflexible and final, as regards interstate commerce, whatever may be its validity for commerce with foreign nations. (See 11 A.J. 57.) Thus, though in their original packages, the articles contained therein have been considered to be a part of the general mass of the property of the state of destination in such cases as the following:

(1) Levy of a non-discriminatory property tax bearing equally with other merchandise produced in the State.

(2) Where Congress has removed restrictions on the States so that upon arrival and delivery in any State or Territory, it becomes subject to the operation of State or local laws, as though produced in such State or Territory, and not entitled to exemption because in the original package. (See same, p. 57, and footnote citations.)

And there are cases which have held that a state, under the proper exercise of the police power, may regulate the labeling of articles of commerce, such as stock feed, and that such a statute is not unconstitutional because it applies to commodities in original packages. (See 11 A.J. 52, and footnote citations.)

Our analysis has already indicated a fact which must, at this point, be made more explicit, namely: That any power which the states have over interstate commerce by reason of congressional inaction ceases to exist from the moment that Congress exerts its paramount authority over the subject. Any conflicting state regulations on the same subject on which Congress has seen fit to act are superseded, regardless of the fact that such state regulations might only incidentally affect interstate commerce, or were enacted as a proper exercise of the police power. It is established that the exercise of the state's police power must yield when it comes in conflict with an affirmative exercise by Congress of its power to regulate interstate Commerce. Congressional regulation of a business does not nullify state regulation of the same business, if the federal act does not cover the same field, or is consistent with the state legislation, or if Congress has so circumscribed its regulation as to leave part of the subject open to state action. It is only where there is an actual and distinct conflict that the state law will be displaced and then only as to that part of the state law in actual conflict with the federal law. The question whether Congress has so far exercised its exclusive jurisdiction as to exclude state action should be determined from the facts of the particular case. And, as already set forth, the question as to conflict between federal and state exercise of jurisdiction, is one for judicial determination. (See 11 A.J. 25-26, and footnote citations; *Pennsylvania R. Co. v. Public Service Commission*, 250 U.S. 566, 63 L.Ed. 1142, 40 S. Ct. 36.)

The selling of commodities in short-weight was regarded as a crime under the common law. One who delivers short-weight for a full price is guilty of obtaining property by false pretenses. Statutory regulations with respect to labels are ordinarily enacted to protect purchasers from obtaining inferior, spurious, worthless or injurious articles, and to promote the general welfare, insure fair dealing, establish safeguards against deception, and prevent fraud or imposition. (See *State v. Washed Sand & Gravel Co.*, 136 Minn. 361, 162 N.W. 451, L.R.A. 1917 D 1127; 22 A.J. 443; 19 A.J. 68; *Mobile v. Yuille*, 3 Ala. 137. 36 Am. Dec. 441, overruled on another point in *Huntsville v. Phelps*, 27 Ala. 55, 58; 55 A.J. 1044-1045, Sec. 54; *United States v. Great Atlantic & P Tea Co.*, C.C.A. 92 F.2d 610, 113 A.L.R. 961.)

As regards the scope of federal and state authority, and exercise of jurisdiction and power, in the field of weights and measures, and labels, the majority view may be stated as follows:

\* \* \* Legislation of this character is not regarded as in conflict with the power given to Congress to regulate interstate commerce, the latter power in no way preventing a state from enacting statutes regulating commerce between citizens and residents of that state, and there are many cases in which the contention that a particular regulation relating to weights and measures constituted an unlawful burden on interstate commerce was rejected. In particular cases, the claim has also been rejected that the regulation involved was in conflict with Federal legislation on the subject.

(See 56 A.J. 1015, pp. 1021-1022, and footnote citations; *Savage v. Scovell*, 1908 C.C., Ky., 171 F. 566; *Savage v. Jones*, 1912, Ind., 32 S.Ct. 715, 225 U.S. 501, 56 L.Ed. 1182; *Schmidinger v. Chicago*, 226 U.S. 578, 57 L.Ed. 364, 33 S.Ct. 182, Ann.Cas. 1914B 284.)

“The power of a state to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers.” (See *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 80 L.Ed. 138, 56 S.Ct. 159, 101 A.L.R. 853, citing *Turner v. Maryland*, 107 U.S. 38, 51-54, 27 L.Ed. 370, 375, 376, 2 S.Ct. 44.) It was held in this case that the state statute did not unduly burden interstate commerce, and was a valid exercise of the police power. (See also, *Detweiler v. Welsh* (C.C.A. 9th), 46 F.2d 75, 73 A.L.R. 1440; *Marshall v. Department of Agriculture*, 44 Idaho 440, 258 P. 171; *Mattei v. Hecke*, 99 Cal.App. 747, 279 P.470; *Re Fujii*, 189 Cal. 55, 207 P. 537; *Oregon-Washington R & Nav. Co. v. Washington*, 270 U.S. 87, 70 L.Ed. 482, 46 S.Ct. 279; *Mintz v. Baldwin*, 289 U.S. 346, 77 L.Ed. 1245, 53 S.Ct. 611, *Gilvary v. Cuyahoga Valley R. Co.*, 292 U.S. 57, 78 L.Ed. 1123, 54 S.Ct. 573; *Packer Corp. v. Utah*, 285 U.S. 105, 76 L.Ed. 643, 52 S.Ct. 273, 79 A.L.R. 546.)

And a state statute requiring every loaf of bread made for sale in the state to be  $\frac{1}{2}$ , 1,  $1\frac{1}{2}$  or exact multiples of 1 pound, subject to reasonable tolerances in excess of, but not under, the specified weight, was held to have a reasonable relation to the protection of purchasers of bread from imposition and the unfair competition by dishonest bakers resulting in an injury to the consuming public, and also a valid exercise by a state of its police power. (See *P. F. Petersen Baking Co. v. Bryan*, 290 U.S. 570, 78 L.Ed. 505, 54 S.Ct. 277, 90 A.L.R. 1285.)

Moreover, and of particular significance to the matter under consideration, statutory provisions requiring a package of a commodity to contain a label with the true net weight thereon has been construed to be applicable to goods (e.g., California salt and raisins) which decrease in weight after packing, due to loss by evaporation. (See 35 A.L.R. 785, citing *Seattle v. Goldsmith*, 1913, 73 Wash. 54, 131 Pac. 456, wherein the court held a municipal ordinance not unreasonable in requiring the packer or manufacturer to ascertain the loss in weight by evaporation, and overcoming such weight loss either by increasing the size of the package or the weight of the commodity, and, if necessary, to withhold his goods from the market until it is possible to ascertain the true net weight, or to adopt some other plan to enable the container to correctly indicate the weight.) The decision was rendered without reference to interstate commerce.

On the other hand, there is some authority to the effect that such statutory provisions do not apply to goods which are subject to great variations in weight, dependent on climatic and atmospheric conditions, and variation in the percentage of moisture present in the product; such a statute or ordinance, if applied to such goods, was held to be so harsh and oppressive as to be deemed in violation of the constitutional due process clause. ( See 35 A.L.R. 785, and 101 A.L.R. 863, citing *Overt v. State*, 1924, 97 Tex.Crim.Rep. 202, 260 S.W. 856, and *Ex parte Lysaght*, 1924, 97 Tex.Crim.Rep. 244, 260 S.W. 860.) The statute involved in both of these cases was the same, and held unconstitutional. In the first, or *Overt* case, flour was involved; in the second, or *Lysaght* case, bales of beans were involved. *It is to be noted that the court in neither case considered the requirements of the statute as they might affect interstate commerce, but placed their decisions squarely on the fact that the statute as drawn was indefinite, and of doubtful construction.*

On the basis of these three cases, it is our considered opinion that the Washington case of *Seattle v. Goldsmith*, supra, apart from other factors to discussed hereafter, represents the better view, and law.

Other cases might be considered, but they would only be cumulative on the point which is here made, namely: That there is no inherent property right to sell products in violation of the public policy of the State. Also, that there is a presumption of the existence of a state of facts sufficient to justify exertion of the police power, which attaches not only to acts of the Legislature, but also to administrative bodies in their exercise of delegated powers, if within the scope of authority legally delegated. (See *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L.Ed. 274; *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U.S. 181, 31 L.Ed. 650, 8 S.Ct. 737; *Hooper v. California*, 155 U.S. 648, 39 L. Ed. 297, 15 S.Ct. 207; *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 44 L.Ed. 657, 20 S.Ct. 518; *Mundy v. Wisconsin Trust Co.*, 252 U.S. 499, 64 L.Ed. 684, 40 S.Ct. 365; *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505, 89 A.L.R. 1469; *Panama Ref. Co. v. Ryan*, 293 U.S. 383, 79 L.Ed. 446, 55 S.Ct. 241; *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947; *Aetna Ins. Co. v. Hyde*, 275 U.S. 440, 447, 72 L.Ed. 357, 364, 48 S.Ct. 174.)

It is believed that our analysis and review of the law has been developed to the point where it is now possible to apply the principles and conclusions therein to the specific problem with which we are concerned.

There is at present, undoubtedly, a lack of desirable uniformity among the states as to the extent to which reasonable variations from the stated weight of flour due to normal exposure to climatic and atmospheric conditions, and consequent evaporation of moisture content, are permitted. Also, at least in part consequence thereof, the interests of the consuming public, administrative and enforcement officials, manufacturers or packers, and wholesale and retail merchants, are seriously affected. There is, also, substantial evidence, adduced by responsible officials on the basis of surveys, that variations from the stated weight of such food commodity, shipped in interstate commerce, are in excess of those caused by ordinary and customary exposure, after the flour is introduced into interstate commerce, to conditions which normally occur in good distribution practice. The surveys indicated further show that such excesses can be directly accounted for on the basis of the inadequacy and unreliability of weighing equipment, the infrequency and unreliability of checking of weights by checkers, and the inadequacy and unreliability of package weight records, all at the mill or packing level.

It also appears that federal law and regulations (21 U.S.C. Sec. 343(e), 52 Stat. 1047), authorizing allowance of reasonable variation from the stated weight of flour, is only effected and determined at the mill or packer level, prior to interstate shipment. A substantial number of states, by legislative enactment or administrative regulations, have evidently adopted such federal rule and regulation. ("Reasonable Variations" in *Food-Package Weights*, by P. F. Sherman, Reprint from June, 1958, issue of *Food Drug Cosmetic Law Journal*.) Notwithstanding such present federal and state laws and regulations, the problem of excessive weight shortages in flour, apparently first officially noted nationally in 1953, has not been resolved, and still persists. Such fact alone, viewed in the light of the virtual termination of effectual federal regulation at the mill or packer level, prior to interstate shipment of flour, reasonably supports the conclusion that present regulation and enforcement of the law, as regards misbranding and weight controls, is insufficient, inadequate and unsatisfactory; that such present condition seriously and substantially affects the interests of the public, as consumers, which states are obligated to protect, and also permits violation of state laws and regulations which would otherwise be applicable and capable of proper enforcement.

A commodity is not, by reason of its extrastate origin, immunized by the commerce clause from the exercise of state regulatory power, if reasonable and in the public interest. There is no virtue in mere uniformity of regulation. Unless regulation is proper, appropriate, fair and reasonable, in conformity with law (both federal and state), and comports with necessary safeguards and protection of the public interest, it is also not desirable. The benefits and protection afforded to industry by society and government properly impose a corresponding and correlative duty upon industry to be fair and just in

its dealings and practices, as regards the general public, and to comply with laws and regulations, whether federal or state, if valid and reasonable and for the public interest.

It is not unreasonable to require the packer or manufacturer of flour to ascertain the loss in weight by evaporation of moisture content (introduced originally to facilitate proper milling), and to overcome or compensate for such weight loss, either by increasing the weight of the flour when packed, by employing drying equipment prior to packing of the flour, or by delaying said packing and withholding the flour from interstate shipment until it is possible to ascertain and correctly pack and indicate the true weight of the flour so shipped and sold to the consuming public.

Under our dual form of government, states have the right, and should be in a position to exercise their regulatory police powers for the enforcement of all laws and regulations reasonably enacted in the public interest. Such is not only a matter of right, but also an obligation on the part of state governments to their people. If federal regulatory controls are inadequate or, of themselves, ineffectual to secure the desired results, and such results as obtain under such circumstances are contrary to public policy, and in violation of express state law and regulations, corrective and remedial action is not only desirable and justified, but necessary and proper. Such corrective and remedial action should contemplate and make appropriate reservation for exercise of state jurisdiction and power, to enact reasonable, necessary, and effectual police regulatory controls, in compliance with law, for protection of the public interest within state boundaries. Such state jurisdiction and power should extend to, and include, interstate commerce at the point when interstate shipment of commodities reach state boundaries.

Applicable Nevada law, relevant to the matter under consideration is contained in NRS 581.330, 581.350, 581.410, 581.420, and 585.350. The provisions of NRS 581.350, being crucial to the determination of the question submitted to us for opinion, are set forth at length:

Containers complying with federal laws and rules. The sale of any commodity in a container complying with any Act of Congress or the opinions and regulations issued by the Secretary of Agriculture *and appertaining to net weight* or measure does not violate the provisions of this chapter. (Italics supplied.)

Apart from another prohibition, to which we shall advert hereafter, the foregoing statutory provision expressly affirms that the federal law, and regulations adopted thereunder, are controlling, and exempt from state jurisdiction and power, anyone who, having complied with federal law and regulations, is in violation of state law, as regards shortages in weight, or misbranding. Flour, as a food commodity, is also covered and included in such exemption.

The other prohibition on any state regulation on the matter, whether legislative or administrative, is predicated on the fact, as indicated in our analysis, that federal jurisdiction and power have been expressly and affirmatively asserted and declared, so that federal control must be deemed to have effectually and exclusively preempted the field of such regulation. Any state regulatory action at this time, and under existing federal law and regulations, would be open to serious constitutional objections as to validity. (See *Stearns v. District Court*, 62 Nev. 102, 142 P.2d 206.)

Proper and appropriate legal remedy and relief presently must be deemed to rest either with Congress, or with the Secretary of Agriculture. The latter could rescind and revise present authorized allowances and tolerances as regards variations from the stated weight of flour, and adopt new regulations, either requiring the packers or millers to compensate for normal, estimated losses in weight through evaporation of moisture content, or require them to dry such flour prior to packing and interstate shipment. A better alternative, however, would be to circumscribe federal regulation and control expressly, so as to authorize and empower the states to inspect, regulate, and control the weight of flour at

the time that shipments thereof arrive at state boundaries, in conformity with applicable state laws and regulations.

At this point, we specifically indicate our considered opinion on the questions set forth at the outset of our inquiry, as follows:

- Question I: Affirmative.
- Question II(a): Negative.
- Question II(b): Affirmative.
- Question III(a): Negative.
- Question III(b): Negative.

Before concluding, we desire to indicate our full appreciation of the seriousness and complexity of the problem. We also further hope that in some measure at least our foregoing analysis and opinion may be of assistance to you in clarification of the problem, and in its constructive and satisfactory solution.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-41 Claims Against the State—NRS 353.090 governs the procedure for payment of claims when legislative appropriation has been made.**

CARSON CITY, April 22, 1959

MR. NEIL D. HUMPHREY, *Budget Director, Carson City, Nevada.*

DEAR MR. HUMPHREY: Your letter of April 13, 1959, requested an opinion of this office concerning the procedure to be followed by the Board of Examiners on the claim for terminal leave for former Supreme Court Justice Edgar Eather.

FACTS

Mr. Justice Eather retired from the Supreme Court bench on December 15, 1958. Since that time, he has been receiving a pension from the State of Nevada, having qualified under the provisions of NRS 2.060.

On April 2, 1959, a claim for Mr. Justice Eather was filed with the Budget Director by Mr. Ned Turner, Clerk of the Supreme Court. The claim as presented by Mr. Turner states Mr. Justice Eather is entitled to \$2,076 as terminal leave pay.

QUESTION

Has Mr. Justice Eather followed the proper procedure in presenting his claim for terminal leave pay?

OPINION

Reference is hereby made to Attorney General Opinion No. 2 of January 28, 1959, for the background and conclusion that terminating state employees and officers may be entitled to terminal leave payments.

Our Forty-eighth Session of the Legislature, on April 1, 1957, appropriated funds for the support of the Supreme Court of Nevada (Statutes of Nevada 1957, Chapter 391.)

Said appropriation was for two fiscal years beginning July 1, 1957, and ending June 30, 1959. Mr. Justice Eather's claim was presented by Mr. Turner on April 2, 1959, which is within the period covered by the legislative appropriation referred to above. There being an appropriation from which a claim may be paid, the provisions of NRS 353.090 must govern the procedure to be followed by the Board of Examiners in allowing or rejecting said claim.

Conceivably, if said claim is allowed and paid, sufficient appropriated money may not remain to permit payment of other salaries out of the same appropriated fund. In that event, the Board of Examiners may expend up to \$2,000 from unappropriated moneys for payment of salaries by the procedure set forth in Chapter 494, Statutes of Nevada 1959, which prior to approval by the Governor on April 6, 1959, was Assembly Bill 482.

It is noted that Mr. Justice Eather's claim was not submitted by him personally, but rather by the Clerk of the Supreme Court. We are of the opinion that the determination of the manner of presenting a claim against the State to the Board of Examiners must be governed by the rules of the board. The section of the statute referred to provides, in part, that the form of the account or petition, and the manner of its presentation shall be as prescribed by the rule of the board. If the manner and form in which the claim for Justice Eather was presented complies with the rules of the board, then the board should proceed in allowing or rejecting said claim as provided by NRS 353.090.

In conclusion, we observe that the pension which Mr. Justice Eather is receiving in no way disqualifies him from a terminal leave payment, if he is otherwise entitled to it. Both the retirement benefits and accrued leave benefits are independent of each other and the payment of one does not preclude payment of the other.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-42 State Department of Health—Division of Public Health  
Engineering has authority to provide for purification of water by user, in  
exceptional type of case mentioned.**

CARSON CITY, April 23, 1959

MR. W.W. WHITE, *Director, Division Public Health Engineering, Nevada State  
Department of Health, 755 Ryland Street, Reno, Nevada*

DEAR MR. WHITE: We are in receipt of your letter of March 25, 1959, presenting a situation and inquiry requiring an official opinion of this department.

FACTS

The Sierra Pacific Power Company takes water from the Truckee River through the Highland Ditch to a treatment plant (Highland Reservoir), where it is treated and then made available to its customers. While in the Highland Ditch and to the point of treatment the water is not safe for human consumption. Those people who have settled about the fringe area and banks of the Highland Ditch ordinarily have no water supply except the Highland Ditch. At the present time the power company does not feel that it is in a position to extend services of a safe and treated water supply to those persons so situated along the banks of said ditch.

The proposal and limited practice has been for the power company to permit an individual to take untreated water from the ditch under a contract between the user and

the company, but requiring the approval of your office as to the necessary treatment facilities. Your office would be expected to determine and provide a set of conditions, including water treatment, that the individual and company would provide and actually place in operation before granting approval.

#### QUESTION

Is the State Department of Health, Division of Public Health Engineering authorized to approve a water supply system for the Sierra Pacific Power Company to provide an unsafe water supply to individuals which they must treat and make safe for human consumption before the water is usable?

#### OPINION

For whatever significance it may have, we observe at the outset that an owner of land adjacent to the ditch may build and reside there, if he desires, and having established a legal residence there the power company and the State Department of Health will be unable to prevent such individuals from the use of a small amount of water for limited purposes, if the individual so desires to use it. And if this be true, from the common sense view, it would be better and more conducive to health for it to be permitted to be taken legally and accompanied with chemical or other authorized treatment, than to be taken otherwise.

We also note that a limited practice has been in operation for individuals so situate to be sold the water, with the consent of your department as a condition to such sale that the water be treated in a manner specified by your office. It appears that the company and the users are willing to so contract as previously.

You have supplied our office with a booklet entitled "Water Supply Regulations," published by your department of date January 8, 1952. However, the regulations therein do not appear to cover this situation or cast light upon the determination. You have made reference to NRS 445.030 as a statute that might be relevant or preclude the practice heretofore mentioned.

NRS 445.030 provides as follows:

Every owner, agent, manager, operator or other person having charge of any waterworks furnishing water for public or private use who shall knowingly permit any act or omit any duty or precaution by reason whereof the purity or healthfulness of the water supplied shall become impaired shall be guilty of a gross misdemeanor.

The section contemplates acts of omission as well as acts of commission, however, from the law and facts given, we are not able to determine that a duty is placed upon the power company to treat and render the water wholesome prior to its treatment at the Highland Reservoir. Neither are we able to determine that the power company, or its agents, have done anything to render the water not wholesome after it is diverted from the river and prior to its reception at the Highland Reservoir. We are, therefore, of the opinion that this section does not preclude an affirmative response to the question under investigation.

The State Board of Health was created by Chapter 199, Statutes 1911, page 392. The act was amended from time to time and by Chapter 184, Statutes of 1939, and in Section 26 thereof it is provided that there shall be a "Division of public health engineering." We find no statutory provisions clearly defining the powers of the division. However, the rule-making power of the department clearly authorizes the department to make necessary rules respecting powers and duties of the divisions, and other matters. We believe there to be nothing incompatible with the purposes of the office, and the reasons

for its creation, which would preclude the director from setting out rules and regulations as to the treatment of the water, and the setting up of the facilities for such treatment, prior to authorizing the execution of a contract between the power company and the user for the use of such water.

For the foregoing reasons, we answer the interrogatory in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-43 Suretyship—Bond Trust Fund Act—The enumeration of officials qualified to be bonded under the Bond Trust Fund Act, is exclusive. NRS 282.230, 2, construed.**

CARSON CITY, May 1, 1959

HONORABLE JOHN KOONTZ, *Secretary of State, Carson City, Nevada*

DEAR MR. KOONTZ: On April 24, 1959, you stated a question to this department requiring our opinion thereon.

QUESTION

Are officers of the Nevada Municipal Association qualified to be bonded under the provisions of the Bond Trust Fund Act?

OPINION

We have made inquiries in regard to the origin and status of the Nevada Municipal Association, and have gained little information in regard to it.

We have found that it is not a corporation under the laws of the State of Nevada, insofar as it is permitted to form a corporation by the filing of articles of incorporation with the Secretary of State.

We have not been able to find reference to it by an examination of the statutory laws of Nevada, and upon this basis we conclude that it is not a creature of the Legislature, or recognized by legislative enactments.

By the process of elimination, we therefore conclude that it is a voluntary association, perhaps with by-laws adopted by its members, having membership of the municipal corporations of Nevada, who have elected to become members thereof. The Statute Revision Commission has confirmed this view.

The Bond Trust Fund Act is NRS 282.230 et seq. Subsection 2 thereof has been amended by Chapter 467, Statutes of 1959, and as amended reads as follows:

2. The purpose of the bond trust fund is to assure the State of Nevada and the several counties, townships, incorporated cities and irrigation districts thereof against loss through defalcation, misappropriation or negligent loss of public funds, tortious misconduct or other wrongful acts *by state or county officials, or officials of townships, incorporated cities or irrigation districts* in the State of Nevada, whose official duties have to do with the handling of funds of the state, counties, townships, incorporated cities or irrigation districts and who are required by law to furnish personal or surety bonds. (Italics supplied.)

The officials that may be bonded under the Act are enumerated in the above section, as “state or county officials, or officials of townships, incorporated cities or irrigation districts.” Officials of the Nevada Municipal Association are not enumerated. The enumeration is exclusive. The doctrine of *inclusio unius est exclusio alterius*, applies. The question is answered in the negative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-44 Department of Insurance—National Health Plan, providing for group medical services, construed and held within purview of licensing and other statutory regulations and requirements applicable to insurance and the conduct of an insurance business in the State of Nevada.**

CARSON CITY, May 4, 1959

HONORABLE PAUL HAMMEL, *Commissioner, Department of Insurance, Carson City, Nevada*

DEAR COMMISSIONER HAMMEL: Reference is made to a letter dated March 23, 1959, from the Insurance Department to National Health Plan, Inc., requesting cessation of operations and negotiations on the part of said corporation in the State of Nevada, considered by the Insurance Department to constitute the carrying on of “insurance business,” within the purview of, and in the absence of compliance with, licensing and other regulatory provisions of existing state law. Reference is also made to the conference held at your office on April 7, 1959, at which meeting the aforesaid action by the Insurance Department as regards the operation and business of National Health Plan, Inc., was reviewed with representatives of said corporation, and decision reached that the matter be submitted to this office for consideration and legal opinion on the question hereinafter set forth.

FACTS

National Health Plan, Inc. (hereafter referred to as NHP), is organized and exists by virtue of the laws of the State of California, as a nonprofit corporation, having as its professed object, acting as a coordinating *service agency* between groups of medical practitioners and the general public. It claims to perform this function of a service agency by procuring contracts from medical groups which undertake to provide medical services to dues-paying members; in other words, NHP, in those areas in which it operates, enters into a contract with certain medical groups or groups of practicing physicians, by the terms of which contract each of said medical groups agrees to serve dues-paying members of NHP within its own district. These contracts explicitly deny that NHP or the medical group is the agent of, or controlled by, the other, and further, expressly state that all services furnished by the various medical groups are provided pursuant to contract, and are not, in any way, furnished by NHP. Dues-paying members consist either of individual persons, or of persons who compose some established group, enrolled as members of NHP, and eligible to the services rendered by the various medical groups under contract to NHP, by payment of certain monthly dues. Though dues-paying members are assigned to one of the said medical groups within their district, they may,

however, transfer from one medical group to another, and may change doctors within the same medical group.

Funds received by NHP, from monthly dues of enrolled members, are disbursed to the various medical groups on an agreed and contract-fixed per capita service basis, as determined by the number of dues-paying members within the district of each medical group, less only necessary administrative expenses retained by NHP for services rendered by it in the operation. The contract payments made by NHP to the medical groups are regulated and determined solely on the basis of the number of dues-paying members eligible for treatment by the group, and the amount of such payments are not at all affected by the degree or extent of the medical services furnished. As a consequence, the monetary benefits derived by each of the medical groups, contractually engaged to NHP, may vary from month to month, depending upon the nature and extensiveness of medical services required in any given month by dues-paying members.

It is the contention of NHP, on the basis of the foregoing facts, derived from its literature and other documents, that as a nonprofit corporation, solely performing the described professed coordinating service function between groups of medical practitioners and the general public, it is not engaged in a type of business or any transaction subjecting it to the regulatory statutory provisions of Nevada law applicable to the conduct of "insurance" business in the state.

#### QUESTION

Does the proposed operation of National Health Plan, Inc., as described in data submitted by it to the Department of Insurance, State of Nevada, and hereinabove outlined, constitute the contemplated conduct of an "insurance" business, within the purview of existing licensing and other regulatory statutory provisions of Nevada law applicable to insurance?

#### OPINION

Typical of the many and varied definitions of insurance to be found in textbooks and the reported cases is the following:

A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest. (Vance, Insurance, 3rd Ed., p. 83, citing 2 Mass.G.L. 1932, Ch. 175, Sec. 2, said to be adopted as a statement of the common law of New York; Ollendorff Watch Co. v. Pink, 1938, 279 N.Y. 32, 17 N.E.2d 676.)

However, whatever the definition, it has not been deemed to be adequate unless it includes the following essential elements:

- (a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
- (b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.
- (c) The insurer assumes that risk of loss.
- (d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks.
- (e) As consideration for the insurer's promise, the insured makes a ratable contribution, called a premium, to a general insurance fund.

A contract possessing only the three elements first named is a risk-shifting device, but not a contract of insurance, which is a risk-distributing device; but, if it possesses the other two as well, it is a contract of insurance, whatever be its name or its form. (Vance, Insurance, 3rd Ed., pp. 2, 83.)

The question whether a given contract is one of insurance most frequently arises in connection with the determination of the rights of the parties to the contract; whether such contract is made by a corporation not authorized under its charter to make contracts of insurance; and whether it, with the person making it, is subject to the statutory regulations applicable to the business of insurance. We are here concerned with the last of these situations.

A review of the cases shows that considerable difficulty has been experienced in distinguishing contracts of insurance from other contracts of contingent obligation such as contracts of mere guaranty; contracts for services to be rendered on the happening of specified contingencies; and contracts providing for contingent benefits merely incident to the main purposes, clearly not indemnity, for which the agreements were made. Many of the latter contracts also, it should here be noted, are also governed and regulated under applicable special provisions of insurance law.

Applicable or relevant existing statutory provisions, as regards the question submitted to us, are contained in NRS, Chapters 631, 681, 682, 683, 684, 686, 692, 693 and 694.

NRS 682.050 defines "insurance contract" and "doing an insurance business." Section 1 substantially corresponds with the typical definition of what constitutes an "insurance contract," set forth above. Section 2 relates to contracts of guaranty or suretyship, when made by guarantors or sureties doing an insurance business within the meaning of the Title. Section 3 provides as follows:

"Doing an insurance business" within the meaning of this Title, shall be deemed to include:

- (a) The making, as insurer, or proposition to make as an insurer, of any insurance contract; and
- (b) The making, as guarantor or surety, of any contract of guaranty or suretyship as a vocation and not as merely incidental to any other legitimate business or activity of the guarantor or surety; and
- (c) The doing of any kind of business, including a reinsurance business, specifically recognized as constituting the doing of an insurance business within the meaning of this Title; and
- (d) The doing of or proposing to do any business *in substance* equivalent to any of the provisions of this Title. (Italics supplied.)

Section 4 provides as follows: "In the application of this Title, the fact that no profit is derived from the making of insurance contracts, agreements or transactions, or that no separate or direct consideration is received therefore, shall not be deemed conclusively to show that the making thereof does not constitute the doing of an insurance business."

NRS 681.020, Section 2, relates to "accident and health" insurance, as does NRS 681.030, Section 1. NRS 681.030, Section 6, relates to "fidelity and surety," and brings within the purview of the Title, the "guaranteeing of the performance of any lawful contract," while Section 9 covers "contingent losses." NRS 681.050, Section 3, provides as follows: "A company not authorized nor seeking to be authorized to transact life insurance may be authorized to transact any or all kinds of business enumerated under classes 2 and 3."

NRS 682.010 brings both stock and mutual companies within the scope of the insurance regulatory provisions, while NRS 683.010 sets forth the qualifications and conditions for foreign and alien companies to do such types of business in the State, and section 1 (d) therein, expressly applies to nonprofit hospital associations.

NRS 684 relates to regulations governing “brokers, agents and solicitors,” and their activities, as regards insurance. NRS 686 relates to “General Provisions and Prohibited Practices.” NRS 686.050 provides that a license is required to do insurance business, and establishes the content of such licenses, while NRS 686.200 makes the transaction of insurance business in the State without a license unlawful, and further defines the acts deemed to constitute transacting of insurance business, Section 2 therein providing as follows: “The following acts, if performed in this state, shall be included among those deemed to constitute transacting insurance business in this state: (a) Maintaining an agency or office where contracts are executed which are or purport to be insurance contracts with citizens of this or any other state. \* \* \* (c) Receiving payment of premiums for insurance contracts except by regularly licensed attorneys or regularly licensed real estate brokers.”

NRS 686.230, while relating to service of process upon unauthorized insurers, further elaborates on the acts forbidden in the State by mail or otherwise, on the part of foreign or alien insurers. Section 1 states: “\* \* \* (a) The issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein; (b) The solicitation of applications for such contracts, including newspaper or direct mail advertising; (c) The collection of premiums, membership fees, assessments or other considerations for such contracts; or (d) Any other transaction of insurance business. \* \* \*

NRS 688 relates to “Fraternal Benefit Societies”; and 688.040 exempts such organizations from insurance laws. NRS 689 specifically regulates “Burial Societies.”

NRS 692 specifically relates to “Accident and Health Insurance,” and by NRS 692.010 makes the scope of said chapter and provisions therein applicable to the kinds of business enumerated in subsection 2 of NRS 681.020 (class 1) and subsection 1 of NRS 681.030 (class 2). NRS 692.060, in establishing classifications of group accident and health insurance, provides: “Any company authorized to do the business of accident and health insurance in this state may issue group policies insuring against bodily injury or death caused by accident or by accidental means or against sickness, or both \* \* \*.”

NRS 692.070 prescribes the policy provisions which are to be included in such group accident and health insurance, and NRS 692.080 specifies which of said policies may provide for payment of benefits and reimbursement for expenses upon the occurrence of certain contingencies. NRS 692.110 regulates the contents of such policies when issued by foreign companies.

NRS 692.130 defines “accident and sickness insurance” to include “any policy or contract covering the kind or kinds of insurance described in subsection 2 of NRS 681.020 (class 1) and subsection 1 of NRS 681.030 (class 2). NRS 692.430 sets forth the requirements of other jurisdictions, and NRS 692.480 provides exemption from the application of NRS 692.140 to 692.470, inclusive, of certain enumerated types of policies, among these being “3. Any blanket or group policy of insurance.”

NRS 693 relates to “Casualty Insurance, Fidelity Bonds and Surety Contracts,” and makes the scope of said chapter and provisions applicable to the kind or kinds of business enumerated in class 2 as described in NRS 681.030. NRS 693.020 defines “loss payments” and “loss expense payments” as including “all payments to claimants, including payments for medical and surgical attendance. \* \* \*.”

NRS 694 relates to “Regulation of Rates”; NRS 694.010, “Purpose of Chapter.” NRS 694.030 exempts from application of the provisions of the chapter “Accident and health insurance,” but NRS 694.020 makes the chapter provisions applicable to “casualty insurance, on risks or operations in this state \* \* \*.”

Before considering whether or not, and to what extent, if any, the foregoing statutory provisions are applicable to the group health plan embodied in NHP, the principal judicial decisions on the matter may properly be reviewed. Apparently, the present majority of cases dealing with the nature and validity of group medical and hospital service plans, support the view that a corporation, whether or not organized for profit, the object of

which is to provide the members of a group with medical services and hospitalization, is *not* engaged in the insurance business, and, therefore, *not* subject to the insurance laws. Since the number of cases involved are not many, the facts in these cases are set forth in some detail, in the belief that by so doing greater clarification will result on the issue and question confronting us.

The facts in the case of *Jordan v. Group Health Asso.* (1939), 71 App.D.C. 38, 107 F.2d 239, may be summarized as follows:

The Group Health Association, incorporated as a nonprofit corporation, had, as its object, the providing of medical services, preventive and curative, surgery, hospitalization, and medical and surgical supplies, exclusively for its members and dependents. The membership was composed *solely* of civil employees of the executive branch of the United States Government. For payment of monthly dues, the Association undertook to arrange for medical and surgical services to be rendered by independent practitioners, and for hospitalization, where necessary, in independent hospitals, for a specified maximum period for any one illness. The by-laws of the Association provided that no liability should attach to it for any act of omission or commission on the part of physicians or other persons with whom it might contract in the rendition of services to members or their dependents.

Membership in the Association was subject to election by a Board of Trustees, themselves elected, in the main, by the membership, and chosen from among the members.

On this set of facts, the court held that it was not engaged in the insurance business. Considering the plan as a whole, it further found that service was its principal object, rather than the assumption of any risk. Also, because composed of the limited and specified class of civil employees, the court found the plan to be within the purview of applicable statutes exempting "relief associations" from compliance with licensing and other regulatory controls pertaining to insurance companies. And, finally, because of the type of organization and virtually-complete vestment of control of the affairs of the organization in the membership itself, the court said: "Although Group Health's activities may be considered in one aspect as creating security against loss from illness or accident, more truly they constitute the quantity purchase of well-rounded, continuous medical service by its members. Group Health is in fact and in function a consumer cooperative. The functions of such an organization are not identical with those of insurance or indemnity companies. \* \* \*."

In the *Jordan Case*, the court relied upon the decision in the case of *State ex rel. Fishback v. Universal Service Agency*, 87 Wash. 413, 151 P. 768, Ann.Cas. 1916 C 1017.

This was an action by the Insurance Commissioner to forfeit the corporate franchise of the organization on the ground that it was "doing an insurance business without complying with the statutes regulating the doing of such business." The applicable definition of insurance was substantially similar or identical to that of the State of California, and the method of doing business was the same as that in the *California Physicians' Service Case* (discussed hereunder), even including the type of contract used.

In the *Fishback Case*, the court held that the corporation there was *not* engaged in the insurance business, and predicated such finding on the fact

that, in its opinion, there was a want of assumption of any hazard or risk by the Universal Service Agency, the corporation involved.

The significance of the fact that the entire operation of the plan was controlled, supervised, and administered by licensed physicians, amenable to disciplinary action in their professional capacities, though not considered by the court, may properly be noted with respect to this case.

The facts in the case of *California Physicians' Service v. Garrison* (1946), 28 Cal. Adv. 771, 172 P.2d 4, 167 A.L.R. 306, may be summarized as follows:

*Under a statute expressly providing for limited regulation of such organizations*, a group of physicians organized and maintained a nonprofit corporation for the purpose of furnishing medical care on a voluntary low-cost basis to persons with small incomes. Under the contracts with its professional and beneficiary members, there was no assumption of risk by the nonprofit service corporation, which acted merely as agent or distributor of funds derived from collection of monthly dues paid by the beneficiary members, to which the physicians solely looked for their compensation.

A majority of the court found that said nonprofit corporation was not engaged in the insurance business within the meaning of the regulatory insurance laws, and, therefore, not subject to the supervision of the insurance commissioner. It further stated that the principal object, purpose and plan of operation involved was "service" rather than "indemnity."

This finding and opinion are, however, *dicta* only, inasmuch as the majority opinion properly construed the legislative enactment (authorizing the formation of such nonprofit medical or physicians' service corporations with express provisions for limited regulation by the attorney general *and the particular professional boards under which the members belonging thereto* are licensed) as necessarily controlling and determining that such organizations should be exempt from the supervision and regulation by the Insurance Commissioner.

The dissenting opinion in this case, by Chief Justice Gibson, is, however, notably significant, under the circumstances. Concurring in the result reached by the majority, because of the express statutory exemption of such organizations from regulation under the insurance laws, he further observed:

"I cannot, however, concur in that portion of the opinion declaring that the plaintiff is exempted from regulation by the Insurance Commissioner because it is not engaged in the business of transacting insurance, but is merely agreeing to render service. The true test is not the character of the consideration agreed to be furnished, but whether or not the contract is aleatory in nature. A contract still partakes of the nature of insurance, whether the consideration is money, property or services, if the agreement is aleatory and the duty to furnish such consideration is dependent upon chance or the happening of some fortuitous event. (See Rest., Contracts, sec. 291.) In the present case, the agreement is to make payments to member doctors for medical services to the beneficial members, and the duty to make such payments is obviously dependent upon the chance or the happening of a fortuitous event, since the necessity of such services, and also for the agreed payment, is dependent upon the members' sickness or accidental injury."

Besides the Jordan and Fishback Cases, *supra*, the court, in the California Physicians' Service Case also relied on the case of Commissioner of Banking and Insurance v. Community Health Service, Inc., 129 N.J.L. 427, 30 A.2d 44.

In this case the Insurance Commissioner sued the defendant corporation to recover a statutory penalty for conducting an unlicensed insurance business.

The corporation had made contracts with licensed physicians under which the latter agreed to render professional services, for a certain stipulated compensation, to those members of the general public who paid the corporation a specified monthly sum. The consideration received by the physicians for services rendered by them varied with the number of contract holders serviced but not with the amount of services furnished to any or all of the contract holders.

Relying on the Fishback Case, *supra*, and Stern v. Rosenthal, 71 Misc. 422, 128 N.Y.S. 711, the court held that the Community Health Service was *not* engaged in the business of insurance because, as between the corporation and the physician, nor between physician and subscriber, (in the court's opinion) was compensation or any other element of the arrangement between them affected by any contingency, hazard or risk which the corporation assumed and insured against. The decision was rendered by a divided court, ten (10) for, and four (4) against. The Stern Case mentioned *held* that where defendants employed plaintiff to manufacture trousers out of defendants' material and, in consideration of a deduction of one percent from the amount due, agreed to pay for plaintiff's services if the goods should be damaged by fire, defendants did not, by such provision, assume a risk which could be deemed to constitute the doing of an "insurance" business within the purview of the statutory definition applicable to insurance.

The fact remains, however, that this case, even though based upon the Fishback Case, distinguished herein on the basis of its particular facts, most strongly supports the position of NHP, whose operation is substantially similar to that involved and before the court in this New Jersey Case.

Michigan Hospital Service v. Sharpe (1954), 339 Mich. 357, 63 N.W.2d 638, 43 A.L.R.2d 1167, is another case which may be considered in connection with this view.

Plaintiff, in this case, sought subrogation against subscribers who were entitled to hospital services as provided in a certificate issued by the plaintiff. The plan involved embraced both hospitalization and medical services.

On the facts, the court held that plaintiff was not entitled to such subrogation.

As *dicta*, the court stated that a mere contract entitling certificate holders to medical services or supplies at reduced rates was not one of "insurance," because of a want of hazard or peril, considered the prerequisite contemplated by the statute defining insurance. Such a contract, in the court's view, is not *necessarily* governed by the laws relating to insurance, even though the enabling statute under which the corporation was organized provides for supervision of the corporation by the state commissioner of insurance.

Further authority that group health plans do not constitute “insurance” in their operations generally, is to be found in Vance on Insurance, Third Edition, p. 87, where said view is set forth as follows:

Contracts to render hospital or medical service entered into between the Blue Cross or similar nonprofit organizations and members *would appear to be contracts of insurance, and it has been so held. However, the majority view at the present time is to the contrary. These associations are, however, generally organized and regulated under special statutes and not the general insurance laws.* (Containing references to cases in footnotes.) (Italics supplied.)

Other cases cited in support of the general proposition are: *Butterworth v. Boyd*, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838; *Group Health Asso. v. Moor* (1938), 24 F.Supp. 445; *Hall D’Ath v. British Provident Asso. H.A.S.* (1932), 48 Times L.R. 240.

We next consider the cases where definitely opposite conclusions and results were reached.

The facts in *Cleveland Hospital Service Asso. V. Ebright* (1942), 36 Ohio L.Abs. 600, 45 N.E.2d 157 (aff’d. 1943, 142 Ohio St. 51, 59 N.E.2d 929) may be summarized as follows:

Plaintiff, a nonprofit hospital service corporation sold contracts entitling subscribers, upon recommendation of their attending physicians to a specified maximum period of hospitalization in a nonprofit hospital. The contracts also provided for specified payments by the corporation to the hospital. Any surplus remaining after payment of hospital bills and expenses was to be held as a reserve for the benefit of the subscribers.

Plaintiff sued to enjoin the collection of a franchise tax by the state treasurer.

The court, in granting the injunction, held that plaintiff was engaged in a business *substantially* amounting to insurance, but that it was not liable for the franchise tax levied on domestic insurance companies because of a statute providing specifically a different method of taxation thereof.

The court expressly rejected plaintiff’s contention that the contract assured the subscribers “service” and not “indemnity,” and that it is essential to a true “insurance contract” that it provide for payment of money to the insured in an amount, fixed in the contract, designated to indemnify him for a loss he has suffered. In this connection, the court justified such rejection as follows:

“In our judgment, the test that a contract may not be one substantially amounting to insurance unless it provides for the payment of money upon the happening of a contingency is too limited. Nor will the fact that the payment is made to the hospital and not to the subscriber change the character of the contract. The advantage to the subscriber, if he invokes the benefits of his contract, requires payment in money which is definitely measured by the extent of service rendered to the subscriber by the hospital to which he elects to go. It is payable upon a contingency, namely, that it is certified by his attending physician that the subscriber requires hospitalization. The minimum payment is not fixed but the maximum payment that may be exacted from the plaintiff is set forth in the contract. The contract, in probability, is not to indemnify the subscriber, because the hospital which he selects does not extend credit to him and, therefore, there is no primary liability on his part to make the Service Association an indemnifier. The amount which is paid by the subscriber is a charge based

upon an actuarial determination of the probable risk incurred in issuing the contract. Although that which is provided the subscriber upon the happening of a contingency is, so far as he is concerned, service, yet it is measured by a money consideration payable to the hospital because of the rendering of that service to the subscriber on behalf of the plaintiff association. The language (of the statute) providing that a company issuing contracts *substantially amounting to insurance of any character is an insurance company*, is so broad as to require us to hold that the plaintiff is an insurance company. The contract in this case in so many particulars amounts *substantially* to insurance to the subscriber as to require that it be construed to be an insurance contract.” (Italics supplied.)

It should, of course, be noted that, in this case, the hospitals received certain specified payments on the basis of *actual* services rendered, and that any surplus remaining after payment of such expenses were held in reserve for the benefit of subscribers. These are, undeniably, important differences. However, there were many essential similarities to the type of operations discussed previously in the cases supporting the contrary view. In any case, the reasoning of the court is equally applicable to those cases and situations also.

It will suffice, in any event, to point out the undeniable fact that the decision was based on statutory construction of applicable insurance regulations and the conclusion reached thereon, that the language of the statute was broad enough in its terms to include the involved operation within the definitions of “insurance” and “insurance contract.”

The case of *Hospital Serv. Asso. v. Evatt* (1944), 144 Ohio St. 179, 57 N.E.2d 928 (relying on the preceding case) *held*: that a corporation organized under the statute for the purpose of establishing, maintaining, and operating a nonprofit hospital service plan whereby hospital care would be furnished by a group of nonprofit hospitals was engaged in a business *substantially* amounting to insurance, and, hence, was not entitled to an exemption from taxation on the ground that its property was used “exclusively for charitable purposes.”

The case of *McCarty v. King County Medical Service Corp.* (1946), 26 Wash.2d 660, 175 P.2d 653 (the forum of the Fishback Case, *supra*, decided earlier, and cited in support of the view that the operation of the plan therein did *not* constitute an “insurance” transaction) contains some significantly interesting variations from the situations thus far analyzed. The facts in this case may be summarized as follows:

Plaintiffs, employee-beneficiaries, brought suit against the medical service corporation and its medical director to recover certain moneys expended by them for medical and hospital services, rendered necessary because the medical director of the service corporation had refused to certify plaintiffs as eligible therefore, as required under a contract for group medical and hospital service. Plaintiffs also sued the hospital for a declaratory judgment relieving them of liability for hospital services received by them, on the ground that such obligation was covered by the terms of a contract made between the hospital and the medical service corporation, for the benefit of a group of employee-beneficiaries, of which plaintiffs were members.

On appeal, judgment in favor of the plaintiffs (employee-beneficiaries) was affirmed. The court here held the medical service corporation not only a “principal” but also an “insurer,” within the purview of the statutory regulations, notwithstanding the fact that the service corporation represented itself and professed to be a *charitable* corporation. The decision

was justified on the basis that the service corporation had the absolute and exclusive power to certify or withhold certification as to the eligibility of members to medical and hospital services, and as a consequence, virtual control over the operation and the disbursement of funds derived from payments made by member-beneficiaries. The court, after reviewing and noting the distinctions between the contracts in the Jordan and Fishback Cases, *supra*, and the contract before it (set forth and contained in the above summarization of the facts), referred to the characterization of the Group Health Association by the court in the Jordan Case, *supra*, as follows:

“Group Health Association was a non-profit corporation, organized in Washington, D. C. by a large number of members, who were civil service employees of the Federal government for the purpose of securing for themselves and their families cheaper medical service by quantity purchasing and economics in operation. In the opinion in the Jordan case \* \* \* Judge Rutledge said ‘Group Health is in fact and in function a consumer cooperative.’ King County Medical Service Corporation is designated in its contract as a ‘charitable corporation’. No intimation appears, however, in the record, as to its incorporators or who they may be, but, certainly, it is wholly evident that they were not the thousands of employees of the Seattle Chamber of Commerce and other employers similarly contracting for medical aid. The service corporation in the present case is not a consumers’ cooperative, not do any of the parties hereto contend that it is. *It is a private corporation, a distinct entity in the eyes of the law, dealing with employee beneficiaries on the one hand and with physicians and hospitals on the other.*” (175 P.2d 662; italics supplied.)

We regard this case to be of crucial importance to the conclusion reached by us on the question under consideration, as regards the resolution of the apparent conflict of the court decisions on the matter. It will be noted that the three principal cases for the view that group medical and hospital service plans do *not* constitute insurance, namely, the cases of *Jordan v. Group Health Asso.*, *California Physicians’ Service v. Garrison*, and *Commissioner of Banking and Insurance v. Community Health Service, Inc.* placed chief reliance on the Fishback Case for their decisions. In other words, the Fishback Case may be regarded as the matrix for the development of the view and doctrine that *no* insurance is involved in the operation of group health plans. The effect of the McCarty Case, decided in the *same forum* as was the Fishback Case, virtually overrides, or at least very materially minimizes the weight and significance of, the Fishback Case. The McCarty Case decision, by the same token, must also be regarded as seriously impairing, if not overruling, the significance and decisions of the three indicated cases, which expressly and mainly relied on the Fishback Case.

The analysis and review of the authorities thus far set forth herein, it is believed, has fairly presented both points of view on the question before us. It has, necessarily, emphasized the *definitional* aspects of the problem. At this point, it is fitting and proper to consider the matter on a *functional* basis, for appraisal and evaluation of the important issues here specifically involved. This may be done by posing and answering the question: What, in general, is the *functional* nature of group health and medical service plans, and the nature and purpose of “insurance” laws and regulations, as applicable to such plans?

Obviously, the apparent conflict in the decisions rendered by the different courts, indicates some present need for evaluation and reappraisal of the fundamental nature and *function* of such group health plans, no matter what their individual variations, and also possible deficiencies or inadequacies in existing laws as regards such *collective* schemes. Such action might properly secure to the general public the benefit of low-cost indemnification against the large present financial burden from illness and accidents,

provided under such plans. This need alone sufficiently accounts for their tremendous popularity and wide-spread adoption by the public generally. Such action should, at the same time establish and afford the general public adequate controls, safeguards and protection against the many, very serious evils and dangers inherent and potentially present in such group health plans and operations when, and if, directed and exploited by inexperienced, irresponsible or unscrupulous individuals, shielded from personal liability for their actions through use of the corporate form of organization. It would take us too far afield to dwell in detail on the medical, economic, and legal experience thus far had with the development and use of group health plans in general, and to recite and discuss the possible abuses and evils merely hinted at above, but the literature available on the subject is both extensive and instructive. (Generally, see: 53 Yale Law J. 162; Vance on Insurance, Third Edition; 23 Cornell L. Qtrly. 188; 52 Harvard Law Review 809; 10 South. Cal. Law Review 329; 43 Columbia Law Review 136; 167 A.L.R. 322; 119 A.L.R. 1241; 100 A.L.R. 1449; 63 A.L.R. 711; 36 Col.L.Rev. 456; and Levy and Mermin, "Cooperative Medicine and the Law" (1938), 1 Nat. Lawyers Guild Q. 194.)

*Functionally*, of course, agreement is possible that the benefits of all group medical and hospital service plans are based upon the use and application of certain actuarial principles to the contingent hazards, perils, burden, and losses, caused by accident or illness. Through their use, it is possible to determine the incidence of all these consequences resulting from accident or illness. A particular person can purchase "indemnification" from such fortuitous or contingent hazards and financial burden, by contribution to a common fund, in which an adequately large, representative cross-section of the general public participates. The over-all cost of required medical service and hospitalization offered by such group health plans is, as regards any particular participant, consequently reduced, through distribution of such over-all costs among the large group of participants.

It must be obvious that the character of the management of every such group health plan, and the sufficiency and proper application of the funds derived from participating members, to assure the availability of the offered medical and hospitalization services *when needed*, are matters of great importance and public interest. It is immaterial what role is played in the operation of any such plan; *functionally*, it is a *collective* scheme, and all distinctions are of form rather than substance. The ultimate object and purpose of such *collective* plans or schemes is, and remains, clearly and definitely, *purchase of low-cost "indemnification,"* by individual subscribers to such group health plans. *For purposes of regulation and control by the state under its police powers*, group health plans and operations, *as a collective and entire scheme*, must properly be deemed and held "insurance," and agreements providing therefor "insurance contracts," unless expressly or clearly exempted or excepted from application of statutory insurance definition and regulations. It is the *functional* purpose and object of such statutory regulations to afford, and adequately protect the general public from fraud, deception, imposition, and losses in this important field of public health and welfare, and such object is well-established to be within the scope of exercise by the state of its police powers. In the absence of clear and express prohibition or exemption, statutory and administrative regulations to secure such objects and purposes are entitled to enforcement and compliance.

It may be conceded that "milder" regulation might be warranted as regards some operations and plans concerned with providing increased and improved medical service and hospitalization at low cost to great numbers of people. This, however, is properly a matter for legislative action, based upon a due regard to the experience had with the various collective schemes and operations, and the public interest. Pending any such legislative action, the matter and problem must, necessarily, be considered and dealt with, within the framework of existing laws, regulations, and concepts. Any notion that regulatory action should await possible legislative action *after actual experience with any such group health plan and operation* would ascribe to the law a static quality belied by

the dynamics of changing society and conditions, to which laws have largely been adapted by the process of judicial construction and determinations.

On the basis of our review of the cases on both sides of the issue, the indicated excerpts of existing law deemed relevant or applicable, the views herein expressed concerning the fundamental nature and *function* of such *collective* schemes pertaining to group health, and the state's regulatory police powers as exercised, we conclude (as did the court in the Cleveland Hospital Service Case, *supra*) that existing law is so broad as to require us to hold that NHP, in its proposed plan and operations in Nevada, "substantially" amounts to "insurance," and the conduct of an "insurance business," within the purview of licensing and other statutory regulatory provisions applicable to insurance. (See Attorney General's Opinion 215, Oct. 28, 1952; Attorney General's Opinion 318, Feb. 26, 1954.)

We, therefore, state it as our considered opinion that the question submitted to us and set forth herein, must be answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-45 Public Employees Retirement System—Deputy City Attorney of Carson City not qualified under Public Employees Retirement System, by reason of the fact that his official duties normally require less than 1,200 hours per year.**

CARSON CITY, May 4, 1959

HONORABLE KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.*

DEAR MR. BUCK: We have your letter of April 9, 1959 requesting an opinion of this department.

FACTS

Cameron Batjer, Esq., was recently employed by the city of Carson City, as a deputy city attorney upon monthly compensation of \$150. Your office was of the opinion that such contract would constitute the rendering of professional service of Mr. Batjer, upon a retainer basis, rendering the attorney in effect an independent contractor, under NRS 286.040, as amended (See: Chapter 142, Statutes 1959—A.B. No. 105), rather than an "employee" within the meaning of the Public Employees Retirement System. If such belief is correct it would lead to the conclusion that time spent by Mr. Batjer in that position may not be counted toward retirement under the Act. It would also mean that your department would not be authorized to receive and accept contributions, from the city and from the attorney, by reason of such contract, during its continuance.

QUESTION

Is an attorney at law, commissioned as a deputy city attorney of the city of Carson City for monthly compensation of \$150, qualified by reason of such contract and to continue during the continuance of such contract, to be classified as an employee of a participating political subdivision, and by making proper contributions as required by the

law, receive creditable time toward retirement under the provisions of the Public Employees Retirement Act?

OPINION

From the knowledge and information that we have upon the matter, we are of the opinion that the question must be answered in the negative. If the attorney should be able to present evidence in disproof of the facts hereinafter set out, however, upon which the opinion is predicated, we would be happy to review the matter in the light of such evidence.

NRS 286.040, prior to the adjournment of the legislative session of 1959, just concluded, reads as follows:

As used in this chapter, "employee" includes, in addition to the employees of the State of Nevada and its political subdivisions, public officers, but not persons employed as independent contractors.

The concept of independent contractors was present in the law before amendment. NRS 286.040 (Chapter 142, Statutes 1959, A.B. 105) provides as follows:

1. As used in this chapter "employee" means:
  - (a) A public officer of the State of Nevada or its political subdivisions.
  - (b) Any person employed by the State of Nevada or its political subdivisions whose compensation is provided by the state or its political subdivisions and who is under the direction or control of officers of the state or political subdivisions thereof.
2. "Employee" does not include independent contractors or persons rendering professional services to an employer on a fee, retainer or contract basis.
3. The board shall determine who are employees under this definition.

It may be that under the above section the deputy city attorney would not properly be classified as an "employee" within the meaning of the Public Employees Retirement Act, under the theory of lack of direction or control, or under the theory of the rendering of independent professional service.

This, however, is not entirely free from doubt as to the proper classification of the deputy city attorney of the city of Carson City, based upon the distinctions and provisions of the statute heretofore quoted. But the distinction or classification may be made upon firmer ground than the distinctions heretofore mentioned.

NRS 286.320, subsection 1, as amended (Ch. 142 Stats. 1959—A.B. No. 105), reads as follows:

1. An employee shall be regarded as eligible for membership in the system if his position, on the basis of one year of service, would require 1,200 or more hours of service per year. In determining eligibility all positions shall be regarded as continuing for one year regardless of anticipated duration, and all incumbents of covered positions shall be eligible regardless of individual tenure.

As we construe this subsection it has the following effect, that if a person is an "employee" within the meaning of NRS 286.040 he may nevertheless be disqualified to become or remain a member of the system by reason of the fact that his position normally requires less than 1,200 hours of service per year.

We assume, although we are not fully convinced that such is the fact, that the attorney is an "employee" of the city of Carson City, within the meaning of NRS 286.040, but despite such assumption arrive at the conclusion that he may not be certified as an employee, within the provisions of the Public Employees Retirement System, for the reason that it appears that his position would normally require less than 1,200 hours of service per year.

There are normally 49 weeks (52 weeks less three for statutory vacation) of five days each. At 8 hours per day the full year of work would normally be 1,960 hours. This would indicate that an attorney who works 1,200 hours or more per year would work an average of 4 hours 53 minutes daily and for each and every office day, during the entire year, in the performance of his duties. We entertain grave doubt that the deputy city attorney of Carson City would or could be occupied with his official duties for such a great part of his office time. Incidentally, at 1,200 hours per year, the allowance would be \$1.50 per hour. This also leads to the belief that the time normally required to do the work in the position under review, would be substantially less than 1,200 hours per year.

For the reasons given, we are of the opinion that the deputy city attorney of Carson City is not qualified to remain or become a member of the Public Employees Retirement System, by reason of his present public employment.

The question is answered in the negative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-46 Claims Against the State, Procedure for Payment of—  
The Board of Examiners is required to examine and transmit to the Legislature under NRS 353.085 all claims filed with said board and against the State, the payment of which would require a legislative appropriation. In considering said claims the Legislature may choose to ignore or enforce the provisions of NRS 353.095.**

CARSON CITY, May 5, 1959

MR. NEIL D. HUMPHREY, *Director of the Budget, Carson City, Nevada.*

DEAR MR. HUMPHREY: In your letter of April 13, 1959, you requested our opinion with reference to the procedure to be followed in the petition of claim against the State of Nevada by Louis Ferrari.

FACTS

Louis Ferrari held the office of Surveyor General of Nevada until July 1, 1957, at which time that office was abolished by a legislative act and the functions and duties thereof assumed by the Department of Conservation and Natural Resources. The complete background on that matter is set forth in the case of *Shamberger v. Ferrari*, 73 Nev. 201, 314 P.2d 384.

On or about March 19, 1959, Mr. Ferrari filed with the Board of Examiners a verified petition of claim against the State of Nevada alleging upon information and belief that he is entitled to terminal leave pay in the sum of \$600. Based on the information available to this office Mr. Ferrari never formally presented his claim against the State of Nevada to the Forty-ninth Session of our Legislature.

QUESTION

Has Mr. Ferrari followed the proper procedure in presenting his claim?

OPINION

Title 31 of Nevada Revised Statutes, entitled "Public Financial Administration," outlines the procedure for the payment of claims against the State. NRS 353.085 thereunder provides for the procedure when no legislative appropriation has been made; NRS 353.090 outlines the procedure to be followed when a legislative appropriation has been made.

The final appropriation made by the Legislature for the office of Surveyor General was in 1955 (Stats. Of Nevada, Chap. 324). That appropriation covered the biennium beginning July 1, 1955, and ending June 30, 1957. Section 63 of said Chapter 324 provided that if any unexpended balances of the appropriations therein made should remain on June 30, 1957, said balances would revert to the fund from which appropriated. When Mr. Ferrari's office of Surveyor General was abolished on June 30, 1957, any unexpended balance then existing in the legislative appropriation for the office of Surveyor General, by law, reverted to the fund from which appropriated. We, therefore, must conclude that there is no legislative appropriation from which Mr. Ferrari's claim could be paid. For that reason, it appears NRS 353.085 will govern the procedure to be followed. NRS 353.085 provides:

1. The state board of examiners shall:
  - (a) Examine all claims against the state presented to the board by petition, for which no appropriation has been made and which require action by the legislature.
  - (b) Take all evidence in regard to the same which may be offered by the claimant or deemed proper by the board.
2. The evidence shall be reduced to writing, and the petition, the written evidence and the opinion of the board in reference to the merits of the same shall be transmitted to the legislature on the first day of its next session.

We have noted in our statement of the facts that Mr. Ferrari did not formally present his claim to the Forty-ninth Session of the Legislature. Under the provisions of NRS 353.095 it is provided:

1. Any person having, or claiming to have, any alleged claim against the State of Nevada shall present such alleged claim for consideration to the next succeeding session of the legislature following its incurrence. Any such alleged claim not so presented, or which has been so presented, shall be forever barred from presentation to any subsequent legislature for further consideration.
2. Nothing contained in this section shall be construed in any way to impair the rights of any claimant to bring an action against the state upon any such claim.

From reading the foregoing, it would appear that Mr. Ferrari should have presented his claim to the Forty-ninth Session of the Legislature as that was the "next succeeding session of the legislature following its incurrence." Since this was not done, does it mean that Mr. Ferrari's claim is forever barred? A similar question was presented to former Attorney General M. A. Diskin which he answered in an opinion dated March 21, 1923. In that case a claim which was incurred prior to the legislative session of 1921 was

presented for the first time to the legislative session of 1923 which passed a relief measure authorizing payment of said claim. It was urged that under the provisions of Statutes of Nevada 1919, page 439 (now NRS 353.095 quoted above), the claimant should have presented his claim to the legislative session of 1921. Since this was not done, the claim was barred from consideration by the session of 1923. The Honorable M. A. Diskin pointed out in a well reasoned opinion that one legislative session cannot enact laws that bind a subsequent Legislature. Each session is supreme in enacting laws and in that respect is limited only by the State and Federal Constitutions. We are in complete accord with that opinion. The provisions of NRS 353.095 can in no way serve to impede the Legislature from considering or enacting any measure. The scope and contents of legislative enactments can be limited only by the State and Federal Constitutions.

We have examined the Nevada and the United States Constitutions to determine if there is anything in their respective provisions that would govern the Legislature in the instant case. There is no provision in the United States Constitution that would act as a prohibition on the Nevada Legislature in this matter. Such a provision, however, is found in the Nevada Constitution in Article V. Section 21. Said provision, in part, provides that the Governor, Secretary of State and Attorney General,

shall also constitute a board of examiners, with power to examine all claims against the state (except salaries or compensation of officers fixed by law), and perform such other duties as may be prescribed by law. And no claim against the state (except salaries or compensation of officers fixed by law) shall be passed upon by the legislature without having been considered and acted upon by said board of examiners.

Our Supreme Court had the occasion to construe Article V. Section 21, of the Nevada Constitution in the case of *County of Lyon v. Hallock*, 20 Nev. 326. In that case the Legislature of 1889 enacted a law which required that a special election be held to submit to the people certain proposed amendments to the Constitution of the State. The law provided that each county would be reimbursed for the expenses incurred upon the county commissioners of the respective counties certifying the same to the State Controller, who would then draw his warrant upon the State Treasurer for the amount certified. In order to reimburse the counties, \$15,000 of unappropriated moneys was set apart in the State Treasury. The County Commissioners of Lyon County certified that the expenses incurred by said county in holding the election amounted to \$1,032.15. The State Controller refused to issue his warrant for that amount. It appears that the Board of Examiners audited the claim for \$775.21 and the State Controller tendered his warrant for that amount. The question was whether the Legislature can require the Controller to issue his warrant for the amount claimed, or does the Constitution (Article V. Section 21) require the Board of Examiners to first audit the claim.

The court referred to the statute relating to the enforcement of claims against the State for which an appropriation has been made, but the amount has not been liquidated, and also to the statute governing claims against the State when no appropriation has been made. The court then said:

Claims for which no appropriation has been made must be acted upon by the board (Examiners) before submission to the legislature in order that its members may have the advantage of the information which the members of the board would naturally acquire from the nature of their duties. These provisions of the statutes present a practical and reasonable exposition of the provisions of the constitution, and place the authority to audit unliquidated claims with the board created for that purpose by the constitution.

From the authority cited above, we conclude that Article V, Section 21, of the Nevada Constitution is a limitation on the Legislature. It limits the Legislature from considering certain claims until the Board of Examiners has made its examination and acquired evidence on the merits of the claim to present to the Legislature for its consideration. As pointed out in *County of Lyon v. Hallock*, supra, it is the duty of the Board of Examiners to examine such claims. We interpret that duty to require the Board of Examiners to present to the Legislature all claims against the State which have been filed with the Board and for which claims there is no legislative appropriation out of which they could be paid. Before making presentation of such a claim to the Legislature, the Board of Examiners must take all evidence relevant to the merits of the claim and proceed as prescribed by NRS 353.085 in transmitting the same to the Legislature.

As pointed out earlier in this opinion, Mr. Ferrari filed his claim with the Board of Examiners. There is no legislative appropriation out of which that claim could be paid, assuming it were allowed. We are, therefore, of the opinion that the Board of Examiners must examine his claim and proceed under NRS 353.085 to transmit the same to the next session of the Legislature. That legislative body may then consider or refuse to consider the claim, NRS 353.085 notwithstanding.

We answer the question propounded in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-47 Department of Welfare, State—Boards of county commissioners cannot, under existing law, delegate their responsibility and power of review to others, as regards decisions of State Welfare Department concerning eligibility of, and allowances to, recipients of public assistance.**

CARSON CITY, May 5, 1959

MRS. BARBARA C. COUGHLAN, *State Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada*

DEAR MRS. COUGHLAN: Reference is made to your letter, dated April 15, 1959, with annexed copy of a letter dated April 14, 1959, from Honorable Ben Winn, Chairman, Washoe County Board of Commissioners, purporting to be a reply to a letter from you dated April 13, 1959, addressed to Mr. Albert Meyers, Director, Washoe County Welfare Department, a copy of which letter you also submitted to us. The import of all of the foregoing correspondence is by way of background material in connection with your request for our opinion on the question which is hereinafter stated.

FACTS

It appears from action taken by the Board of County Commissioners of Washoe County, Nevada, that said Board has delegated to the Director of the County Welfare Department, among other powers and duties, the responsibility for review and either concurrence or disagreement with the decisions of the State Welfare Department relative to new applications and changes in awards or allowances under the Old-Age Assistance and Aid to Dependent Children programs.

The State Welfare Department is concerned with the propriety and validity of such action on the part of said Board of County Commissioners, in view of the specific statutory provisions contained in NRS 427.230 and 427.250.

QUESTION

Can a Board of County Commissioners properly and legally delegate its power of review of the determinations made by the State Welfare Department with respect to the eligibility and amount of assistance rendered to applicants for public assistance, as provided and set forth in NRS 427.230 and NRS 427.250?

OPINION

The applicable, and controlling, statutory provision relative to the foregoing question is contained in NRS 427.230, and is as follows:

Subsection 2. The county board shall review the decision of the state department at its next regular meeting, and shall express its concurrence in the state department's decision, or if it does not concur therein may express the basis for such nonconcurrence and request reconsideration or further investigation by the state department.

Subsection 3. The state department, on request of the county board, shall reconsider its decision or further investigate the application.

Subsection 4. The decision of the state department, after such reconsideration or further investigation, shall be binding on the county board.

Subsection 5. In no case shall payment in accordance with the decision of the state department be withheld pending reconsideration or further investigation as requested by the county board.

Article IV, Section 26, Nevada Constitution, provides as follows:

The legislature shall provide by law for the election of a board of county commissioners in each county, and such county commissioners shall, jointly and individually, perform such duties as may be prescribed by law.

It is well settled that a county board (of commissioners) possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the constitution or statutes of the state, or such powers as arise by necessary implication from those expressly granted, or such as are requisite to the performance of the duties which are imposed on it by law. It must necessarily possess an authority commensurate with its public trusts and duties.

(See 20 C.J.S. 849, Sec. 82; State ex rel. King v. Lothrop, 36 P.2d 355, 55 Nev. 405; NRS 244.195.)

We have carefully examined the provisions of Chapter 244 of the Nevada Revised Statutes, and have not found any provision contained therein which would authorize or justify such delegation of power as seems to be involved herein. In fact, our review of the financial powers of boards of county commissioners generally and specifically (see NRS 244.200-244.780, inclusive), definitely supports a want of such authority.

The right of a county board to delegate its authority depends on the nature of the duty to be performed. *Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent.* Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by

the board to a committee or to an agent, an employee, or a servant \* \* \*.  
(Italics supplied.) (See 20 C.J.S. 862, Sec. 89.)

We deem the statutory responsibility imposed upon boards of county commissioners by the provisions of NRS 427.230 and NRS 427.259[427.250] as involving the exercise of discretion and judgment. We are of the further belief that the responsibility for review and concurrence or disagreement with the decisions of the State Welfare Department is not a ministerial function, but an important and serious one, inasmuch as federal funds are involved in the administration of these public assistance programs. Eligibility for such federal funds on the part of the State is based upon prior federal approval of an over-all state plan, expressly and specifically providing for defined county participation and responsibility. The responsibility for the review of the decisions made by the State Welfare Department, and concurrence or nonconcurrence with said decisions, is, by statute and the federally-approved over-all state plan, vested and imposed upon the Board of County Commissioners. NRS 427.230 and 427.250 are clear and explicit on this point, and there is no doubt in the language employed therein to warrant resort to rules of construction, in order to derive an inference to the contrary.

While the Board of County Commissioners, in the instant case, is entirely within its rights in utilizing the experience and services of an expert in such matters, even to the point of adopting his findings and conclusions, the ultimate responsibility and decision must necessarily be reflected as officially that of the Board of County Commissioners, *and of no one else.*

It is, therefore, our considered opinion that the action taken by the Board of County Commissioners, Washoe County, Nevada, insofar as it is reflected as an exercise of the required reviewing power and responsibility of the decisions of the State Welfare Department (as to eligibility and amount of allowances of public assistance recipients) by someone other than itself, acting officially as a board, is both improper and illegal.

We, therefore, conclude that the question hereinbefore stated must be answered in the negative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-48 Vocational Education, State Board of—Apprenticeship Training. The off duty supplemental instruction of a duly indentured apprentice is exclusively the function and duty of the local board of education. See: Companion Opinion No. 59-49.**

CARSON CITY, May 8, 1959

HONORABLE BYRON F. STETLER, *Superintendent of Public Instruction, Carson City, Nevada.*

DEAR MR. STETLER: In your letter of March 4, 1959, you have requested an opinion of this office. The problem will more concisely be stated by quoting from your letter.

The training of apprentices in Nevada is a cooperative program with the Local Joint Apprenticeship Committee, the State Apprenticeship Counsel, the Local Board of Education and the State Board of Vocational Education participating in the various functions in accordance with laws and regulations governing same.

You have propounded the following question:

QUESTION

Under the provisions of NRS 610.010-610.190, will any or all of the above mentioned agencies have the authority to prohibit a person who does not meet the minimum qualifications, as set forth in the Apprenticeship Standards for the area in which the school is located, from entering or continuing in a class of related instruction that has been organized specifically for registered apprentices?

OPINION

A full understanding of this problem is very complicated for reasons that will hereafter be made more clear. Another question involving the training of apprentices dealing with apprentice training, certification, etc., and which will cast some light upon this opinion, will be released shortly after this opinion. The two opinions should be read together.

The voluntary apprenticeship statutes are contained in NRS 610.010 to 610.190. As stated in the letter, the program of apprenticeship training involves the cooperative efforts of the four entities named. The problem is one of delineating the respective functions of each. It is a problem of coordination.

We are here concerned with the preliminaries of creation of a valid apprenticeship, including the rights of the apprentice under the apprenticeship status, (2) the powers and functions of the local Joint Apprenticeship Committee, and how affected by the State Apprenticeship Council and the Board of Vocational Education, and (3) the powers and authority of local boards of education. Incidentally, this involves the cooperative approach and coordination of the local Joint Apprenticeship Committee and the local boards of education in the use of school plants, in a cooperative function and to a mutually desirable end.

Adult vocational education in Nevada, under the administration of the State Department of Vocational Education, is of two classifications, viz: (1) That education and training which has for its purpose the training and qualification of a journeyman in one of the trades, and (2) Other training not leading to certification in a trade but nevertheless of a manual nature. This opinion and all remarks and distinctions made herein will have application to the number 1 classification only, namely, that training leading to proficiency and certification in one of the recognized trades.

Under this chapter, an "apprentice" is defined, and the manner of creation of the status is set out, (NRS 610.010); the purposes of voluntary apprenticeship are clearly stated, (NRS 610.020); the manner of creation and number of members of State Apprenticeship Council is provided, (NRS 610.030); the term of office of members of the council is provided, (NRS 610.040); the manner of filling of vacancies on the council is provided. (NRS 610.050); the division of offices, the meetings, and the expenses of the members of the council are provided in Sections NRS 610.060, 610.070, 610.080, respectively. In NRS 610.090, the duties of the State Apprenticeship Council are set out, and among other things it is provided that the State Apprenticeship council shall establish standards for apprenticeship agreements, which shall not be lower than those standards otherwise provided in the chapter. In NRS 610.100, it is provided that at least annually the State Apprenticeship Council shall report its activities through the Labor Commissioner to the Legislature. In NRS 610.110, it is provided that the Labor Commissioner shall be ex officio state director of apprenticeship.

NRS 610.120 provides as follows:

1. The state director of apprenticeship is authorized:

(a) With the advice and guidance of the state apprenticeship council, to administer the provisions of NRS 610.010 to 610.190, inclusive.

(b) In cooperation with the state apprenticeship council and local or state joint apprenticeship committees, to set up conditions and training standards for apprentice agreements, which conditions or standards shall in no case be lower than those prescribed by NRS 610.010 to 610.190, inclusive.

(c) To approve any apprentice agreement which meets the standards established under NRS 610.010 to 610.190, inclusive, and to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement.

(d) To keep a record of apprentice agreements and their disposition.

(e) To notify local joint apprenticeship committees of completion of apprenticeships.

(f) To perform such other duties as are necessary to carry out the intent of NRS 610.010 to 610.190, inclusive.

2. The administration and supervision of related and supplemental instruction for apprentices, coordination of instruction with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of state and local boards responsible for vocational education.

It will be observed that subdivision 1, above, and (a) to (f) thereof, is a grant of power to the state director of apprenticeship, whereas, subdivision 2 thereof is a declaration of disclaimer of power in the state director of apprenticeship, in certain enumerated respects. This is significant and will be hereinafter alluded to.

We are informed that journeymen, with a desire and aptitude for instruction are certified by the State Department of Vocational Education, as instructors, under the apprenticeship programs; that such tradesmen so certified are employed and compensated by local boards of education, for work under apprenticeship programs, and that the moneys of the local boards of education are augmented by contributions from the State Department of Vocational Education, which in part receives its money from the United States, under the provisions of the Smith-Hughes and related federal acts.

Under NRS 610.130, provision is made for the creation, composition, and membership of local or State Joint Apprenticeship Committees, hereinafter referred to as local Joint Apprenticeship Committees, or committees. Under 610.140, the functions of the local Joint Apprenticeship Committees are delineated, and it is provided inter alia:

2. The activities of local or state joint apprenticeship committee shall be, at all times, subject to appeal to the state apprenticeship council.

Under NRS 610.150 the mandatory contents of apprentice agreements or indentures are set out; whereas under NRS 610.160 the persons authorized to sign such indentures are enumerated, and the effect of such an agreement on a minor apprentice, upon attaining his majority, is contemplated and provided.

Under NRS 610.170, it is provided that an apprenticeship indenture may be signed by an association of employers; whereas under NRS 610.180, violations of apprenticeship agreements are anticipated and provisions are made for investigations, hearings, appeals, and exhaustion of administrative remedies.

We are informed by the State Department of Vocational Education that a Director of Vocational Adult Education serves in each of the two larger county school districts, namely, for Washoe and Clark Counties. Such director is in effect a coordinator between the state office and the local board of education, as well as the local administrative head of adult educational work. Such director, of course, has jurisdiction in matters of apprenticeship as well as other adult educational programs.

We are also informed that for the most part the organization of apprenticeship programs is that of the local joint apprenticeship committees, with whom the prospective apprentice enrolls. Such committees are for the most part his sponsor and as such administer the execution of apprentice agreements, arrange for his on-job employment and his off-job supplemental instruction. This instruction as a general rule is carried on in public school buildings, which are, of course, under the provisions of NRS 386.350, under the control and supervision of county boards of education, i.e., county school trustees.

The power of the local boards of trustees to control and supervise the local school plant, and to administer the public schools cannot be questioned under Chapter 386 of the Nevada Revised Statutes. And the power of the state and local school boards respecting the administration and supervision of vocational education, including apprenticeship, cannot be questioned under NRS 610.120, subdivision 2. And no conflict exists between the state and local school boards respecting the power of administration of the schools on the local level, the state conceding that it is the sole responsibility of the local school boards.

The problem then is one of jurisdiction and authority respecting the enrollment and education of apprentices in their off-job supplemental instruction, involving the manner of enrollment for such supplemental instruction and the manner of, and power to, dispense with the enrollment of such an apprentice, who was improperly accepted.

It is almost apparent from what has heretofore been set out that the power of the local joint apprenticeship committee does not extend to the actual administration of the off-duty supplemental instruction, for the certification of instructors is on a state level, the employment and pay of such instructors is that of the local school board, and the facilities for such instruction are clearly under the supervision and control of the local school board. However, the certification by the local joint apprenticeship committee as to those that are qualified to be accepted for supplemental instruction under an apprentice program is clearly that of the committee. None except those so certified by the committee should have been or should be accepted by the local school board, for the reception of off-duty supplemental instruction. The school board through the Director of Vocational Education, or otherwise, should certify back to the local Joint Apprenticeship Committee, the results achieved by the apprentice in the pursuit of such off-duty supplemental instruction.

We now summarize to make unmistakably clear our convictions in regard to the powers of the respective entities in the matter of off-duty supplemental instruction of duly indentured apprentices.

The enrollment of the apprentices is that of the local Joint Apprenticeship Committee, which committee has a number of other functions not pertinent here.

The certification to the local school board of the duly indentured apprentices for supplemental off-duty instruction is that of the said committee.

The power of the committee over the apprentice as regards his supplemental instruction is suspended upon his entry upon the school grounds, into the school plant, to receive such instruction.

The board has a duty to certify to the committee, under rules acceptable to both, the results of and achievement of the duly certified apprentice, in the pursuit of his off-duty supplemental instruction.

The board has the full control and supervision of the school, including its plant, in all matters of education, including adult education, and also including the administration of off-duty training of apprentices.

The board has a duty to accept no one for off-duty supplemental training of apprentices except those persons that are certified to it by the committee as duly indentured apprentices, and entitled to such training.

The board has a duty to accept every one for off-duty supplemental training of apprentices that is duly certified to it by the committee as a duly indentured apprentice, and entitled to such training.

The above rules will take care in the future of those duly indentured apprentices that are to be certified by a committee to a board for off duty supplemental instruction. Now we consider those now in training. If there are persons now in training and in receipt of off duty supplemental instruction, who have not been certified by the local joint apprenticeship committee, as entitled to such training, they are to be dismissed by the board, unless the committee, upon now being duly informed of the progress of such person, is willing to enroll the person as an apprentice, and willing to accord to such person all rights of a duly indentured apprentice and exact from such person all of the obligations of a duly indentured apprentice. In the absence of such a declaration in writing of acceptance by the local joint apprenticeship committee, accepting such person as an apprentice, with all of the rights pertaining to such station, and subject to the obligations of such, it becomes the duty of the board to dismiss such person from further training under the apprenticeship program, without undue delay.

The dismissal of such person or persons, from participating under the apprenticeship off duty training program, of course would not preclude such person from receiving other adult education not connected with an apprenticeship program.

It follows from the foregoing that the duty and power to prohibit, from the commencement or continuing, of reception of off duty supplemental instruction by a person not an indentured apprentice, is clearly and exclusively that of the local board of education.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-49 Labor-Commissioner of—Apprenticeship training. Deals with the power and authority of the local Joint Apprenticeship Committees in the training of journeymen under the apprenticeship statutes. See: Companion Opinion No. 48.**

CARSON CITY, May 11, 1959

HONORABLE GEORGE S. JOLLY, *Labor Commissioner, State of Nevada, Carson City, Nevada*

DEAR MR. JOLLY: We have your letter of February 2, 1959 interposing certain questions, hereinafter stated, requiring an official opinion of this department. The questions have reference to the Voluntary Apprenticeship Law—NRS 610.010 to 610.190. Certain significant facts were stated, as follows:

FACTS

The local Joint Apprenticeship Committees, which are composed of representatives from the union and from the employers in a given trade, develop standards for the selection of apprentices, select apprentices and refer them to an employer for employment and training. They utilize the services of a business agent of the union, or other persons, to assist with maintaining lists of applicants or apprentices, screening applicants, or referring of apprentices to employers. They require employers to utilize laid-off apprentices before hiring as apprentices persons not previously employed under

the apprenticeship program; and refuse to open the apprenticeship program to all other employers (that is those not parties to the program) and their apprentices if they do not want to do so. Under Section NRS 610.140, they also have the authority to specify the number of apprentices which may be employed locally in the trade, and the applicants on the list for apprenticeship training must wait until there is an opening before being placed.

A plumbing contractor in the Las Vegas area requested the local Joint Apprenticeship Committee for the plumbing trade to indenture his son as an apprentice, stating that he would employ and train him. The local joint committee refused to place him immediately, stating that they had a list of applicants waiting to be apprenticed, and that he would have to await his turn on the list.

The contractor, becoming indignant because the committee would not grant his request, went to the union and received permission to apprentice his son, and the son was issued a union card. This was done by the union in spite of the fact that the National Association of Journeymen and Apprentices of the plumbing and pipe fitting industry has instructed all local unions to allow the local Joint Apprenticeship Committee to administer the apprenticeship program for the trade.

Because of this confusion and short circuiting, as it were, of the efforts of the Joint Apprenticeship Committee, leading as it would if all parties remain adamant and inflexible, to the full certification as a journeyman of a man with less training than the standards set up by the said committee, and with the accompanying disheartening and discouraging effects upon the said committee, you have interposed the questions, which it is hoped may, when answered, bring about a degree of harmony in the training of apprentices in the plumbing trade and in other trades. The questions presented therefore become of great significance, both to the harmony of the operation of training apprentices and to the very survival of the system of training of apprentices in this and other industries. All of this warrants a careful application of the principles of law and logic.

#### QUESTIONS

1. May the local Joint Apprenticeship Committees develop standards for the selection of apprentices, select apprentices and refer them to an employer for employment and training?
2. May the committees utilize the services of a business agent of the union, or other persons, to assist with maintaining lists of applicants or apprentices, screening applicants, or referring applicants or apprentices to employers?
3. May the committees use every lawful means to cause employers to utilize laid-off apprentices before hiring as apprentices persons not previously employed under the apprenticeship program?
4. May the committees refuse to open the apprenticeship program to all other employers (that is those not parties to the program) and their apprentices if they do not want to do so?

#### OPINION

A companion opinion, dealing with the authority of the several entities that engage in the cooperative program of training apprentices, has recently been released. The determinations therein have significance as to the questions herein presented. The two opinions should be read together. See: Attorney General's Opinion Number 48 of May 8, 1959.

In discussing the several questions we shall use the same numbers assigned to the questions.

1. Under NRS 610.030 the manner of creation and composition of the State Apprenticeship Council is provided. Under NRS 610.040 the term of office of the

members of the State Apprenticeship Council is provided. Under NRS 610.050 provision is made for the filling of vacancies in the membership of the State Apprenticeship Council. NRS 610.060 provides for the officers of the council, whereas under NRS 610.070 the manner of calling of meetings of the council is considered. Under NRS 610.080 the allowable expenses of the members of the council are considered. Under 610.090 the duties of the State Apprenticeship Council are enumerated. In part, this section provides as follows:

The state apprenticeship council shall:

1. Establish standards for apprenticeship agreements, etc.

This proposition of the establishment of standards of apprenticeship agreements by the State Apprenticeship Council is again set out in NRS 610.140.

These provisions, however, are not in answer of the question, merely going to the content of the apprenticeship indenture and not to the question of those who are authorized to sign. Here the question under consideration is whether or not the local committee may develop standards for the selection of apprentices, who, when selected, will be authorized to sign an indenture contract previously approved by the State Apprenticeship Council.

Under NRS 610.140, subdivision (b) it is provided, with respect to the powers and functions of the local committees, the following:

(b) In accordance with standards set up by the state apprenticeship council, to work in an advisory capacity with employers and employees in matters regarding schedules of operations, application of wage rates, and working conditions for apprentices, which conditions shall specify the number of apprentices which may be employed locally in the trade under apprentice agreements under NRS 610.010 to 610.190, inclusive.

It is clear from the foregoing provision that the Legislature intended that there be no great amount of overcrowding of training of apprentices in any one trade, or the "number of apprentices" would not have been considered. If restricting the number of apprentices that may be accepted as to any trade in any given trade area, is a proper function of the local Joint Apprenticeship Committees, and we believe that it is, under the subsection above quoted, the power to promulgate standards by which applicants for apprenticeship may be accepted or rejected, by a local committee, must be conceded. If the objective is clearly delineated and stated in the law, the power to promulgate rules by which that objective may be reached in an orderly and just fashion, may be inferred. In short we conclude that if the local committees have the power to restrict the number of trainees for a trade, such committees have the power to promulgate rules by which an intelligent and just selection of applicants for training, may be made.

This conclusion squares with common sense in that trained men like commodities, should be, as to the number or quantity, more or less proportional with anticipated demand. Under the law this power is not conferred upon any other entity, and being closely associated with the power to execute the apprentice indenture, and as to the persons who are permitted to execute, we conclude that the power by inference has been conferred upon the local Joint Apprenticeship Committees.

Question Number 1 is answered in the affirmative.

2, 3, and 4. In answering questions numbered 2, 3, and 4, hereinabove set out, it must be borne in mind that the local Joint Apprenticeship Committees are in effect sponsors of the indentured apprentices accepted by them. They assist in screening, in securing employment, or reemployment, in the off-duty educational program in that they cooperate in arranging for it, although they are not authorized in the administration of such off-duty supplemental educational work. They are contractors or craftsmen under

NRS 610.130 and hence, from the nature of things, properly selected and authorized to sponsor, and from time to time check out the progress of the indentured apprentices under their program. The statutes are silent in regard to the answers to questions numbered 2, 3 and 4. But we are not without authority upon the questions.

Following the Brown-Olds decision of the National Labor Relations Board (See: Decisions of the National Labor Relations Board, Vol. 115, p. 594) of February 28, 1956, Mr. Harry R. Olson, Apprentice Coordinator, Houston Area Joint Apprenticeship Committee, for Painters, Paperhangers and Decorators, propounded certain questions to the Director of the U. S. Department of Labor, Bureau of Apprenticeship, concerning the functioning of the Joint Committee in view of the Brown-Olds decision. To this inquiry the Director replied as follows:

Thank you for your letter of September 15, in which you ask for our opinion concerning six specific functions of a Joint Apprenticeship Committee in view of the Brown-Olds decision of the National Labor Relations Board.

We have discussed these functions of a Joint Apprenticeship Committee with the Solicitor's Office. That office sees no reason why a Joint Apprenticeship Committee should not perform the following functions without being charged with an unfair labor act, provided there is no discrimination against applicants because of union membership or lack of union affiliation.

1. Develop standards for the selection of apprentices, select apprentices and refer them to an employer for employment and training.

2. If empowered to do so by the employer, the Committee may discharge an apprentice or cause his discharge for failing to pursue his training with diligence (the actual discharge is usually performed by the employer).

3. The Committee may utilize the services of a business agent of the union, or other persons, to assist with maintaining lists of applicants or apprentices, screening applicants, or referring applicants or apprentices to employers.

4. If the apprenticeship program so provides, the Committee may use every lawful means to cause employers to utilize laid-off apprentices before hiring as apprentices persons not previously employed under the apprenticeship program.

5. The fact that the apprentice became a union member after being employed as an apprentice would make no difference in the Committee's responsibility for recognizing his seniority as an apprentice.

6. The Committee need not open the apprenticeship program to all other employers (that is those not parties to the program) and their apprentices if they do not want to do so.

There being nothing in the Nevada statutes in conflict with the conclusions reached by the Director of the Bureau of Apprenticeship, United States Department of Labor, as expressed in the above quoted letter, and it being in keeping with the spirit of the provisions of the Nevada law, it is the belief of this department that the above conclusions express the law of this State.

In the administration of their duties, however, under the law the joint apprenticeship committees should not allow or tolerate any discrimination for or against applicants under the program for the training of apprentices because of union membership or lack of it on the part of any apprentice. See: NRS 613.230, et seq. (Right to Work Act.)

Questions 2, 3 and 4, above propounded, are for the foregoing reasons, answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-50 Real Estate Commission, Nevada—Commission without legislative power and could not add further qualifications and requirements in issuance of broker's license.**

CARSON CITY, May 12, 1959

MR. GERALD J. MCBRIDE, *Executive Secretary, Nevada Real Estate Commission, Post Office Box 369, Carson City, Nevada*

DEAR MR. MCBRIDE: We have your letter of April 9, 1959, requesting a formal opinion of this department, upon a question as hereinafter stated.

You have set out in your letter that the Nevada Real Estate Commission proposes to promulgate a rule or regulation respecting the issuance of real estate broker's license, substantially in the following form and content:

Any applicant for a broker's license will not be considered competent to transact the business of a real estate broker unless or until he shall have demonstrated to the commission, in connection with his application for a broker's license, that he has had six months actual experience as a licensed real estate salesman or the equivalent.

QUESTION

Does the Nevada Real Estate Commission have the authority, under NRS 645.400, subparagraphs 2 and 3, or by other statute, to promulgate an administrative ruling of the content as hereinabove proposed?

OPINION

The necessary qualifications for a broker's license are set out in NRS 645.330, 645.340, and 645.460. Nowhere in the statutes, so far as we have discovered, does it provide that one must be licensed as and must have served for six months or more as a licensed real estate salesman, as a prerequisite to being licensed as a real estate broker.

It is true that the commission is vested with rule-making power by which the laws respecting brokers' and salesmen's licenses may be enforced. But the section does not purport to, nor could it effectually delegate a legislative power, in the premises.

NRS 645.400 provides as follows:

645.400 1. In addition to the information required by this chapter, applications for broker's or salesmen's licenses shall contain such other information pertaining to the applicants as the commission shall require.

2. The commission may require such other proof through the application or otherwise as it shall deem desirable, with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant.

3. The commission is expressly vested with the power and authority to make and enforce any and all reasonable rules and regulations connected

with the application for any license as shall be deemed necessary to administer and enforce the provisions of this chapter.

We are of the opinion that to promulgate the rule that is proposed is in effect to legislate, for it would not be a rule to carry out a previously expressed legislative purpose and intent. The distinction between the two propositions is clear.

The authority to make rules and regulations to carry out a policy declared by the lawmaker is administrative and not legislative. See: 42 Am.Jur. Art. 37, p. 330.

However: "To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate." See: 42 Am.Jur. Art. 36, p. 329.

For the reasons given, we are of the opinion that for the commission to promulgate the rule here under consideration would be to legislate, not administer the present law, and the question is therefore answered in the negative. The power to alter the statute in the manner proposed rests with the Legislature only.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-51 Cities, Incorporated. (ELY)—Publication requirement of a lengthy, proposed ordinance involving adoption of a master, or land use, plan and building code, may be legally satisfied under other existing statutory provisions, to obviate considerable expense of publication in full. Similar, adopted county ordinance held not effective or applicable to incorporated city in county.**

CARSON CITY, May 13, 1959

HONORABLE ROBERT R. GILL, *City Attorney, City of Ely, Ely, Nevada.*

DEAR MR. GILL: Reference is made to your letter dated April 15, 1959, wherein you indicate that the city of Ely is confronted with a serious problem of publication costs of lengthy ordinances.

Specifically, however, the immediate problem appears to be whether or not there is some legal means of avoiding the considerable cost of publishing the "Land Use Zoning Ordinance," recommended for adoption by the Joint Planning Commission for both the county and city of Ely. The county, it would appear from your letter, has already adopted the ordinance. The city of Ely, apparently, is prepared to take similar action. Because of the length of the proposed ordinance (some 40 legal-size pages), the city council has instructed you to request our opinion as to the legality of adopting a substitute procedure to publication, as set forth and described in the questions hereinafter stated. In this connection, you invite our attention to NRS 266.165. We assume that you meant to refer to NRS 266.155.

#### QUESTIONS

1. Would the proposed "Land Use Zoning Ordinance" come within the terms and provisions of NRS 266.155, so that publication in full thereof may properly be dispensed

with, and the requirement of publication satisfied, by filing for use and examination by the public, in the office of the City Clerk, of an adequate number of mimeographed or other machine-duplicated copies of said proposed ordinance, at least one (1) week prior to adoption thereof?

2. If our answer to the foregoing question were to be in the negative, would the county's adoption of said ordinance be sufficient so as to render the provisions thereof effective and applicable to the city of Ely, without further action or enactment thereof, by the city of Ely?

#### OPINION

We do not have available to us any charter for the city of Ely, and assume that the city was incorporated under provisions of the general law, now contained in Chapter 266 of the Nevada Revised Statutes. We must, therefore, further assume that nothing contained in the basic law governing the city, expressly precludes application of general statutory provisions to the problem which you have submitted to us for our opinion. Based upon such assumptions, we have considered the problem in the light of relevant and applicable provisions contained in Chapters 266 and 278 of the Nevada Revised Statutes.

An examination of the contents of the proposed ordinance amply supports the conclusion that it is in the nature of a master plan, or general uniform code; establishing land use districts and regulating the use of buildings, structures and land; the height, number of stories, and the size of buildings and structures; the size of yards, and other open spaces; the density of population and the intensity of the use of the land; adopting a map defining said land use districts; providing for amendments, variances, conditional use permits, and the enforcement of its provisions; prescribing penalties for violations thereof; and providing for other related matters.

We are, therefore, of the opinion that the provisions and procedures contained in NRS 266.155, or NRS 278.130-278.310, inclusive, (and more specifically, NRS 278.170-278.230 thereof) are definitely applicable, available, proper, and valid, to resolve the specific problem of enacting said proposed ordinance, without incurring the considerable expense which otherwise, and, in the more usual situation, would be entailed in satisfying the requirement of publication.

Inasmuch as NRS 266.155 expressly provides for filing of an adequate number of copies of such type of code, either *typewritten* or printed, in the office of the City Clerk, at least one (1) week prior to passage of the ordinance adopting said code, to be available for use and examination by the public, substantial compliance will be made by filing of mimeographed copies. Attention is invited to the further requirement of prior single publication in a newspaper in the city, at least one (1) week prior to passage of the ordinance, *of notice of such filing*.

In view of our foregoing affirmative answer to the first question (believed sufficient to enable resolution of the immediate problem under consideration), it should not be necessary to dwell at any length on the second question.

Counties, and Boards of County Commissioners, possess only such powers as have been expressly delegated to them by statute or which are necessarily or reasonably implied from the powers expressly granted to them. (See: *King v. Lothrop*, 55 Nev. 405, 36 P.2d 355; 14 Am.Jur. 188, Sec. 5; NRS 244.140 et seq., and 244.195.) As a *county* ordinance, such "Land Use Zoning Ordinance" would *not* be effective or applicable to incorporated municipalities within the county, since such municipal corporations are expressly governed by their own basic law, either under Chapter 265, or 266, or 267, or 268 of the Nevada Revised Statutes. (See 266.005, 266.010, 267.020.)

We therefore, submit it as our considered conclusion and opinion that the questions, as hereinbefore stated, must be answered as follows:

Question No. 1: Affirmative

Question No. 2: Negative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-52 Legislature—Committee in Aid of—Members of committee appointed to study fiscal affairs and report to Legislature, entitled to traveling expenses and subsistence allowance, by necessary implication, despite fact that the act does not expressly so provide.**

CARSON CITY, May 14, 1959

MR. NEIL D. HUMPHREY, *Director of the Budget, Carson City, Nevada.*

DEAR MR. HUMPHREY: We have your letter of April 28, 1959, asking that this department render an official opinion upon facts as hereinafter set out.

FACTS

Senate Bill Number 97 was approved on March 3, 1959, and will become Chapter 60, Statutes of 1959.

The act directs the legislative commission to cause a study to be made of the fiscal affairs of the State and local governmental subdivisions, by a special committee on taxation and fiscal affairs of not more than 25 persons, with report by the committee to the Legislature of findings and recommendations.

In Section 2, subdivision 7 of said act, it is provided: "Members of the committee shall serve without compensation." Nowhere in the act does it provide that the members of the committee shall or shall not receive traveling expenses and subsistence allowance. The act makes an appropriation of \$50,000, provides for an executive committee of five members, and project director. In Section 5, subdivision 3, it is provided: "All claims for expenses incurred pursuant to this act shall be prepared by the project director and, after approval by the legislative commission, paid from the general fund in the same manner as other claims against the state are paid."

QUESTION

Are the duly constituted members of the committee provided for in this act, entitled to receive traveling expenses and subsistence allowance, as allowed by the provisions of subdivision 1 of NRS 281.170, despite the fact that the statute is silent as to such allowance?

OPINION

Subdivision 1 of NRS 281.170, as amended by Chapter 485, Statutes of 1959 (A. B. 96), reads, in part, as follows:

1. When any district judge, state officer, commissioner, representative of the state, or other state employee of any office, department, board, commission, bureau, agency or institution operating by authority of law and supported in whole or in part by any public funds, whether the public funds are funds received from the Federal Government of the United States or any branch or agency thereof, or from private, or any other sources, shall be

entitled to receive his necessary expenses in the transaction of public business within the state, such person shall be paid a per diem allowance not to exceed \$15 per day, and also an allowance for transportation, but the amount allowed for traveling by a private conveyance shall not exceed the amount charged by public conveyance. As used in this subsection "necessary expenses" shall not include the costs of personal laundry, recreation or entertainment.

It will be noted that the above subsection recites that when a district judge or other public officer "shall be entitled to receive his necessary expenses" they shall be computed in a certain manner and amount. It does not recite that the enumerated public officers are all entitled to receive necessary expenses. This subsection then, it is clear, leaves us still in search of the answer. It is clear that no compensation shall be received for such service, by the provisions of Section 2, subsection 7 of Chapter 60, Statutes of 1959, hereinabove quoted.

If costs of subsistence are denied in addition to compensation, it is clear that such officers would be required to pay personally costs that they would not have incurred if they had not accepted an appointment to serve the State without compensation. May the subsistence allowance, of the above quoted subsection, be allowed by necessary implication? We believe that they may.

Under "Officers" of 67 C.J.S., p. 329, subdivision "Mileage and other expenses," the rule is stated as follows:

The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or statute conferring it either directly or by necessary implication, and the officer cannot recover compensation additional to the compensation fixed by statute for such expenses, \* \* \* and, where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and receive reimbursement therefor.

For the reasons above given, upon the authority cited, we are of the opinion that members of the committee who properly expend money in the performance of their duties provided in Chapter 60, Statutes of 1959, should be reimbursed under the provisions of subdivision 1 of NRS 281.170, and that they are entitled to reimbursement by necessary implication.

The question is answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-53 Insurance, Group Life—NRS 690.120 precludes a union which is the policyholder for the benefit of its group insured members, from being effectually designated as beneficiary.**

CARSON CITY, May 18, 1959

HONORABLE PAUL A. HAMMEL, *Insurance Commissioner, Carson City, Nevada*

DEAR MR. HAMMEL: We have your letter of May 12, 1959 reciting facts and asking an opinion of this department upon the question presented.

#### FACTS

The Teachers' Union Local of Reno, Nevada purchased a group life insurance policy covering its membership. Premiums have been paid by the union. Almost all of the insured members have designated relatives as beneficiaries. However, in one or a few instances, members have been financially unable to pay dues and premiums under the policy. They have asked the union to pay the dues and premiums upon condition that the union be designated beneficiary, upon understanding that at death the union will pay and discharge the last illness and mortuary expenses and retain the balance of sums received under the policy as beneficiary. This procedure has been followed in such cases, except perhaps as to the actual change of beneficiary.

One of the teachers so insured died. The union notified the insurer and requested the insurer to discharge the mortuary bill and pay balance of the insured coverage to the union. The insurer paid the mortuary but declined and refused to pay the balance to the union, and instead paid it to the relative under the laws of intestacy, or by the provisions of the beneficiary designation. It does not appear that the deceased member left a will. Nor does it appear that an administration of the estate of the deceased member was had, by the public administrator or otherwise. The insurer assigned NRS 690.120 as the basis for its determination.

#### QUESTION

As a matter of law, was the insurer correct in its determination to decline to pay the balance of the insurance coverage (after payment of the mortuary bill) to the teachers' union?

#### OPINION

Actually it appears that before the teacher became impoverished and unable to pay her dues and insurance premium, she had designated a relative as beneficiary, and that this designation was never changed by the member. If such had not been the case the death benefits would not have been payable to a relative, except by virtue of a court order, which would have been incidental to the administration of an estate of a deceased person who dies intestate. In brief, the union did not obtain the change of beneficiary, or there was an administration of an estate of a deceased person.

It is our opinion that under the provisions of NRS 690.120, the union would be precluded as policyholder, in such a case, from being effectually designated as beneficiary, i.e., that the union is disqualified, as a matter of law, from being effectually designated the beneficiary.

NRS 690.120 provides, in part, the following:

690.120 A policy may be issued to a labor union, which shall be deemed the policyholder, to insure members of such union for the benefit of persons *other than the union or any of its officials*, representatives or agents, subject to the following requirements: (Italics supplied.)

By the provision quoted it is provided that policies covered by this provision, may not designate the union or any of its officials as beneficiaries. The meaning is clear and requires no interpretation.

\* \* \* \* \*

There are legal means by which the union could safely advance money to its members, for such purpose as hereinabove mentioned. A number of means would present themselves to the mind of an experienced lawyer to accomplish this purpose. The officers of the union should consult an attorney and present this problem and seek advice on ways and means to prevent its repetition.

The question is answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-54 Rule Making Powers—Administrative Agencies.  
Administrative rules reasonably adapted to regulate the time and manner of  
taking annual leaves by state officers and employees are not contrary to NRS  
284.350. Section 8.02 of rules of personnel administration construed.**

CARSON CITY, May 18, 1959

HONORABLE NEIL D. HUMPHREY, *Budget Director, Carson City, Nevada.*

HONORABLE RICHARD HAM, *Executive Director, Employment Security Department,  
Carson City, Nevada.*

GENTLEMEN: We are in receipt of letters dated April 16, 1959, and April 20, 1959, from the offices of the Director of the Budget and Employment Security Department, respectively. Each letter requested our opinion on essentially the same question. For that reason, we shall dispose of the questions and contentions raised in those letters in this one opinion.

STATEMENT

Reference is made to Attorney General Opinion 2 of January 28, 1959, in which this office held that a terminating employee of the State of Nevada is entitled to a lump sum payment for accumulated annual leave. Since that time this office has written Opinions 41 and 46 relating to other questions that have arisen with reference to annual leave for state employees.

The instant problem deals with the question of the validity of rules and regulations made by the State Department of Personnel as applied to employees in the public service and their entitlement to annual leave. The question may be stated more specifically as follows:

QUESTION

Is Section 8.02 of the Rules for State Personnel Administration contrary to NRS 284.350 and therefore void?

OPINION

Section 8.02 of the Rules for State Personnel Administration reads as follows:

Section 8.02 Vacation Leave. On the day following completion of six months of continuous service, each full time officer or employee in the public service shall be allowed seven and one-half days credit for vacation with pay. Thereafter, for each additional calendar month of service, he shall be allowed one and one-quarter days of credit for vacation with pay on the first of the following month. Vacation credit may be accumulated to a maximum of thirty working days. Vacation leave shall not be granted in excess of vacation credit earned by service prior to the starting date of leave. (Section 42, Personnel Act of 1953.)

Upon separation from service, for any cause, an employee's unused or accumulated annual vacation leave shall be projected on a work day basis to determine the effective separation date. Provided, however, that no employee shall accept employment with another state agency during the time he is on vacation leave status.

Employees who have completed fifteen years of continuous service as defined in these rules, shall be allowed one and one-half working days of vacation leave credit for each month thereafter.

Absence on account of sickness, injury or disability in excess of that hereinafter authorized for such purposes may, at the request of the employee, be charged against vacation leave credit.

Upon the recommendation of the appointing authority and the approval of the director, accumulated vacation leave may be used before the first six months of service is completed in cases of emergency, hardship and factors related to the employees position.

Each department head shall keep necessary records of vacation leave credit as prescribed by the department and approved by the director and shall schedule vacation leaves with particular regard to seniority of employees and in accord with operating requirements and, insofar as possible, with the written requests of the employees.

NRS 284.350 entitled "Annual leave of employees in classified and unclassified service; accumulated leave of deceased employees," provides:

1. All employees in the public service, whether in the classified or unclassified service, shall be entitled to annual leave with pay of not less than one and one-quarter working days for each full calendar month of service, which may be cumulative from year to year not to exceed 30 working days.

2. If an employee dies and was entitled to accumulated annual leave under the provisions of this chapter, the heirs of the deceased employee who are given priority to succeed to his assets under the laws of intestate succession of this state, or the executor or administrator of his estate, upon submitting satisfactory proof to the director of their entitlement, shall be paid an amount of money equal to the number of days of earned or accrued annual leave multiplied by the daily salary or wages of such deceased employee.

The effect of the foregoing rule of the Personnel Department is to prevent an officer or employee in the public service from using the leave entitlement provided in NRS 284.350 until that officer or employee has completed six months of continuous service. An exception to the rule is provided for emergency cases. In such cases leave may be used before completion of six months' service upon the recommendation of the appointing authority and approval of the Personnel Director. It has been urged that the rule applies only to classified personnel and that said rule deprives employees of a vested right

granted by the provisions of NRS 284.350. With both contentions we disagree. With reference to the first contention, NRS 284.345 provides that the Director (Personnel Department) shall prescribe rules and regulations for attendance and leaves, with or without pay, or reduced pay, in the various classes of positions in the public service. In the same chapter under NRS 284.015, subparagraph 4, public service is defined as "positions providing service for any office, department, board, commission, bureau, agency or institution operating by authority of the constitution or law \* \* \*." It is clear that "public service," as used in this chapter, embraces both classified and unclassified personnel. It follows that Rule 8.02, referred to above, applies to both classified and unclassified positions and the authority for the Personnel Director prescribing said rule is found in NRS 284.345.

We now proceed to the contention that said rule deprives employees of a vested right. To properly answer that contention, a brief discussion of the purpose and effect of administrative rules is in order.

It has long been legally recognized that a legislative body may delegate rule-making powers to administrative boards and agencies. All that is required is that the legislative body establish a standard to which the rule must conform and the rules adopted be reasonable and not in conflict with express statutory provision (Maryland Casualty Co. v. United States, 251 U.S. 342).

In the instant case the Legislature delegated the rule-making power to the Personnel Director under NRS 284.345. The standard which the rule must adhere to is found in the legislative declaration of purpose for creating the State Personnel Department. Under NRS 284.010 it is provided, in part, as follows:

1. The legislature declares that the purpose of this chapter is: \* \* \*

- (d) To increase the efficiency and economy of the governmental departments and agencies by the improvement of methods of personnel administration.

Viewing Rule 8.02 in the light of the foregoing language, it is apparent that the effect of the rule is to increase the efficiency and economy of the government by regulating in a uniform manner the attendance and leaves of all employees and officers. The fact that employees and officers with less than six months' service cannot use annual leave during the first six months (except in emergency) is not unreasonable. It does not discriminate because it applies to all employees and officers with less than six months' service. The rule tends to assure attendance of new employees which results in efficiency and economy of operation of government.

We turn now to what apparently is the more difficult problem of analyzing Rule 8.02 in the light of NRS 284.350. This problem is not so difficult if we keep in mind certain basic propositions. NRS 284.350 confers a right on all employees in the public service. That right is one and one-quarter days leave for each full calendar month of service. No administrative board or agency can deprive an employee of that right. To postpone the time of enjoyment of that right for a reasonable purpose and time is not a deprivation of that right, as pointed out above. However, if an employee terminates his employment for any reason, he (or his estate under paragraph 2 of said statute) is entitled to a lump sum payment for his accumulated annual leave pursuant to said statute. Any rule or regulation that would deprive the employee of that right is contrary to NRS 284.350, and, therefore, void.

A careful reading of Rule 8.02 reveals that there is no express provision therein that would deprive an employee of that right acquired under NRS 284.350. Paragraph 1 of said rule applies to employees who are continuing in service. It cannot be applied by implication to deprive a terminating employee of accumulated annual leave to which he is entitled without being contrary to NRS 284.350.

We conclude that Rule 8.02 of the Personnel Rules is not contrary to NRS 284.350, and should always be construed in a manner consonant with the above interpretation.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-55 Fish and Game Department, Salaries of Employees—  
Fish and Game Department employees in classified service are governed by pay  
plan provided in NRS 284.75. Salaries and wages of Fish and Game Department  
employees not in classified service established by appointing authority within  
budgetary limitations and approved work plans.**

CARSON CITY, May 20, 1959

MR. FRANK W. GROVES, *Director, Nevada Fish and Game Commission, P.O. Box 678,  
Reno, Nevada.*

DEAR MR. GROVES: We have your letter dated April 30, 1959, requesting our opinion on the question as hereinafter stated.

QUESTION

Is the State Fish and Game Commission required to increase its employees' pay scale by 10 percent or by the amount determined by the State Personnel Board?

OPINION

The apparent basis for your question lies in a recent enactment of our Legislature. The Forty-ninth Session of the Nevada Legislature enacted Assembly Bill No. 20, which was subsequently approved by the Governor and will appear as Statutes of Nevada 1959, Chapter 482. That act appropriated moneys for the purpose of providing salary increases for classified personnel of the State of Nevada for the fiscal year beginning July 1, 1959, and ending June 30, 1960.

In the preamble of said chapter it is provided, in part, as follows:

WHEREAS, Recently the state department of personnel has completed a salary survey to provide information on current wages for comparable employment in private industry and other government agencies; and

WHEREAS, The results of such survey show that salaries and wages in private industry in the State of Nevada are continually rising and are currently 9.97 percent higher than the salaries and wages of personnel working for the State of Nevada; and

WHEREAS, These factors indicate that a general 10 percent or two-grade salary increase is warranted for most state employees for the 1959-1960 fiscal year, which will require an appropriation of \$275,000 from the general fund and \$58,470 from the state highway fund; now, therefore, \* \*

We wish to make clear that the preamble to the statute is solely for explaining the reasons for its enactment. It is not essential to the act and neither enlarges nor confers powers. (*Portland Van and Storage Co. v. Hoss, Oregon, 9 P.2d 122.*) The reference in

said preamble that a general 10 percent increase is warranted for most state employees must not be construed as part of the law. The statute itself makes no reference to a fixed increase in pay for classified employees. It does, however, refer to an adjusted pay plan to become effective on or after July 1, 1959.

It is provided under NRS 284.175 that the Personnel Director shall prepare a pay plan and ranges for positions in the classified service. The pay plan shall become effective upon approval of the Advisory Personnel Commission and the Governor. Unquestionably the pay plan referred to in said Chapter 482 is the pay plan provided for in NRS 284.175.

There is no doubt that the preparation of pay plans, and any amendments thereto, for all positions in the classified service is the responsibility of the Personnel Director.

Based upon the authority cited above, we are of the opinion that all employees of the State Fish and Game Department, who are in the classified service, will be governed by the pay plan prepared by the Personnel Director and approved by the Advisory Personnel Commission and the Governor. We reach this conclusion notwithstanding the provisions of NRS 501.180 empowering the Fish and Game Commission to appoint and fix the compensation of its employees. That section of our law was enacted prior to the act creating the State Personnel Department. For that reason, the later enactment, by implication, repeals any provisions of the earlier act that might be in conflict.

With reference to officers and employees of the Fish and Game Commission who are not in the classified service, the pay plan referred to above is not applicable. The salary or wages of unclassified personnel is established by the appointing authority within budgetary limitations and approved work programs.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-56 Controller, State of Nevada—A cash bond pledged to secure an accruing indebtedness of the Sales and Use Tax Division of Nevada Tax Commission is subject to levy and distraint by the Federal Government upon delinquent tax claim, and such creditor is second only to tax account of Sales and Use Tax Division.**

CARSON CITY, May 25, 1959

HONORABLE KEITH L. LEE, *State Controller, Carson City, Nevada*

Attention: MR. D.H. RIDDELL, *Deputy*

DEAR MR. LEE: Your inquiry of May 22, 1959, based upon facts hereinafter stated, requires the rendering of an official opinion of his department.

#### FACTS

A business was heretofore (perhaps it still operates) operated in Las Vegas, Nevada, upon which sales taxes and gaming taxes were accruing in favor of the Nevada Tax Commission.

Under the provisions of NRS 372.510 the Director of the Sales and Use Tax Division of the Nevada Tax Commission required of the said business a cash deposit of \$800, to secure the contingent liability to the Division under the provisions of the Nevada Sales and Use Tax statute.

On May 14, 1959, V.W. Evans, District Director of Internal Revenue, by H.L. Collomb, Revenue Officer, served upon you or a deputy or agent in your office, under the provisions of 6321 U.S.C.A. and subsequent sections, a Notice of Levy of \$12,598.87, purportedly due from the taxpayer, the depositor of the \$800 cash bond.

On May 20, 1959, the Nevada Tax Commission filed a claim in your office, claiming a deduction from this cash bond in the amount of \$309.49, for the Sales and Use Tax Division, and in the amount of \$427.12 for the Gaming Control Board.

The federal officials concede that the Sales and Use Tax Division is entitled to that claim of \$309.49, it having arisen as a liability contemplated in the requirement of that Division that the cash bond be provided in security of that accruing indebtedness.

If the claim of the Internal Revenue Department is next in line of preference, that department is entitled to the remainder of the bond in the sum of \$490.51, but if not, the Nevada Tax Commission is entitled to its claim of \$427.12, by reason of the taxpayers liability on gaming taxes, and the Internal Revenue Department the remainder in the sum of \$63.39.

#### QUESTION

Is the United States Internal Revenue Department entitled to the remainder of the bond fund, in the amount of \$490.51, after the allowance only of the claim of Nevada Tax Commission, Sales and Use Tax Division, in the sum of \$309.49?

#### OPINION

On May 1, 1957, in official opinion No. 260, this department ruled that the "State of Nevada, as one in position of garnishee, is subject to proceedings for levy and distraint by the Federal Government in the exercise of its tax collecting power."

That an effective lien against the excess in this fund, over sums due or to become due, under the Sales and Use Tax statute, attached in favor of the Collector of Internal Revenue on May 14, 1959, upon service of the "Notice of Levy," we entertain no doubt. Such a levy is provided for under U.S.C.A., Section 6331. That this was property of the taxpayer at the time of the levy against the State as garnishee, except as to the accruing sums for which it was pledged in security, we have no doubt. That it was property subject to such a levy there is no question in our mind. *Highsmith v. Lair* (Calif. 1955), 281 P.2d 865. Same was not pledged to secure the gaming tax, and before it was taken upon the claim of such tax, an effective lien for another purpose and by another creditor has attached.

The question propounded is answered in the affirmative.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-57 Planning Board, Nevada State—Statute construed as requiring prepayment of proportionate share of bonded indebtedness of county prior to any transfer of any real property to the State of Nevada, as determined by multiplying amount of current or recent levied tax by number of years to maturity of bond issue, secured in part by tax receipts from real property to be transferred to State. School District Building Bond Issues held to constitute "general obligation bonds" of county.**

CARSON CITY, May 25, 1959

MR. M. GEORGE BISSELL, *Manager, State Planning Board, Carson City, Nevada*

DEAR MR. BISSELL: Reference is made to your letter of May 19, 1959, wherein you request our opinion as to what constitutes "general obligation bonds," as specified in Section 1, subsection 1, of Chapter 317, 1959 Statutes of Nevada (Senate Bill 159), which became law without signature by the Governor of the State of Nevada, on March 30, 1959. More specifically, on behalf of the State Planning Board, you are primarily concerned with the effect of said law on the authorized program for purchase of real properties by the State Planning Board for public purposes and use, within the limitations of funds legislatively appropriated and available therefor in Ormsby County, Nevada.

#### FACTS

According to information secured by your office and furnished to us, we understand that the present bond indebtedness of Ormsby County, Nevada, if any, relates to obligations incurred in connection with the financing of school buildings authorized by the Ormsby County School District in the County of Ormsby, State of Nevada. We further understand, and, in connection herewith, shall assume, that there have been three (3) bond issues for this purpose; that the last issue therefor is Series April 1, 1959, for the sum of \$275,000; and that the obligation incurred by the two (2) prior issues (for amounts not known to us) are similar as to security for amortization and satisfaction as said last issue of Series April 1, 1959.

Chapter 317, 1959 Statutes of Nevada, in substance, provides for prepayment of the proportionate share of the bonded indebtedness of a county prior to any transfer of any real property to the United States, the State of Nevada, or any political subdivision thereof, to be computed by multiplying the amount of the then current or most recent tax levied against such real property for the repayment of principal and interest on such bonds by the number of years then remaining until maturity of each such bond issue. Such moneys shall be received by the county treasurer and credited to the bond interest and redemption fund of the county.

It is, therefore, necessary to determine the nature of such school building bond issues made by Ormsby County which are still outstanding obligations of said county, and the relationship of such obligations to the provisions of Chapter 317, 1959 Statutes of Nevada.

#### QUESTION

Is the State of Nevada Planning Board required to make prepayment of the proportionate share of the bonded indebtedness of Ormsby County, Nevada, prior to any transfer of real property to the State of Nevada, pursuant to Chapter 317, 1959 Statutes of Nevada, by reason of the school building bond issues presently constituting existing obligations of said county?

#### OPINION

NRS 387.480, entitled "Levy of tax for interest," insofar as pertinent herein, provides as follows:

1. Whenever any county school district shall issue bonds under the provisions of NRS 387.385 to 387.525, inclusive, or shall have any bonds outstanding, *the board of county commissioners* of the county whose boundaries are conterminous with the boundaries of the county school district *shall levy and access a special tax on all the taxable property in the*

*county school district*, including the net proceeds of mines, in an amount sufficient to pay the interest accruing thereon promptly when and as the same becomes due according to the tenor and effect of the bonds . . . (Italics supplied.)

NRS 387.485, entitled “Levy of tax for payment of bonds; sinking fund,” insofar as pertinent herein, provides as follows:

1. Following the issuance of bonds by a county school district and within sufficient time so that the receipts of the special tax shall be sufficient to pay the principal as it accrues, and annually thereafter until the bonds have been paid in full, *the board of county commissioners of the county whose boundaries are coterminous with the boundaries of the county school district shall levy and assess a special tax*, and shall continue to levy and assess such special tax, *and shall cause it to be collected*, on all the taxable property in the county school district \* \* \* *in an amount sufficient to pay the principal* accruing promptly when and as the same becomes due according to the tenor and effect of the bonds, *which amount shall be levied, assessed and collected by the county treasurer of that county* in the same manner as the tax for the payment of the interest coupons \* \* \*. (Italics supplied.)

NRS 350.190, entitled, “Levy of tax for payment of bonds, interest,” provides as follows:

The officials charged by law with the duty of levying taxes for the payment of the bonds and interest shall, in the manner provided by law, make an annual levy sufficient to meet the annual or semiannual payments of principal and interest on the bonds maturing as provided in NRS 350.010 to 350.200, inclusive.

NRS 350.250, entitled “Tax levies for payment of bonds, interest: Priority of taxes,” provides as follows:

1. So far as legally possible within the limitations of section 2 of article X of the constitution of the State of Nevada, all bonds issued by any county, city, town, *school district* or other political subdivision *shall be payable as to both principal and interest from taxes* fully sufficient for that purpose, *to be levied on all taxable property within the boundaries of the issuing unit*. (Italics supplied.)

2. Without regard to any statutory or charter tax limitations now or hereafter existing, the governing body of such unit \* \* \* shall provide for the levy of taxes fully sufficient, after making due allowance for probable delinquencies, to assure prompt payment of all such principal and interest as they become due.

3. In any year in which the total taxes levied by all over-lapping units in any county in the state may exceed the limitation of 5 cents on the dollar imposed by section 2 of article X of the constitution of the State of Nevada, and it shall become necessary by reason thereof to reduce the levies made by any or all such units, the reduction so made shall be in taxes levied by such unit or units for purposes other than the payment of their bonded indebtedness, and the taxes levied hereafter for the payment of bonded indebtedness shall always enjoy a priority over taxes levied by each such unit for all other purposes where reduction is necessary in order to comply

with the limitations of section 2 of article X of the constitution of the State of Nevada. (See Attorney General's Opinion 305, May 23, 1946.)

NRS 350.240 entitled "Faith of state pledged," provides as follows:

The faith of the State of Nevada is hereby pledged that NRS 350.210 to 350.240, inclusive, (dealing with "Refunding Bonds of Counties, Cities and Towns) shall not be repealed, nor taxation to be imposed omitted, nor any other act or thing be done or permitted to be done to impair the marketable value of the good faith of the State of Nevada in causing the bonds to be issued, until all of the bonds and coupons issued under and by virtue of the terms of NRS 350.210 to 350.240, inclusive, shall have been paid in full.

The Notice of Bond Sale of Ormsby County School District, Ormsby County, Nevada, with respect to Bond Issue Series April 1, 1950, which appeared in the Nevada Appeal, Carson City, Nevada, on February 16 and 23, and March 2 and 9, 1959, characterized such bond series as "Ormsby County School District, Ormsby County, Nevada, General Obligation Building Bonds-Series April 1, 1959-\$275,000.00," and such series, at least, is represented as being payable from "general (ad valorem) taxes, subject to the limitation imposed by the Constitution of the State of Nevada."

It is reasonable to assume that other bond issues for the same purpose, if any, are similarly secured.

From the foregoing facts, and in the light of the above statutory provisions, which we deem to be pertinent to the question before us, we, therefore, reach the following results:

1. That the security of any such outstanding bond obligations of Ormsby County School District, Ormsby County, Nevada, are "General Obligation Bonds" not only of the School District, but also of Ormsby County, Nevada, to be amortized and satisfied as to both principal and interest due thereon, from tax receipts derived from "general (ad valorem)," or property tax levies, including real property;
2. That the statutory requirement contained in Chapter 317, 1959 Statutes of Nevada (Senate Bill 159) expressly recognizes that all taxable real property as of the date of any such bond issues must properly be regarded as securing the obligation of such bond issues; and
3. That the exemption of any real property from tax levies for the satisfaction of such bond obligations, through transfer to the State, or any of its political subdivisions (normally tax exempt), would, in effect, impair such security and the obligation of such bond contracts, and would also be unfair and inequitable as increasing the tax burden of the remaining unexempted owners of real property in connection with said bond issues.

In conclusion, therefore, we submit it as our considered opinion that the school building bonds specifically here involved are "general obligation bonds," within the meaning of the provisions of Chapter 317, 1959 Statutes of Nevada, and that the question, as hereinbefore stated, must be answered in the affirmative. (See A.G.O. B-934, July 7, 1950; A.G.O. 429, March 7, 1947; A.G.O. 76, June 28, 1951; A.G.O. 669, Sept. 9, 1948; A.G.O. 928, June 12, 1950.)

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-58 Planning Board, State—Practice of architecture or engineering by firms or partnerships, comprised of both licensed architects or engineers and nonarchitects or nonengineers, respectively, held not violative of law, in absence of any misleading public representation that nonarchitect or nonengineer members of such firms are duly licensed or authorized to engage in said professions. State Planning Board may properly enter into contracts with firms comprised of such mixed memberships.**

CARSON CITY, May 27, 1959

MR. W. E. HANCOCK, *Assistant Manager, State Planning Board, Carson City, Nevada*

DEAR MR. HANCOCK: Reference is made to your letter of May 18, 1959 in which, on behalf of the State Planning Board, you request the opinion of this office on the following questions:

1. Do Chapters 623 and 625 of Nevada Revised Statutes prohibit formation of a firm, partnership or association for the practice of architecture and engineering when such firm, partnership or association is composed of duly registered architects, engineers, and persons not registered under the provisions of said statutory provisions?

2. Does Chapter 623 of Nevada Revised Statutes prohibit the State Planning Board from entering into architectural contracts with such firms, partnerships or associations which may be comprised as noted in the preceding question?

OPINION

NRS 623.350, entitled "Firms, partnerships and associations," provides as follows:

Nothing in this chapter shall be construed as preventing firms, partnerships or associations of architects from practicing as such, provided each member of such firm, partnership or association is registered under the provisions of this chapter.

NRS 625.240, entitled "Partnership, corporation, association may practice professional engineering," provides as follows:

A firm, a copartnership, a corporation or a joint-stock association may engage in the practice of professional engineering in this state, if the principal member or members of the firm, copartnership, corporation or joint-stock association in responsible charge of engineering work are registered professional engineers under the provisions of this chapter.

The rationale for legal requirements for registration and licensing of the various professions can now be said to be sufficiently defined and established. They are, of course, intended to prevent, regulate and control the exercise of highly specialized activities and skills by unqualified or untrained persons, and to protect the general public from engaging the services of persons professing, but actually lacking, professional competence to render or perform such desired services. Architecture and engineering are, of course, professions within the meaning and requirement for registration and licensing generally required.

A careful reading of the provisions of NRS 623.350 leads us to the conclusion that the term "firms," "partnerships," and "associations of architects" are intended to have

synonymous meaning and import. It would appear that “associations of architects” adds nothing to the other terms, except to characterize the nature of the association of the persons comprising “firm” or “partnership,” professing, or publicly representing, to be qualified, licensed, and authorized to engage in the practice of architecture.

If the persons comprising a “firm” or “partnership” of architects, by firm or partnership title or name, or, in any manner whatsoever, were to make public representation that a member of the firm or partnership was a qualified, licensed, and authorized architect, *when in fact such was not the case*, such public representation would, beyond any reasonable doubt, in our opinion, be contrary to, and violative of, NRS 623.350.

Assuming the absence of any such untrue or misleading public representation, in any manner whatsoever, as above mentioned, however, does NRS 623.350 prohibit membership in a firm or partnership of architects, of a person who is *not* a qualified, licensed or authorized architect?

Obviously, the manifold aspects and matters involved in, or connected with, the practice of architecture, may properly and legitimately justify the inclusion of persons *who are not licensed architects* in a firm or partnership licensed or authorized to render and perform architectural services. Among such may, and probably will, be, office and clerical help and draftsmen. If the firm has developed a substantial and varied practice, it is certainly conceivable that the services of cost-accountants, mechanical engineers, and even lawyers, might well be desirable and justified. Expansion of firm facilities and services might entail capital expenditures beyond the means of the firm or partnership, and only obtainable from a person who might demand and exact a participating interest in the proceeds of operations of the business as a condition for advance of said capital investment.

Can it be said that the indicated statutory provision would prohibit such purely private, business relationship? We think not, so long as the nonarchitect person, holding, or granted, such participating, or partnership, interest in an architect firm did not hold himself out, nor was permitted by the licensed members of the architectural firm to publicly represent himself, as an authorized and licensed architect, and the firm name or style were not misleading in such respect. In the writer’s opinion, an acceptable example of a firm name and style which would embrace such mixed, business relationship of licensed architects and nonarchitects as members of the same firm, or partnership, would be “JONES & SMITH, Architects, and Associates.”

A careful reading of NRS 625.240, which is the related statutory provision pertaining to the practice of engineering, indicates even greater liberality and latitude as regards the varied and mixed business relationships that may be entered into, and are authorized, as between licensed engineers and non-engineers holding, or being granted, participating or partnership interests in the same firm or partnership business. The analysis and discussion had with respect to architects, above, is equally relevant and applicable as regards engineers, and the test and criterion is, as to substance, the same.

We next consider the second question submitted to us for opinion.

Chapter 341 of the Nevada Revised Statutes governs the State Planning Board as to functions, powers, transactions, and activities. We find nothing therein which would prohibit the State Planning Board from entering into architectural or engineering contracts with firms or partnerships comprised, in the one case, of firm members who are architects and non-architects, or in the other case, engineers and non-engineers. We have also examined statutory provisions imposing prohibitions generally on public offices and officers, as contained in NRS 281.210, through 281.360, with specific consideration being given to NRS 281.220 and NRS 281.230, and also find nothing contained therein, to forbid, prohibit, or prevent the execution by the State Planning Board of architectural or engineering contracts, merely for the reason that said agreements had been made with firms or partnerships comprised of participating members, some of whom were architects

or engineers while others were not either architects or engineers. (See Attorney General's Opinion 64, May 19, 1955, holding State Planning Board member to be "State Officer.")

We conclude, therefore, that, in our considered opinion, the answer to both of the questions, as hereinabove stated, is in the negative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-59 National Guard, Nevada Army—In the absence of a collective bargaining or other agreement to the contrary, a private employer of a member of the Nevada Army National Guard, may refuse such employee a leave of absence for 15 days, at a period selected by the employee, if such refusal is based upon occupational and financial reasons and pleasures.**

CARSON CITY, May 29, 1959

OFFICE OF THE ADJUTANT GENERAL, *Nevada National Guard, Carson City, Nevada*

Attention: WILLIAM PLUMMER, *Deputy Adjutant General*

DEAR SIR: We have your inquiry of May 14, 1959, stating certain facts, and requesting our opinion of the law appertaining thereto, upon a question hereinafter stated.

FACTS

A member of the Nevada Army National Guard is employed by one other than the State or National Government. The Nevada Army National Guard will leave for summer field training (presumably for 15 days' duration, or thereabouts) on June 5, 1959. The employer (the type of employment or seasonal nature is not stated) threatens to discharge said employee if he attends the Summer Field Encampment. It is not stated whether the employer threatens to dismiss the employee by reason of his antagonism for the armed forces or whether the threat is entirely based upon the belief or contention that he cannot dispense with the services of the employee at that particular time. We cannot presume evil or presume that the employer is disloyal to his government and will, therefore, presume that the decision of the employer to refuse leave to his employee is based upon the indispensable nature of the service of the employee.

QUESTION

May the employer legally, in the absence of showing that he is disloyal or antagonistic toward his government, give an ultimatum to his employee to the effect that he may not be released from his employment for a period of two weeks beginning June 5, 1959, to attend Nevada Army National Guard Summer Field Encampment, or for any other reason, and that disobedience of such administrative mandate by the employee will constitute a ground for dismissal from employment?

OPINION

In the study of this problem we are asked to examine NRS Sections 412.770 and 412.745, as well as the federal law which makes provision for such summer

encampments. The latter section is the National Guard Chapter of the U.S.C.A. It is cited as Section 502, Title 32, U.S.C.A.

NRS 412.770 provides the following:

412.770 As provided in NRS 284.370, any person holding a position in the classified service of the state who is an active member of the Nevada National Guard shall be relieved from his duties, upon request, to serve under orders on training duty without loss of his regular compensation for a period of not to exceed 15 working days in any one calendar year. Any such absence shall not be deemed to be such employee's annual vacation provided for by law.

Chapter 284 is the Personnel Act. NRS 284.370 provides the following:

284.370 Any person holding a position in the classified service who is an active member of the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United State Public Health Service Reserve or the Nevada National Guard shall be relieved from his duties, upon request, to serve under orders on training duty without loss of his regular compensation for a period of not to exceed 15 working days in any one calendar year. Any such absence shall not be deemed to be such employee's annual vacation provided by law.

Neither section of NRS heretofore quoted, of course, has any persuasive effect in the solution of the problem which has been presented, for the reason that under both statutes the reference is to an employee of the State of Nevada and in the classified service thereof, whereas it is stated in the case under investigation that the employee is employed by one other than the State or Federal Government.

NRS 412.745 provides the following:

412.745 1. No association or corporation shall, by any constitution, rule, by-law, resolution, vote or regulation, discriminate against any member of the National Guard of Nevada because of his membership therein.

2. Any person who willfully aids in enforcing any such constitution, rule, by-law, resolution, vote or regulation against any member of the National Guard of Nevada is guilty of a misdemeanor.

As we have formerly suggested, the fact that an employer may refuse to permit an employee to take time off from his employment for two weeks at a time selected by the employee, and without reference to the pressure of work or convenience of the employer, in the absence of a showing of a dislike by the employer for the type of activity that the employee proposes to engage in during such two weeks interval, may not be interpreted as a "discrimination against \* \* \* (a) member of the National Guard of Nevada because of his membership therein." Perhaps the employer refuses a leave of absence by reason of the profit angle only, or the fact that a suitable substitute may not be found for the employee during the proposed period of absence. Under NRS 412.745, and the facts given with reference to the reason for the refusal to grant a leave of absence, it would be well nigh impossible for a prosecuting attorney to prove that the reason for refusal constituted a breach of the statute, for there is, or well may be, another logical explanation, which, if true, is not in violation of the statute.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-60 Children's Home, State—State Welfare Board as the governing body of the State Children's Home has the authority to discontinue the farming operation, but must obtain legislative sanction to lease the agricultural land.**

CARSON CITY, June 1, 1959

HONORABLE NEIL D. HUMPHREY, *Budget Director, Carson City, Nevada*

DEAR MR. HUMPHREY: We have your letter of April 30, 1959 requesting the opinion of this office on the following facts and questions:

FACTS

The State Welfare Board is contemplating discontinuing the use of the farm at the State Children's Home. Three members of the board (all three are ranchers) have inspected the farm, farm equipment and production records. It will be their recommendation to the Welfare Board that the farming operation be discontinued if the board possesses such authority.

QUESTIONS

1. Does the State Welfare Board have the legal authority to discontinue the operation of said farm?
2. If the answer to the question stated above is in the affirmative, may the farm equipment be sold and the land leased?

OPINION

An examination of the law discloses that there is no specific reference to the farm at the State Children's Home. It has long been considered by those in charge of the home to be a part of the over-all operation of that institution.

In 1951 the Legislature designated the children's home to be an agency of the State Welfare Board. (Statutes of Nevada 1951, Chapter 254, now NRS 423.030.) No reference was made to the farm. Since that time the farm has been operated under the management of the superintendent of the home, subject to the direction of the State Welfare Board.

Under NRS 423.040, it is provided that the State Welfare Board shall be the policymaking board of the Nevada State Children's Home. Since we have concluded that the farm is part of the operation of the State Children's Home, it follows that the Welfare Board is empowered to establish the policy for operating the farm. If in the opinion of the Welfare Board it is believed that the best interests of the State would be served if the farm operation were discontinued, we are of the opinion that such determination is a solution to an operational problem properly within the policymaking power delegated to the Welfare Board by NRS 423.040. We answer question 1 in the affirmative.

Question 2 as stated above, is directed to the sale of personal property of the State located on the farm and the authority to lease all or part of said real property. Each of these matters will be discussed separately and in the order stated.

In 1951 the State Purchasing Department was created by the Legislature (Statutes of Nevada 1951, Chapter 333). Under Section 33 of said Act, now NRS 333.220, it is provided, in part, as follows:

2. The director shall have authority to transfer tools, implements, machinery or other equipment in the possession of any using agency, when such equipment is not necessary for the use of such agency, to such other agency or agencies as may have need therefor.

4. The rules of the director shall prescribe the procedure by which supplies, materials and equipment may be condemned and disposed of, by sale or otherwise, when of no further use to the state. Such rules shall provide that no such property shall be sold otherwise than to the highest bidder after every effort has been made to secure at least three competitive bids and that no condemned property of an appraised value over \$500 shall be sold except through notice published in a newspaper circulated in the area in which the sale is made.

From reading the foregoing it is apparent that the State Children's Home must be considered a "using agency" as that term is defined in NRS 333.020. Therefore, if the Welfare Board concludes that certain farm equipment and other personal property belonging to the State is no longer required in the operation of the farm, the provisions of NRS 333.220 must govern the manner of transfer or disposal of that equipment and personal property.

We now proceed to the question of the authority to lease said farm property. On occasions in the past the Legislature has expressly authorized the superintendent of the State Children's Home to convey specifically described real property belonging to the State. (Statutes of Nevada 1955, Chapters 237 and 282). However, there is no statute expressly conferring the unlimited power on any state agency to sell, lease or otherwise dispose of the state's property known as the State Children's Home. (See Attorney General's Opinion 200, dated August 31, 1952). We are of the opinion that such a power should never be readily implied. For those reasons it is our conclusion that the Legislature has never conferred, either expressly or impliedly, the unlimited power to lease that real property belonging to the State and known as the State Children's Home Farm. If the Welfare Board wishes to lease said farm, it will be necessary to first obtain legislative sanction.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-61 Tax Commission, Nevada—Sales and Use Tax Division.**  
**“Sales by” charitable hospitals of tangible personal property, incidental to their rendition of services, exempt from tax under act. The State, all political subdivisions thereof and county public hospitals, similarly exempt. Proceeds from “occasional” transactions or activities of religious or charitable organizations, for such purposes, also exempt.**

CARSON CITY, June 5, 1959

MR. NORMAN W. CLAY, *Administrator, Sales and Use Tax Division, Nevada Tax Commission, Carson City, Nevada*

DEAR MR. CLAY: Reference is made to your letters, respectively dated January 8, 21, February 2, and April 14, 1959, and related documents, record of proceedings, exhibits, Points and Authorities, compilations and surveys deemed relevant or pertinent to certain questions, hereinafter stated, submitted to this office for opinion, in connection with certain disputes which have arisen as regards Ruling No. 62, adopted and enforced by the Sales and Use Tax Division, and the Division's construction and application of certain related provisions of the Nevada Sales and Use Tax Act itself.

We also desire to make reference to a letter dated January 23, 1959 and annexed memorandum, dated January 26, 1959, received from M.A. Diskin, Esq., attorney representing St. Mary's and Rose de Lima Hospitals, pertaining to the indicated dispute and questions submitted to us for opinion, copies of which you may, or may not, have received.

There is also before us for consideration and opinion, several miscellaneous inquiries, both written and oral, of a related nature, pertaining to the Division's construction and application of the Sales and Use Tax Law to organizations created for "religious, charitable or eleemosynary purposes."

Since all these matters relate to such type of organizations, they are being included within the scope of this opinion.

#### FACTS

The principal questions for our consideration and opinion are based upon an application for refund of sales taxes, claimed by St. Mary's Hospital to have been illegally assessed by the Sales and Use Tax Division for the quarters ending March 31, 1958 and June 30, 1958, which were paid under protest by said hospital. As regards such hospital, the record pertaining thereto would appear to indicate the imposition of a penalty also. Specifically placed in issue by such assessment and collection of sales taxes under protest, is Ruling No. 62, adopted June 29, 1955 by the Sales and Use Tax Division. The record before us also discloses that a hearing on the disputed tax assessment was held before the Nevada Tax Commission on May 27, 1958, which meeting was attended by representatives of the hospitals operating in Nevada, also apparently interested and concerned with the administrative interpretation and application of the law as regards hospitals. Specifically mentioned as being represented at said meeting, in addition to St. Mary's Hospital, was Rose de Lima Hospital and the attorney for Boulder City Hospital, Inc.

So far as can be determined from the record also Steptoe Clinic, a private, nonprofit hospital, operated by Kennecott Copper Corporation in Nevada, and the Boulder City Hospital, a community nonprofit hospital, at different times also questioned the application of the sales tax law as to them, but apparently finally yielded to the division's ruling, and have made payment of taxes, in compliance with such ruling, though not without apparent reluctance and reservations concerning the propriety of the tax exactions.

The foregoing facts should sufficiently indicate the probable need for clarification of the specific issues in dispute, and definitive determination of the interpretation and application of the law as regards the following: (1) organizations created for "religious, charitable or eleemosynary purposes; (2) hospitals, insofar as they may be deemed to be "charitable" organizations; (3) hospitals, insofar as they may be deemed agencies or instrumentalities of any county, city, district, or other political subdivision of the state; (4) the State of Nevada, and its unincorporated agencies and instrumentalities.

#### QUESTIONS

1. Are religious and charitable organizations excluded from the provisions of the Sales Tax Law relative to "retailers" on *sales by* them?

2. In the event that the foregoing question is answered in the affirmative, are said organizations entitled to refund of taxes paid by them:

(a) if *not* collected from their purchasers?

(b) if collected by such organizations from their purchasers, the persons who actually bore the economic burden of such exacted tax payment?

3. Are counties, cities, districts, or other political subdivisions of the State of Nevada excluded from the provisions of the Sales Tax Law relative to “retailers” *on sales by* such governmental or political units?

4. Is the State of Nevada, its unincorporated agencies and instrumentalities excluded from the provisions of the Sales Tax Law relative to “retailers” *on sales by* them?

5. Are *sales by* religious or charitable organizations of *donated* tangible personal property (e.g. cooked food, ice cream, cakes, etc.), or proceeds from admission charges to amateur shows, sponsored or given under the auspices of religious or charitable organizations in order to raise funds for the fundamental purposes and objects of such organizations, exempt from payment of taxes under the Sales and Use Tax Law?

#### OPINION

Before undertaking specific consideration of the foregoing matters, we deem it appropriate to review some preliminary questions, posed by some of the named “charitable” hospitals to establish their exemption from payment of any sales tax.

Such “charitable” hospitals contend that they are exempt from payment of any sales tax under the Act by reason of their *constitutional* exemption, as contained in Section 2, Article VIII and Section 1, Article X, Nevada Constitution, and the *legislative* exemption contained in Chapter 66, 1933 Statutes of Nevada, page 76, and NRS 372.265.

The Sales Tax Division’s position is that said constitutional and legislative exemptions only relate to the levy of *ad valorem taxes* on real and personal property of the organizations expressly named in said constitutional or legislative provisions, and do *not* apply to levy or imposition of *privilege or excise taxes*, which the Sales Tax is claimed to be. (See NRS 372.105; 117 A.L.R. 846.)

With this view of the Sales Tax Division we agree. “An exemption from taxation applies primarily to *ad valorem* taxes and not to excises, especially to such excises as are not in lieu of property taxes but are imposed upon the enjoyment of a privilege; it does not include things not fairly within the meaning of words read as they are written; and the exemption of certain specified things which may be exempted excludes all others not therein mentioned.” (1 A.L.R.2d 465, 466; 51 A.J. 526-534; Ex parte Robinson, 12 Nev. 263, 28 Am.Rep. 794; California State Board of Equalization v. Goggin, 27 A.L.R.2d 1211, 191 F.2d 726.)

NRS 372.325, entitled “Sales tax: United States; state; political subdivisions; religious, eleemosynary organizations,” provides as follows:

There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

1. The United States, its unincorporated agencies and instrumentalities.
2. Any incorporated agency or instrumentality of the United States or by a corporation wholly owned by the United States.
3. The State of Nevada, its unincorporated agencies and instrumentalities.
4. Any county, city, district or other political subdivision of this state.
5. Any organization created for religious, charitable or eleemosynary purposes, provided that no part of the net earnings of any such organization inures to the benefit of any private shareholder or individual.

As regards “hospitals” operated under *religious* auspices, it would clearly appear that the exemption granted in subsection 5, above, would only be authorized on the basis of such hospitals being *charitable* organizations. This conclusion is based on the established rule that: “A law exempting property from taxation must be strictly construed, and in determining whether property is exempt as belonging to a religious body or devoted to a religious use, such a law cannot be made by judicial construction to embrace other subjects than those plainly expressed therein.” (See 17 A.L.R. 1027, 1028, at page 1029, citing many authorities.) However, it must also be noted that a hospital, even though operated under religious auspices (and, on the basis of such fact alone not entitled to the indicated exemption because such activity is not legally regarded as primarily religious), may, nevertheless, be entitled to the exemption as a *charitable* organization, if such, in fact, it is.

The fundamental ground upon which the exemption in favor of the charitable institutions is based is a benefit conferred upon the public by them, and the consequent relief, to some extent, of the burden imposed on the state to care for and advance the interest of its citizens. (See 34 A.L.R. 634, 635, where many authorities are cited.)

The determination as to whether an organization is “charitable” depends on the following considerations: (1) Is the organization claiming the exemption a charitable one? (2) Whether the property on which the exemption is claimed is being devoted to charitable purposes.

The courts are agreed that a charitable institution does not lose its charitable character and its consequent exemption from taxation merely because recipients of its benefits who are able to pay are required to do so, where funds derived in this manner are devoted to the charitable purposes of the institution. (See 34 A.L.R. 637, 638, wherein many cases are cited and analyzed.)

The record before us shows considerable discussion and question whether the particular hospitals here involved are, in fact, *charitable* organizations. The evidence submitted by the said hospitals on this point, un rebutted and, in no respect, questioned by the Sales Tax Division, justifies the conclusion that such hospitals are *charitable* organizations, entitled as such, to any exemption accorded by the law (to such organizations). If there were any doubt concerning such conclusion on a factual basis, such doubt must be considered to be resolved by the letter of the Sales Tax Division, dated February 2, 1959, which, as regards this point, expressly states:

The charitable and religious nature of these two organizations is well established and was recognized by this division of the tax commission from the inception of the act.

It is, therefore, both sufficiently established and conceded that the hospitals concerned herein, of religious auspices, are *charitable* operations and activities.

We next consider the specific issue submitted to us for opinion, namely, whether the exemption contained in NRS 372.325, subsection 5, as above stated, exempts “*sales by*” such charitable hospitals?

The Sales Tax Division, relying on the aforementioned rule of strict construction of tax laws, directs attention to, and emphasizes that, the exemption accorded by the law expressly applies to deduction from the computation of the amount of sales tax due, “the gross receipts from the *sale* of any tangible personal property *to*” religious, charitable,

etc. organizations. (Italics supplied.) In other words, the contention is that “*sales by*” such organizations are *not* entitled to exemption.

Our attention has been invited to the fact that the Legislature prior to enactment of the law, had before it, and must be presumed to have had knowledge of, the distinction and differentiation involved, and having enacted the law as it plainly reads, must have decided to restrict the exemption to “sales to.” In accordance with the rule of statutory construction, namely, “*expressio unius, exclusio alterius*,” therefore, the Sales Tax Division contends “*sales by*” such charitable organizations are *not* exempted. (See “Survey of Sales Taxes Applicable to Nevada,” Bulletin No. 3, dated May 1948, prepared by Nevada Legislative Counsel Bureau, in connection with legislative consideration in the adoption of the present Sales Tax Law, pp. 38, 39.)

Some discussion of this contention on the part of the Sales Tax Division, and rules of statutory construction, is deemed necessary at this point, in view of the record before us, indicating serious question of such administrative construction of the law by the concerned hospitals and their attorneys.

The rule of “strict construction” of tax laws has already been mentioned. (17 A.L.R. 1027, 1029.) Another, and qualifying, rule is: “While tax exemption provisions must be strictly construed against those claiming the benefit of them, they are not to be given a distorted or unreasonable construction.” (See 108 A.L.R. 284, at p. 286, citing *Brattleboro Retreat v. Brattleboro*, 1934, 106 Vt. 228, 173 A. 209; 157 A.L.R. 804, 812 et seq.) Finally, another qualifying rule, previously indicated, is: “Whatever doubt exists in a tax measure must be resolved against the Government.” (See *Shwab v. Doyle*, 258 U.S. 529, 42 S. Ct. 391, 66 L.Ed. 747, 26 A.L.R. 1454; *United States v. Goelet*, 232 U.S. 293, 34 S. Ct. 431, 58 L.Ed. 610; *United States v. Field*, 255 U.S. 257, 41 S.Ct. 256, 65 L.Ed. 617, 18 A.L.R. 1461; *Reinecke v. Northern Trust Co.*, 278 U.S. 339, 49 S. Ct. 123, 73 L.Ed. 410, 66 A.L.R. 397; *Com. ex rel. Martin v. Stone*, 279 Ky. 243, 130 S.W.2d 758; *Reaves v. Brown-Foreman Distillers Corp.*, 288 Ky. 667, 157 S.W.2d 297; *Smith v. Ryan*, 88 Ky. 636, 11 S.W. 647.)

The foregoing rules may well be kept in mind in trying to determine *legislative intent* as regards the Sales Tax Act, as finally enacted.

In this connection, it may be noted that though the “Survey of Sales Taxes Applicable to Nevada,” contained a suggested model of a Sales Tax Law which omitted the exemption ultimately enacted into law in favor of “religious, charitable, and eleemosynary” organizations (See p. 157 of said Survey), *the Legislature saw fit to reject said omission, and gave such organizations the same status as regards exemption from the sales tax, as was being accorded the “United States, its unincorporated agencies and instrumentalities”*; “*Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States*”; “*The State of Nevada, its unincorporated agencies and instrumentalities*”; and “*Any county, city, district, or other political subdivision of this state.*”

Perhaps, it was intended by the Legislature *not to exempt* “religious, charitable and eleemosynary” organizations from liability from the sales tax on gross receipts derived from “*sales by*” such organizations. Certainly, if such had been its intention, adequate and *expressed* prohibition of exemption from taxes on “*sales by*” such organizations, could readily, and *plainly*, have been set forth and provided in the law. What significance and weight may properly, and reasonably, be placed on the absence of any reference to exemption from taxes on “*sales by*” *not only such named organizations but also the various governmental units accorded exemption as provided in said NRS 372.325?*

Obviously, unless the various governmental units indicated are further exempted by *express* provisions elsewhere contained in the Act, it should be concluded that all such governmental units are similarly subject to the sales tax on “*sales by*” them, and on the same basis as the Sales Tax Division maintains the religious and charitable organizations are liable.

Are there any such other provisions in the law which would “save” such governmental units from liability for sales taxes on “*sales by*” them? Apparently, (See Letter, April 14, 1959, from the Sales and Use Tax Division) reliance for exemption of such governmental units from the tax on “*sales by*” them in the past, and even up to the present, so far as appears, has been predicated on NRS 372.040, which defines “Person” as follows:

“Person” includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, cooperative, assignee, or any other group or combination acting as a unit, *but shall not include the United States, this state or any agency thereof, or any city, county, district or other political subdivision of this state.* (Italics supplied.)

But as the letter from the Sales Division (April 14, 1959) properly intimates, the applicability of the above-quoted section must be conditioned and qualified by the provision contained in NRS 372.015, entitled “Construction: Operation of definitions,” which is as follows:

Except where the context otherwise requires, the definitions given in NRS 372.010 to 372.100 inclusive, govern the construction of this chapter.

In the writer’s opinion, NRS 372.325 leaves no room for statutory construction: its provisions are clear and unambiguous, and its meaning plain. The *context*, therefore, should control, rather than the definition. And, if NRS 372.325 is to be given the construction that the exemption from the sales tax levy only applies to “*sales to*” and not to “*sales by*” religious and charitable organizations, then said construction is equally valid for the *governmental* units therein enumerated. Any other conclusion would be unreasonable, illogical, and an exercise in semantics, inappropriate to the importance and very substantial implications here under consideration. (Sec. 157 A.L.R. 804 et seq.)

The record before us amply indicates that no such construction has, heretofore, been made and applied in connection with the administration and enforcement of the law. Specifically, as regards *county* hospitals, it would appear that no sales tax has been levied on, or collected from, county public hospitals on “*sales by*” them, inasmuch as they have, heretofore, apparently been deemed exempted, by reason of the provisions of NRS 372.040. Exemption from liability for sales tax payment, *merely on such basis*, is, in our opinion, legally unjustified and untenable.

Lest this conclusion be construed as justifying levy and collection of such tax from such *governmental* units henceforth, the writer desires to call attention to another controlling and well-established rule which forbids such tax exaction, *albeit such rule nowhere is expressed or implied in the Sales Act*, namely:

The general rule is that while in the absence of any constitutional prohibition the state may tax its own property, the presumption is always against an intention to do so, and such property is impliedly immune from taxation unless an intention to include is *clearly* manifested. (Italics supplied.) Stated otherwise: When public property is involved, exemption is the rule and taxation the exception. (See *State et al. v. Lincoln County Power District No. 1*, 60 Nev. 401, 111 P.2d 528.)

Clearly NRS 372.325 shows no sufficiently *clear and plain intention* on the part of the State to subject its property, or the property of counties, cities and other political subdivisions of the State, or of the United States and its agencies and instrumentalities, to liability for taxes on “*sales by*” them. And if such intention is *not* clear as to such

*governmental* units, then it is equally unclear and ambiguous as to exaction of such tax from “religious and charitable” organizations.

In other words, there is no *express* provision in the Act for imposition or exaction of the tax on “sales by” any of the enumerated governmental units or organizations, otherwise expressly exempted. Although presumptively aware of the distinction as between “sales to” and “sales by” (See Survey of Sales Taxes Applicable to Nevada, *supra*), and in a position to make suitable provision for transactions of such different nature, the legislature did not see fit to do so. By its silence, it presumptively left the enumerated governmental units and “religious and charitable” organizations on a parity with each other. The decision to levy and assess the tax on “sales by” religious and charitable organizations is, therefore, based solely on *administrative* interpretation, construction, and application of the law, and is not, *necessarily*, the law.

There are other, and, in the writer’s opinion, even more cogent arguments against the Division’s construction and application of NRS 372.325, to be considered hereafter, but it is proper at this point, to note the views of our own Supreme Court in this connection.

\* \* \* Merely because there may be property escaping taxation *does not authorize the commission to tax that property in a manner not authorized by law.* (Italics supplied.) See: Goldfield Consolidated Mines Co. v. State, 60 Nev. 241, 248, 106 P.2d 613.

Ruling No. 62, adopted June 29, 1955 by the Sales and Use Tax Division, Nevada Tax Commission, and entitled “Hospitals,” provides as follows:

Hospitals are consumers of the tangible personal property furnished in connection with rendering their services, and tax applies to the purchase of all tangible personal property purchased by them to be used in the rendering of such services to inpatients.

If hospitals serve meals to employees at cost or below cost as a matter of convenience to employees of the hospital, tax does not apply. Tax applies to meals served to guests or others for a consideration.

Hospitals are retailers of the tangible personal property sold to outpatients. Hospitals are retailers of the tangible personal property sold through a pharmacy operated by the hospital.

References: NRS 372.055.

A reasonable construction of the foregoing plainly implies the meaning that the Division, as regards “hospitals,” and their acquisition and use of tangible personal property in connection with rendering their services, would be deemed *consumers* thereof, insofar as liability for sales tax is concerned. To this extent, such construction and ruling is proper and in accord with the law and administrative regulations generally, with respect to Sales and Use Tax Acts. It is based on the fact that the transfer of tangible personal property by hospitals in connection with the rendering of their services, *is merely incidental to the main purpose and use of such tangible personal property by the hospitals, which is “SERVICE.”* It follows that the hospitals, or *consumers*, (as defined in Ruling No. 62) in both fact and legal effect, constitute *purchasers* of such tangible personal property. But NRS 372.325, expressly and specifically, exempts from levy of the sales tax the gross receipts from “sales to” “charitable” hospitals of tangible personal property, and, in writer’s opinion, there is no *expressed reasonable basis or justification for any administrative holding that all tangible personal property which is purchased and proximately used in connection with the rendering of services by “charitable hospitals” is not included within the scope of the exemption granted by NRS 372.325.* But for such *express* exemption, the position and ruling of the Sales Tax Division would be more tenable, legally.

On the other hand, in favor of the Division's contention and position, it is maintained that the ultimate and beneficial user and consumer is actually not the "charitable hospital," but the patient, of many items of tangible personal property. Moreover, that the tax levy, pursuant to the Sales Act, is not actually borne by the "charitable hospital," but is paid as a separate and additional charge by the patient, to whom it should be, and ultimately is, shifted.

However, this contention necessitates *implying* that the beneficial use and consumption of certain items of tangible personal property by "charitable hospital" patients and personnel constitute "*sales by*" the hospitals, subject to tax levy based upon the purchase price of such items as so used in their rendering of services to inpatients. We have already advanced some reasons as to why such construction of the Sales Tax Act is unsatisfactory and legally questionable. It is now necessary to adduce other, and, in the writer's opinion, controlling and determinative, reasons in this connection.

We must first consider, and very specifically determine, what is a "*sale*" for sales tax purposes.

Each state having some form of sales tax has also adopted its own individual definition of the term "sale" or "retail sale," and such definitions in the Nevada Sales Tax Act are, respectively, set forth in NRS 372.060 and 372.050. "So long as a tax upon a business transaction does not offend some constitutional principle, a legislature is free to include such transaction within its statutory definition of a sale for purposes of an excise tax levy. The statutory definitions, then, are conditioned not by the normal denotation or connotation of the word "sale," but rather by the taxing policies of the several legislative bodies." (See Vanderbilt Law Review, February 1956, Vol. 9, No. 2, p. 227: "What Is a Sale for Sales Tax Purposes?" by Clyde L. Ball, and cases cited therein.)

With respect to "Service Transactions," this article (p. 228 et seq.) states as follows:

When a transaction does not involve any transfer of property at all, the transaction will not be taxable in the absence of special statutory provisions \* \* \*. When the transfer of tangible personal property takes place in connection with a service, a problem immediately arises. Most of the sales tax statutes tax transfers of possession as well as transfers of title. It may be reasonably argued that the tax statutes should be applied literally, and that the transfer of tangible personal property for a consideration is a taxable event, regardless of the fundamental purpose of the transaction. This position has not been followed, however, so that it is desirable to discover some criterion which will classify a given transaction as taxable or non-taxable. Some courts have resorted to a questionable definition of possession to avoid the application of a tax to a transaction which the court deemed to be outside the taxing intent of the legislature. Others have considered the necessity of the transfer to be significant—was the transfer necessary to the effectuation of the purpose of the transaction, or was it merely convenient? If the purpose of the transaction could be accomplished without transfer of the tangible personal property, it is reasonable to conclude that the transfer of the property is not the motivating purpose of the transaction, and the transfer should not be taxable, at least in the absence of transfer of title to the property. (See cited footnote cases therein; *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 11 N.E.2d 728 (1937))

And:

Though it must be recognized that there is no definitely established rule which will fit all cases, it may be of value to try to formulate certain guiding principles in the service-sale type of case. The Illinois court, interpreting the Illinois Retailers' Occupation Tax Act, has laid down tests which would classify these transactions into three tax categories:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering services, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays \* \* \* (is measured by the total cost of article and services). If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax-exempt as to the other (citing cases).

Although the application of these general statements to specific fact situations would not always be clear, the statement by the Illinois court does offer an acceptable basis upon which appropriate regulations could be erected, with a result that a reasonable and logical classification of taxable transactions could be made.

The foregoing extensive excerpts quoted provide sufficient indication, in the writer's opinion, not only of the complexity of the *administrative* problem involved in trying to enforce the *legislative intent* of Sales Tax laws including the one in effect in this State, but also serve to emphasize the lack of definite or uniform decisions and determinations as to when a transaction involving the transfer of tangible personal property does constitute a "sale" for sales tax purposes. It should also be noted that the foregoing views (by a Columbia University Professor of Law, and a specialist on the subject), are significantly concerned with sale-service transactions in general and applicable law, *apart from the question of express exemption involved in the matter before us*. In other words, there appears to be sufficient uncertainty as to whether transactions involving transfers of tangible personal property by "charitable hospitals" *to inpatients and hospital staff and personnel proximately connected with their rendition of services*, may properly and *legally* be construed to constitute "sales," or "retail sales," within the meaning of the Sales Tax Act, and, in any manner, subject to *sales* tax levy and payment.

Since Ruling No. 62 construes "hospitals" as "consumers," we may properly consider NRS 372.055, subsection 3, which expressly provides that an "optometrist or physician and surgeon is a *consumer* of, and shall not be considered, a retailer within the provisions of this chapter, with respect to the ophthalmic materials used or furnished by him in the performance of his professional services in the diagnosis, treatment or correction of conditions of the human eye, including the adaptation of lenses or frames for the aid thereof." Because of the substantially close similarity involved as regards sales-professional service transactions, it may be inferred that Ruling No. 62 was thus derived.

In any case, under NRS 372.055, subsection 3, it is assumed that sales *to* optometrists of the materials used by them for their rendition of professional services, are *not* taxed—the transaction, in legal effect, being treated as entitled to exemption from the tax as a "sale for resale purposes." (NRS 372.050, subsection 1.) but the tax does apply when the materials are actually used, and transfer thereof is actually made to the patient. This is deemed the taxable event, and, of course, the transaction may be considered a "sale by" the optometrist. (See *Babcock v. Nudelman*, 376 Ill. 526, 12 N.E.2d 635 (1937); *American Optical Co. v. Nudelman*, 370 Ill. 627, 19 N.E.2d 582 (1939); *Huston Bros. Co. v. McKibbin*, 386 Ill. 479, 54 N.E.2d 564 (1944); *State Tax Commission v. Hopkins*, 234 Ala. 556, 176 So. 210 (1937). The last cited case, which, incidentally, appears to

reflect the majority view, is authority for the proposition that even if the value of tangible materials employed in the manufacture of eyeglasses is only twenty percent of the total price charged the consumer, the sales tax applies to the whole amount. On the other hand, in Illinois (See *American Optical Co. v. Nudelman*, supra), it was held that sales of glasses by an optical manufacturer to optometrists and oculists were sales for resale, since the Babcock decision (supra) did not involve a determination that the glasses were not sold, but merely that the sale was not taxable because it was incidental to the practice of a profession. Thus, the glasses are not taxable at all. The McKibbin case, supra, held that the sale of drugs, medicines, pharmaceutical and surgical supplies to physicians and hospitals was not subject to the tax on the ground that it was not a retail sale. *P.H. Mallen Co. v. Department of Finance*, 372 Ill. 598, 25 N.E.2d 43 (1939) is to the same effect. (See 139 A.L.R. 372, 403 et seq.)

However, we also desire to note, and invite attention to the *significant difference in statutory treatment* of the sale-service transactions in the optometrical, and “charitable” hospital situation in the case before us. In our view, it would seem that if the Legislature had intended to restrict the exemption of the hospitals to “sales to” them, then it would have been just as simple and equally sufficient to achieve such result by including another provision, in substance similar to that applicable to optometrists. This, the Legislature did *not* do. Instead, along with governmental units—in the absence of *express* provision to the contrary, presumptively *always* exempt from taxation—it included “religious and charitable” organizations *within the classification established for grant of exemption*.

Therefore, to sanction the *administrative* construction contained in Ruling No. 62, would substantially place “charitable hospitals” in the same category as unexempted optometrists, thus rendering their *express* inclusion in the exempt classification a meaningless legislative act. Such is the only logical result of the construction advanced by the administrative agency. For, it must be remembered that as to all personal property of “religious and charitable” organizations, they are already constitutionally and legislatively exempt from property taxes. The exemption granted in the Sales Tax Act, if it has any meaning at all, must be deemed an exemption from the *sales excise tax*, imposed by the Act, in the same manner, and to the same extent thereunder, as the enumerated governmental units. Otherwise, they would never have been included in the exempt classification of the Sales Tax Act at all, but would have been treated as the optometrists are in NRS 372.050, subsection 1.

In *legal* effect the construction of the Sales and Use Tax Division has the following result: the Legislature saw fit *expressly* to grant “religious and charitable” organizations the benefits of exemption from sales tax liability, which exemption benefits the legislatively created agency charged with responsibility for administration of the law would virtually cancel and revoke by its interpretation and application in a manner excluding such express exemption. Unless there is unquestionable sanction *expressly* justifying such exclusion from exemption and consequent tax liability, it must be deemed contrary to legislative intent, and invalid.

Since the Division’s Ruling No. 62 defines hospitals as “consumers,” we may also consider whether such “charitable hospitals,” as regards transactions involving transfers of tangible personal property, may not, in legal contemplation of the law, be subject to liability for payment of the “use tax,” as provided in NRS 372.185 et seq.

Here, too, but with even greater certainty, we find *legal* obstacles.

The use tax was conceived as a necessary supplement to the successful administration of the sales tax \* \* \*.

Thus, if for some reason a sale at retail of tangible personal property escaped tax, “the use, the consumption, the distribution, and the storage (of the property would be taxed) *after it has come to rest in this state and has become a part of the mass of property in this state.*” (Italics supplied; see

Article: "The Use Tax: Its Relationship to the Sales Tax," by Eugene Greener, Jr., commencing at p. 349 et seq., also contained in the issue of Vanderbilt Law Review, cited supra, which issue is practically entirely devoted to "A Symposium on Sales Taxation," and may prove helpful to the Sales and Use Tax Division in connection with its administratively difficult problems.)

It must at once be noted that the rationale of "use taxes" is twofold: (1) to prevent evasion of the sales tax, through *out-of-state* purchases in states where there are *no* sales tax, or where the sales tax may be lower than in the state of residence of the purchaser; and (2) to protect local merchants, and the economy, of the state. The *legislative intent* of "use taxes" generally, is, therefore, that they shall apply to tangible personal property coming from another state, or another political or geographical area within the same state, whether or not, a sales tax be in effect there. It would take us too far afield to dwell upon the problems arising in connection with the application of the "use tax," and we will, therefore, consider it only insofar as it pertains and may be considered to apply to the specific issue here involved. Insofar as *legislative intent* is concerned, therefore, if the 'charitable hospitals, with which we are concerned, did not make their purchases in another state, then the "use tax" would not, in legal effect, be deemed applicable. (We note in passing only, that "use taxes" have also been held to be excise or privilege taxes, and not a property tax.)

In further clarification of the correlation of the "use tax" to the "sales tax," the following may be noted:

Nearly all of the states which have both sales and use taxes provide in their statutes that the sales tax and the use tax are complementary. It follows that if the sales tax and the use tax is paid on a transaction, the use tax is not. Some use-tax statutes \* \* \* specifically allow credit for sales taxes paid in other states. This leaves two questions. *Does the use tax apply in a situation not subject to sales taxation but not designed to evade sales taxation? Secondly, if the transaction is specifically exempt from sales taxation may it be subject to the use tax?* (Italics supplied)

The use tax does not apply when property was purchased outside the state for use there and was subsequently brought (elsewhere), since there was no intention to avoid \* \* \* sales or use taxes.

*Sales and use taxes are complementary and exemptions from the sales tax are to be treated as exemptions from the use tax.* (Italics supplied.)

(See Vanderbilt Law Review, supra, "The Measure of Sales Taxes," by Arthur H. Northrup, commencing at p. 237, 248, citing as to the last paragraph above quoted, Union Portland Cement Co. v. State Tax Comm'n, 110 Utah 152, 170 P.2d 879, 1947. See also: "Interpretation of Amended Regulation 285—Religious and Charitable Organizations—State of Pennsylvania," Joseph C. Snyder, Director, Div. of Sales and Use Tax, by J. Scott Calkins, Asst. Legal Counsel, Prentice-Hall, Pennsylvania, pages 23,002, 23,003, and 23,004; 129 A.L.R. 222, 238 et seq; 153 A.L.R. 609, 628 et seq.)

We believe that our analysis of the principal questions and issues has been developed sufficiently and to the point where certain conclusions are justified. Other important questions also involved before us for opinion, lend themselves to answer on basis of specific references, where deemed necessary.

Generally, in our considered opinion, we conclude that the *administrative* construction and application of the Sales Tax Act, as set forth presently in Ruling No. 62, is legally untenable and invalid, insofar as it purports to hold "charitable hospitals" liable to levy

and payment of sales taxes, and predicating such liability on the *assumption only* that the statutory exemption granted to such organizations does not extend to and include “*sales by*” such hospitals.

As already noted herein, the rule of construction of long standing and universal application is “Whatever doubt exists in a tax measure must be resolved against the Government.” (See *supra*) Our analysis, it is submitted, sufficiently establishes that the *administrative* construction (and its Ruling No. 62), is lacking in that degree of certainty required in a tax measure or regulation, and, because of such deficiency, it must be deemed both untenable and invalid.

As regards refund of excessive or illegal exaction of taxes, it should be noted that the Act imposes the legal obligation and payment thereof, upon the “taxpayer,” or “vendor,” or “retailer,” herein the “charitable hospitals,” (See NRS 372.095) and not the purchaser or consumer, who actually ultimately bears the economic burden of such tax. The Act provides for refund of excessive or illegal payments made under protest, to such “taxpayers,” here the said hospitals, except where a purchaser-claimant for refund is able to produce a receipt for the tax collected. (See NRS 372.185-372.255, inclusive and NRS 372.630.) The law affords adequate remedy to a consumer or purchaser as against the “taxpayer” of any excessive or illegal exaction of the amount paid for sales tax. (See *Marchica v. State Board of Equalization*, 237 P.2d 725; *Helms Bakeries v. State Board of Equalization*, 128 P.2d 167; *Cert. denied*, 318 U.S. 756, 87 L.Ed. 1129.)

Transactions involving transfers of tangible personal property by gift shops or (as regards outpatients) pharmacies connected with “charitable hospitals” must be deemed “sales” subject to levy of the tax, and *not* exempt under NRS 372.325. Meals served to inpatients, staff members and personnel employed by “charitable hospitals,” or connected with the functioning of same in the rendition of their services, are exempt from sales tax levy. Ruling No. 62 contains and provides properly for such transactions.

*Sales by* other religious or charitable organizations of *donated* tangible personal property (e.g., cooked food, cakes, ice cream, etc.) transacted on an occasional basis only, and intended to raise funds for religious or charitable purposes, are exempt from levy of the sales tax if (1) they are in conformity, and comply, with the requirements of the Act as to “occasional sales” (See NRS 372.035, 372.055, subsection 1 (c); or (2) a sales tax has already been paid on the item, or the component ingredients of said item; or (3) if the transfer of the tangible personal property *or the exercise of an intangible right* is merely incidental to the rendition of some service. (See “Interpretation of Amended Regulation 285—Religious and Charitable Organizations—State of Pennsylvania, *supra*; *Vanderbilt Law Review*, *supra*, p. 227 et seq., pp. 229-235.) Amateur performances or shows sponsored by, or given under the auspices of religious or charitable organizations in order to raise funds for the fundamental purposes and objects of such organizations, fall within the purview of the same criteria, but particularly the last, involving, primarily, the exercise of an *intangible* right, and not the transfer of *tangible* personal property. The “transfer” here involved (albeit with amateur talents), is the exercise of the *intangible* right of performing or giving a representation of the product of the special art, skill, or learning of the author, or creator, primarily, a *sale of services*. (See *Times-Herald, Inc. v. District of Columbia*, 213 F.2d 23, (D.C. Cir. 1954), 68 *Harv.L. Rev.* 727, (1955).) In the writer’s opinion since such “occasional” performances and shows are non-competitive with regular theatre operations, they are not subject to tax liability.

Except as specifically otherwise qualified herein, our opinion and answers to the questions hereinbefore stated, are, therefore, as follows:

- |                |              |      |
|----------------|--------------|------|
| Question 1:    | Affirmative: | Yes. |
| Question 2(a): | Affirmative: | Yes. |
| Question 2(b): | Affirmative: | Yes. |
| Question 3:    | Affirmative: | Yes. |
| Question 4:    | Affirmative: | Yes. |

Question 5:           Affirmative: Yes.

In conformity with the foregoing conclusions, the Sales and Use Tax Division, Nevada Tax Commission, is advised as follows:

1. To the extent that taxpayer-claimants *have complied with statutory requirements therefor, and secured their rights to refund of sales tax payments, consistent with the conclusions herein*, said Sales and Use Tax Division should take appropriate action to effect refund of said tax payments.

2. Ruling No. 62 should be revised, insofar as necessary, to conform with the views and conclusions herein contained.

3. Any other rules and regulations, relating to transactions on the part of religious and charitable organizations, insofar as they may be inconsistent with the views and conclusions herein set forth, should also be revised to conform herewith.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-62 Fish and Game Commission, Nevada. Taxation—Senate Bill 100, passed by the Forty-ninth Session of the Legislature, amending NRS 361.055, is prospective in operation. The annual payments in lieu of taxes required to be paid thereunder are fixed in amount and not subject to changes in assessment or tax rate.**

CARSON CITY, June 5, 1959

MR. FRANK W. GROVES, *Director, Fish and Game Commission, P.O. Box 678, Reno, Nevada*

DEAR MR. GROVES: We have your letter dated April 29, 1959, requesting our opinion on certain questions relating to Senate Bill 100, which was passed by the recent session of the Legislature and approved by the Governor. Said bill will appear in the statutes as Statutes of Nevada 1959, Chapter 237, and in Nevada Revised Statutes as an amendment to NRS 361.055. We will refer to said enactment in this opinion as Chapter 237.

Lands owned by the Commission have been acquired either from private ownership or from the State or National Government. The bill provides that those lands that have been acquired by the Commission from private ownership shall be burdened with an in lieu of tax obligation, payable by the Commission annually to the county tax receiver.

Your questions may be stated as follows:

QUESTIONS

1. Is Chapter 237 retroactive in operation?
2. Will the annual payments referred to in said chapter be a fixed figure unaffected by changes in assessed value or tax rates?
3. Should your department follow any special procedure in making the annual payments required to be made under said chapter?

OPINION

It is a well settled rule of statutory construction that all statutes are to be construed as having only a prospective operation. If doubts exist in construing a statute, such doubts must be resolved against a retroactive construction. (*Wildes v. State*, 43 Nevada 388.) Applying that rule to Chapter 237, we must conclude that said chapter must be construed as having a prospective operation only. There is no language in said chapter expressly providing for a retroactive operation and such a construction should not be implied from the fact that said enactment makes reference to the year in which the fish and game department acquired title to a parcel of real property. Such a reference is solely for the purpose of fixing the amount of the annual payments to be made. A more detailed discussion of the matter will be made hereinafter. We answer question No. 1 in the negative.

The language employed in said paragraph 2 clearly indicates that the annual payments in lieu of taxes shall be a fixed amount. If the Legislature had intended otherwise, no purpose would be served by referring to the year in which title was acquired in determining the manner of arriving at the amount of such payment. The language is unmistakable. The annual payment in lieu of taxes is a fixed amount unaffected by changes in assessed value or tax rate. We answer question No. 2 in the affirmative.

It should be noted that said chapter makes no reference to an effective date. It is provided under NRS 218.530 that every law passed by the Legislature shall take force and effect on July 1 following its passage unless such law provides otherwise. Therefore, Chapter 237, amending NRS 361.055, becomes effective July 1, 1959.

It is provided in said chapter that the annual payments in lieu of taxes shall be collected and accounted for in the same manner taxes on real property are collected and accounted for. Since taxes on real property are collected on a deferred basis, that is to say, real property taxes for fiscal year 1958-1959 (ending June 30, 1959) are due and payable in full in July, 1959, or quarterly installments thereafter, we conclude the Fish and Game Commission must commence the payments in lieu of taxes in July, 1959.

We realize that there could be conflicting views among the various tax receivers in interpreting Chapter 237. In the interest of achieving uniformity of interpretation and thereby avoid such conflicts, this department will furnish a copy of this opinion to each county tax receiver.

In making the annual payments as required under Chapter 237, we cannot outline any special procedure to be employed except to say sound business judgment dictates that the Commission, before authorizing payment, satisfy itself that the amount of the payment reflected in each statement received is equal to the total taxes levied and assessed on that particular parcel in the year the Commission acquired title.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-64 City of Reno, City Attorney, Jurisdiction of Municipal Courts—In absence of city ordinances relating to such offenses, Municipal City Court is without jurisdiction to prosecute violations constituting misdemeanors under State law. NRS 5.050, purporting to vest such jurisdiction in municipal courts, is constitutionally inapplicable unless corresponding city ordinances covering same offenses are in effect. City of Reno may constitutionally, and under grant of legislative powers, enact appropriate ordinances for such offenses.**

CARSON CITY, June 16, 1959

HON. ROY LEE TORVINEN, *City Attorney, Reno, Nevada*

DEAR SIR: Reference is made to your letter dated May 25, 1959, in which you request our opinion on certain questions hereinafter stated.

#### FACTS

Some question concerning jurisdiction has apparently arisen in connection with prosecution of violations of NRS 205.130 (insufficient fund checks) and NRS 205.240 (petit larceny). The problem is as to whether such violations may properly be prosecuted in the municipal court of the City of Reno, Nevada, in the absence of a city ordinance specifically embracing such offenses, and solely on the basis of NRS 5.050 which generally confers jurisdiction upon municipal courts over all public offenses punishable as misdemeanors. The City of Reno owes its existence to, and functions under powers granted to it by, special charter from the State Legislature and NRS 266 (and more specifically NRS 266.555 is inapplicable, since such chapter and section are applicable only to cities incorporated under general law. It appears to be the position of the office of the District Attorney, Washoe County, Nevada, that since NRS 5.050 confers jurisdiction upon municipal courts, these violations of State law, or public offenses, should be prosecuted by the City Attorney's Office.

#### QUESTIONS

1. May the Reno Municipal Court properly and legally prosecute public offenses, as defined in NRS 205.130 (insufficient fund checks) and NRS 205.240 (petit larceny), under the authority and jurisdiction conferred by NRS 5.050, and in the absence of city ordinance applicable to such offenses?
2. If such public offenses be deemed to fall within the jurisdiction of the Reno Municipal Court, and, therefore, subject to prosecution therein, is it then the duty of the District Attorney of Washoe County, or of the City Attorney of Reno, to conduct such prosecutions?
3. Would it be proper and legal for the Reno City Council to enact corresponding city ordinances making insufficient fund checks and petit larceny misdemeanors, in view of existing State law on said subjects?

#### OPINION

It is evident that the problem here involved results from the lack in the Reno City Charter of a certain provision which one might usually expect to find in such basic law of a municipal corporation. Such a provision would constitute and make misdemeanors as defined by State law, also offenses against the municipality, when committed within the boundaries of the city.

Another complication arises from the fact that, apparently, the City of Reno has no ordinance implementing the general delegation and grant of police power authorized under the "welfare clause" contained in Article XII, Section 10h, subsection "Fourth."

And, finally, the problem is further complicated by certain constitutional limitations on the jurisdiction of municipal courts, legislative delegation of police power by the State to municipal corporations, and the historical difference existing between public offenses, as defined under State laws, and offenses against municipal ordinances or regulations.

In order to resolve these problems, and determine the significance or import of NRS 5.050, and the legal effect of said statutory provision with respect thereto, some basic principles must first be understood.

The first of these principles is, of course, the well-established rule that municipal courts are courts of limited or restricted jurisdiction, authorized to exercise only such jurisdiction as has been expressly or specifically granted by applicable law, whether constitutional, legislative, or through valid municipal ordinance. (See Art. VI, Sections 1 and 9, Nev. Const.; McQuillin, *Municipal Corporations*, 3rd Ed., Vol. 9, p. 533, Sec 27.02.)

Since the municipal court of Reno exists by virtue of the Reno City Charter, we may properly ascertain the jurisdiction of said court as defined and provided therein. Article XIV, Section 3, thereof, insofar as here pertinent, provides as follows:

The municipal court shall have the powers and jurisdiction in said city as are now provided for justices of the peace, wherein any person or persons are charged with the breach *or violation of the provisions of any ordinance of said city or of this charter, of a police nature; provided*, that the trial and proceedings in such cases, in the municipal court or on appeal therefrom, shall be summary and without a jury. The said court shall have jurisdiction to hear, try and determine all cases, *whether civil or criminal for the breach or violation of any city ordinance or any provision of this charter of a police nature \* \* \**. The practice and proceedings in said court shall conform, as nearly as practicable, to the practice and proceedings of justices' courts in similar cases, except as herein limited or extended. \* \* \* (Italics supplied.)

Article XIV, Section 5, Reno City Charter, provides;

The said Court shall have jurisdiction of the following offenses committed within the city, which violate the peace and good order of the city or which invade any of the police powers of the city or endanger the health of the inhabitants thereof, such as breaches of the peace \* \* \* and all disorderly, offensive or opprobrious conduct, and of all offenses *under ordinances of the city*. (Italics supplied.)

Article XII, Section 10i, subsection "Fifth," provides:

(The city council, among other things, shall have power:)

To prescribe fines, forfeitures, and penalties for the breach *or violation of any ordinance*, or the provisions of this charter, but no penalty shall exceed the amount of five hundred dollars or six months' imprisonment, or both such fine and imprisonment. (Italics supplied.)

The foregoing Reno City Charter excerpts, it would definitely appear, limit or restrict the power and jurisdiction of said city's municipal court *to those offenses only which contravene city ordinances*.

We next briefly note certain rules of law concerning the nature and status of municipal corporations, and certain consequences deriving therefrom. Municipal corporations are, of course, exclusively legislative creations, having existence and only such powers as have been delegated to them by the State. Also, that it lies within the sovereign power of the State, at any time, either to abolish them completely, or restrict powers previously conferred upon them, or enlarge their powers, as and when it, the State, sees fit, *provided there is no constitutional inhibition or prohibition against such action*. Necessarily, such sovereign power of the State also extends to any phase or branch of municipal governments, including municipal courts. (See 37 A.J. 787, Sec. 165 and 166 at p. 791; McAullin, *Municipal Corporations*, 3rd Ed., Vol. 2, p. 13 et seq.)

As already indicated, NRS 5.050 purports to confer certain jurisdiction upon municipal courts generally, apart from, and in addition to, the jurisdiction vested in such courts by city charters, by providing (insofar as here pertinent) as follows:

1. Municipal courts which are already established, or which may hereafter be established in any incorporated city of this state, shall have jurisdiction:

(a) Of an action or proceeding for the *violation of any ordinance* of their respective cities \* \* \*.

2. The municipal courts already established, or which may hereafter be established, shall also have jurisdiction of the following *public offenses* committed in their respective cities:

(a) Petit larceny \* \* \*.

(c) Breaches of peace, riots, affrays, committing a wilful injury to property, *and all misdemeanors punishable by fine not exceeding \$500, or imprisonment not exceeding 3 months, or by both such fine and imprisonment.* (Italics supplied.)

(It might be noted in passing that both NRS 205.130 (insufficient fund checks) and NRS 205.240 (petit larceny) prescribe maximum fines and imprisonment of \$500 or *six months*, or both.)

On the basis of the nature and status of municipal corporations as legislative creations, above noted, the argument might be made that NRS 5.050 must be construed in such manner as to give effect to the clear *legislative* intent expressed therein. In other words, that said statutory provision vests in municipal courts powers and jurisdiction over the *state offenses* specified therein, *apart from, and in addition to*, such powers and jurisdiction which they may have under any city charters authorizing their establishment and existence. In the instant case, since NRS 5.050, as herein pertinent, was enacted in 1865, and the City of Reno was legislatively chartered in 1903, such contention would mean that *the charter should be deemed subject to said prior general law.*

Pursuing such suggested argument further, it might also be maintained that if NRS 5.050 is *not* so construed, then the mere absence of a city ordinance to cover a specified public (state) offense would, in legal effect, preclude exercise by a municipal court of that express jurisdiction conferred upon such courts by State legislative enactment. The result would be nullification of legislative intent and power, through mere inaction on the part of municipal governments. Such a consequence is contrary to the fundamental concept of state sovereignty and supremacy, and renders NRS 5.050 apparently meaningless and a nullity, to the detriment of the public interest, as regards enforcement of state criminal laws.

Some support for such argument may be found in a discussion of "Jurisdiction of local courts," in McQuillan, *Municipal Corporations*, 3rd Ed., Vol. 9, Section 27.02, p. 533 et seq.:

\* \* \* The jurisdiction of such local courts is generally confined to violations of ordinances and local police regulations. Unless the power is expressly given, municipal and local courts have no jurisdiction relative to the violation of statutes. However, such jurisdiction may be conferred *if the state constitution does not forbid.*

*In the absence of constitutional restriction* these courts may be invested with civil jurisdiction, and, also, power to enforce penalties for violations of state and federal laws \* \* \*. (Italics supplied; see footnote citations therein.)

Are there are constitutional prohibitions with respect to legislative grant of such *additional* jurisdiction to municipal courts over the specified *state offenses*? Article VI, Sections 1 and 9, Nevada Constitution, are here pertinent. Section 1 provides:

*The judicial power of this state shall be vested in a supreme court, district courts, and in justices of the peace. The legislature may also establish courts, for municipal purposes only, in incorporated cities and towns. (Italics supplied.)*

Section 9 provides:

Provision shall be made by law prescribing the powers, duties, and responsibilities of any municipal court that may be established in pursuance of section one of this article; and also fixing by law the jurisdiction of said court, so as not to conflict with that of the several courts of record.

The foregoing constitutional provisions clearly vest the State's judicial power in all the enumerated courts except *municipal courts*. Also, if and when the legislature sees fit to establish courts in incorporated cities and towns, the jurisdiction of said courts shall be limited and restricted to "*municipal purposes only*."

The offenses covered by NRS 205.130 (insufficient fund checks) and NRS 205.240 (petit larceny), because of the absence of corresponding ordinances in the City of Reno, are general public offenses, primarily matters of *State* concern. We must, therefore, determine whether, under the above quoted constitutional restrictions, and within the purview of the jurisdiction vested in the municipal court *of Reno*, prosecution of such offenses can be deemed a "municipal purpose."

It has been held that Section 9, Article VI, of the Nevada Constitution, is undoubtedly restricted by Section 1, Article VI, and that the Legislature is only authorized to regulate the jurisdiction of municipal courts within the limits prescribed in Section 1. It cannot extend such jurisdiction beyond the scope of municipal purposes; also, "for municipal purposes only" means such matters as relate solely to the affairs of the incorporated cities or towns. Therefore, *the jurisdiction of such courts is clearly restricted to such municipal matters*. (See *Meagher v. The County of Storey*, 5 Nev. 244, 249 et seq.; *Ex parte Shaw*, 32 Cal.App.2d 84, 89 P.2d 161, 162 and cases cited therein.)

In addition to the foregoing constitutional objection, there are other difficulties involved. For example, it is well established that chartered cities are governed by their charters and ordinances, and not by general laws applicable to unchartered municipalities. That when a municipal corporation adopts a home-rule charter, that charter unquestionably supersedes the existing general law under which it has been operating, and said charter becomes its organic law, definitely having priority over general law as regards matters of purely municipal concern. (McQuillin, *Municipal Corporations*, Vol 6, p. 222 and footnote citations.) Moreover, that a special charter can only be amended by special act of the Legislature, and that a statute intended to repeal such a charter must conform to constitutional limitations and requirements, e.g., the requirement that the subject be expressed in the title. (McQuillin, *Municipal Corporations*, p. 225 with footnote citations; Article IV, Section 17, Nevada Constitution.)

We must also note the general rule of statutory construction that a later or specific legislative enactment supersedes a prior or general law. As applied herein, the later enacted and specific Reno City Charter (1903) should be deemed to supersede NRS 5.050 (adopted in 1865.)

However, it might still be asked: Was it the intention of the Legislature to have the Reno City Charter supersede a general law (NRS 5.050) designed to establish uniformity in city governments with respect to a matter of state-wide concern, viz: prosecution of specified public (state) offenses? Especially, since there is some authority that a

legislative act which in terms applies to all cities of the State should be read into a city charter or be construed to repeal inconsistent charter provisions. (See McQuillin, *Municipal Corporations*, Vol. 6, pp. 223-224 and 229 et seq., and footnote citations.) Is there actually an *irreconcilable* conflict, necessitating a determination as to whether NRS 5.050, a general statute, supersedes the Reno City Charter? It is the general rule that charter provisions and statutes are to be reconciled, and not regarded as superseding each other, if at all possible. The rule has been stated as follows: "Conflict must exist; otherwise a special municipal charter stands. Clearly, where the general law and \* \* \* charter or ordinance provisions do not conflict, they both stand \* \* \*." (See McQuillin, *Municipal Corporations*, pp. 234-235 and cases referred to therein.)

Since there are no Reno City ordinances corresponding to NRS 205.130 and 205.240 (State laws) in existence, there is no irreconcilable conflict requiring a determination as to which controls, at least as regards the general law and ordinances. But what about NRS 5.050 and the Reno City Charter?

Involved in municipal control of offenses against the State are enforcement of such laws by municipal police officers, and municipal administration thereof. "*Also involved are municipal ordinances to supplement and aid or implement standards of state law; e.g., an ordinance prohibiting under penalty the 'commission within the municipality of any act constituting a felony or misdemeanor against the state'.*" (Italics supplied; see McQuillin, *Municipal Corporations*, p. 379, Sec. 23.01.) "Certainly, it is entirely competent for the legislature to confer in express terms such powers as will enable a municipal corporation to declare *by ordinance* any given act as an offense against its authority, notwithstanding such act has been made by statute a public offense and a crime against the state \* \* \*." (Italics supplied; see McQuillin, *Municipal Corporations*, Sec. 23.03 at p. 382; Sec. 23.05 at p. 390.)

While there is, undoubtedly (undoubtedly), a general duty upon duly constituted municipal authorities to exercise the police power delegated to them where there is a public need for it, it is, nevertheless, deemed to be within their sound discretion to determine both the need and the measure to meet it. The obvious differences between small or rural centers and large urban centers may be mentioned as justification for this rule. So: "Courts will not interfere except for abuse of their discretion, and violation of their duty subjects them only to political consequence and not civil liability." "The exercise of the police power by municipal corporations ordinarily is *by ordinance*, enacted by the legislative department of the municipal government." (Italics supplied; see McQuillin, *Municipal Corporations*, Sec. 24.03 at p. 518, and footnote citations.)

Where a legislative enactment exists, providing that all offenses against the criminal laws of the State shall constitute offenses against a municipality wherein they occur, no special ordinance is necessary to give effect thereto or to sustain a prosecution. (See McQuillin, *Municipal Corporations*, Sec. 23.03 at p. 383 and footnote citations.) And the same would, undoubtedly, hold true, if the City Charter of Reno contained such a provision. However, neither said charter, nor NRS 5.050, or other applicable law, furnishes sufficient authority for dispensing with the requirement of a municipal *ordinance* to aid, implement, and give effect either to the "general welfare" clause in said charter (Article XII, Sec. 10h, subsection "Fourth," or NRS 5.050 (general law).)

Governmental authority known as the police power is an inherent attribute of state sovereignty. It can belong to cities or other subordinate governmental agencies or divisions of the state when and as conferred by the state. But without doubt a state can delegate the power or *at least authority to exercise it* to municipal and other governmental agencies of the state. The delegation may be by constitution, statute, or charter." (Italics supplied; see McQuillin, *Municipal Corporations*, Vol. 6, Sec. 24.36, pp. 522-523.)

At this point, note should be taken of the historical fact that misdemeanors or offenses of the character covered by NRS 205.130 (insufficient fund checks) and NRS 205.240 (petit larceny) were once definitely beyond the jurisdiction exercised by municipal courts. Such offenses had the status of crimes, and prosecution thereof involved the exercise of *judicial* power, formerly exclusively reserved to state courts of record. In fact, the “police jurisdiction” exercised by municipal courts to this day in many states is not considered of a *judicial* nature, but only quasi-judicial or civil in nature. So, in early days it was the general practice for states to delegate to municipalities only a limited portion of their police powers, sufficient to enable them to promote the peace, safety, morals, health, and general welfare of their inhabitants. Our constitutional restriction on the jurisdiction of municipal courts is understandable on such basis. However, with the development of crowded urban centers, and the resulting problems of modern conditions, it has become essential to enlarge or broaden the scope of municipal police powers, so as to enable incorporated cities adequately to cope with the problems created. In the writer’s opinion, based upon a review of the historical development of municipal courts and their jurisdiction, NRS 5.050 must be so viewed and considered. (See McQuillin, *Municipal Corporations*, Vol. 9, Sec. 27.06, p. 554 et seq.)

While the Legislature, in exercise of state sovereign power, could amend all municipal charters so as to make “insufficient fund checks” and petit larceny municipal offenses, when such acts are committed in cities, *it has not, either specifically or expressly done so*, in any manner as required by constitutional provision. (See McQuillin, *Municipal Corporations*, Vol. 6, p. 225, with footnote citations; Article IV, Sections 17 and 20, Nevada Constitution.) NRS 5.050 makes no reference to any amendment of city charters to effect its objective. Such absence therefrom of express amendatory intention violates constitutional requirements; it cannot, therefore, be considered as amending, *pro tanto*, all municipal charters. And, if it still be assumed that such is its intent, it would then be violative of the constitutional restriction relative to the jurisdiction of municipal courts.

Thus, we are forced to the conclusion that NRS 5.050 *alone* cannot invest municipal courts with jurisdiction over the *state offenses* defined in NRS 205.130 and 205.240. These *state offenses* are, primarily, matters of *State concern*, and not within the purview of the constitutional requirement that the jurisdiction of municipal courts shall be restricted to “municipal purposes *only*.”

We must further conclude that, as regards the jurisdiction of municipal courts only, NRS 5.050 constitutes merely *permissive or enabling legislation*, granting to municipal corporations concurrent power and jurisdiction over the (state) public offenses therein enumerated, when committed within municipal boundaries, *if and only, when municipal corporations see fit to exercise such authority and jurisdiction by adoption of appropriate ordinances*.

Basically, support for this conclusion is to be found in the constitutional limitation on the jurisdiction of municipal courts, to “municipal purposes only,” and that the judicial power of the State is vested in *other* courts. In order to overcome such constitutional limitation, it is necessary to establish and make prosecution of the offenses covered by NRS 205.130 and 205.240 “municipal purposes.” To do this requires only legislative action by municipal corporations, *in the form of appropriate ordinances*, authority for which can be found in the “general welfare” provisions usually contained in all city charters. (See McQuillin, *Municipal Corporations*, Vol. 6, Sec. 24.43, p. 535, and cases cited therein.) NRS 5.050 is, however, necessary *as an enabling act*, since without it, a municipal court might, ordinarily, be considered precluded from exercise of jurisdiction over *state* offenses, such as those here involved. For there is *some* authority for such a view.

The trial and punishment of offenses defined by the laws of the state is not a municipal affair, and a municipal corporation cannot punish for an offense against the criminal laws of the state. *A municipal corporation,*

*nevertheless, may be empowered to enforce a statute.* (Italics supplied; see McQuillin, *Municipal Corporations*, Vol. 6, Sec. 23.05, p. 390, and footnote citations.)

Exercise of such power must, however, be *by ordinance*, as shown. Of course, if such enumerated offenses are also *validly* made offenses against a municipality, when committed within its boundaries, they can, unquestionably, be prosecuted in municipal courts, such prosecution then being a “municipal purpose.” Such would be the result, if the City of Reno had enacted, *or were to enact, ordinances corresponding to NRS 205.130 and 205.240, or a general ordinance which would make misdemeanors under State law offenses against the municipality, when committed within municipal boundaries.*

In the absence of adoption of such ordinances, direct amendment of a city’s charter, so as to constitute such offenses specific violations of municipal law, when committed within city boundaries, is required. In such case, NRS 5.050 would also have the effect of vesting the municipal court with *concurrent* jurisdiction over the specifically enumerated public offenses, when committed within the city’s boundaries, with Justice Courts. For prosecution of the municipal offense would *not* bar prosecution for the *state* offense, though based on the same act, as we shall hereafter show. (See NRS 4.370, Sections 3 and 4: “Jurisdiction of justices courts”)

We next consider whether it would be proper and legal for the City of Reno to enact corresponding city ordinances making “insufficient fund checks” and “petit larceny,” municipal offenses, in view of existing State law on these offenses. We have already implied that the City of Reno has such power, and have sufficiently discussed the constitutional aspects of the matter resulting in the conclusion that it would be valid for the city to do so if such ordinances can be shown to be “municipal purposes,” within the grant of charter police powers.

Insofar as *legislative* authority is concerned, we have already referred to Article XII, Section 10h, subsection “Fourth,” the “general welfare” clause of said city’s organic law. Other pertinent or relevant provisions therein can be merely enumerated. Attention is invited to the following: Article XII, Section 10.205, 10i “Fifth,” 10.1, Article XIX, Section 4. We are satisfied that all of these provisions adequately authorize valid adoption of such ordinances, even though there appears to be contrary authority in some other states.

In such other states it has been held that when the Legislature has made provision for the punishment of an offense, it must be deemed to have manifested state intent that the matter is fully covered by the statute, and that a municipality, under its “general powers,” cannot make the same act an offense against a municipal ordinance as well, unless the offense is attended by circumstances or aggravation not covered by the state law. Other states hold that under a general delegation of power, such as NRS 5.050 construed together with the Reno Charter, a municipality may impose penalties for acts which by the statutes of the state are declared to be crimes. In these states *ordinances enacted in pursuance of express authority* to legislate upon particular subjects are generally held to be valid. And, if a certain act is lawfully prohibited by both a state statute and a municipal ordinance, a conviction of an offense under either does not bar a prosecution under the other, there being no constitutional objection to a second jeopardy for the same act, *but merely for the same offense.* Although the act may be the same, the *offenses* are regarded as separate and distinct. (See 19 R.C.L. 804 et seq., and footnote citations; 17 L.R.A. (New Series) 54 et seq., and footnote citations; 37 A.J. 791 et seq., and footnote citations; 11 A.J. Sec. 224, Supp.)

Insofar as the State of Nevada is concerned, it has been *held* that the Legislature may delegate to municipal corporations the lawful exercise of police powers within their boundaries. Also, that the State and city may legislate on the same subject, so that the same act may constitute both an offense against the State and a municipal corporation,

both of whom may punish without violation of any constitutional principle. The charter of a municipal corporation, under a "general welfare" cause or provision, will authorize the supplying of omitted powers. However, when the power to pass an ordinance upon any subject has been specifically given, the power so granted cannot be enlarged or changed by a general clause of the charter, but, if the subject is omitted altogether in the specific powers, then the authority to pass an ordinance upon the omitted subject may be deemed to have been conferred under the general clause or provision. (See Ex parte Sloan, 47 Nev. 109, 217 Pac. 233.)

A careful reading of the Reno City Charter has failed to disclose any grant of specific power to pass ordinances either with respect to "insufficient fund checks" or petit larceny. The said City Charter, on the other hand, shows a legislative intent to vest in the City Council any and all necessary power to enact laws in the interests of the inhabitants of the city, the protection of their property, and the maintenance of peace and good order of the municipality. We conclude, therefore, that the City of Reno may properly and legally enact city ordinances making "insufficient fund checks" and petit larceny municipal offenses, if committed within the boundaries of said city, notwithstanding existence of State law on the same offenses.

In view of our analysis and conclusions reached on the first of the questions hereinabove set forth, the second question must be deemed moot, and no answer thereto necessary.

As regards the incidental question of a jury trial, the indicated offenses being misdemeanors, no constitutional guarantee is violated by summary trial thereof without a jury. (See State v. Ruhe, 24 Nev. 251, 262, 52 Pac. 274; Ex parte Sloan, 47 Nev. 109, 118-119, 217 Pac. 233.)

It is our considered opinion, therefore, that the questions hereinbefore set forth must be answered as follows:

Question No. 1: Negative: No.

Question No. 2: Moot: Not answered, in view of our answer to question No. 1.

Question No. 3: Affirmative: Yes.

We trust that the foregoing analysis and conclusions will prove of assistance in clarification of the problem.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-65 Annual Leave—Termination pay for accumulated annual leave must be computed on salary as of date of separation.**

CARSON CITY, June 23, 1959

MR. J. E. MOOSE, *Acting Commissioner, Food and Drugs, Weights and Measures Department, State of Nevada, Post Office Box 719, Reno, Nevada*

DEAR MR. MOOSE: We have your letter dated June 4, 1959, wherein you request the opinion of this office upon the facts and questions hereinafter stated.

FACTS

Mr. E. L. Randall, Chief Chemist of the Food and Drugs, Weights and Measures Department, proposes to leave the service of the State on July 1, 1959.

Prior to November 13, 1958, Mr. Randall was the Commissioner of said department. On that date the Board of Regents of the University of Nevada restored him to the position he once held as Chief Chemist. He will leave the State's service as Chief Chemist at a salary less than he received as Commissioner.

Mr. Randall has apparently accumulated 30 days annual leave, which is the maximum amount allowed by law for officers and employees of the State of Nevada.

#### QUESTION

Should Mr. Randall's 30 days' termination pay be computed on his present salary as Chief Chemist or on the higher salary he received as Commissioner of the department?

#### OPINION

Employees in the public service, both in the classified and unclassified service, are entitled to not less than  $1\frac{1}{4}$  days of annual leave with pay for each full calendar month of service, which may be cumulative not to exceed 30 days (NRS 284.350). Under Rule 8.02 of the Rules and Regulations of the State Personnel Department, the leave entitlement increases to  $1\frac{1}{2}$  days for each month after fifteen years' continuous service.

From the information available to this office, Mr. Randall has been in the service of the State for approximately 26 years. Since he has been in his present position of Chief Chemist at a reduced salary from November, 1958, it is apparent that most of the thirty days' leave he claims must have accumulated prior to November, 1958, at which time he was serving as Commissioner.

With that background the question has arisen as to whether the terminal leave payment should be computed on the salary Mr. Randall was receiving when he accumulated most of the leave or on his present reduced salary.

In Attorney General's Opinion No. 2, of January 28, 1959, we concluded that accumulated annual leave of a State employee was a property right. We did not mean to imply that an employee of the State accumulates a sum of money each month based upon his current daily salary or wage times his leave entitlement of  $1\frac{1}{4}$  or  $1\frac{1}{2}$  days, as the case may be. The employee's right is to the use of his leave with pay during the period of his employment. That is the primary purpose for annual leave. If, for any reason, the employee does not, or cannot, use his annual leave then, upon termination of his employment, he is entitled to be paid for that leave computed on the basis of his salary or wage at that time. To compute the terminal leave payment on a salary or wage different than the rate of pay at the time of separation from service would result in completely overlooking the fact that salaries and wages of State employees may be increased or decreased by legislative and personnel action.

After a State employee or officer has received an increase or decrease in his salary, any annual leave taken thereafter by that employee is taken at the rate of pay then in effect irrespective of the pay rate as the leave is being accumulated. It, therefore, follows that if annual leave is not taken in the form of time off with pay and an employee terminates his service, he should be paid for his accumulated annual leave at the rate of pay in effect at termination.

For the reasons expressed, we are of the opinion that Mr. Randall's termination pay for accumulated leave, if allowed, must be computed entirely on his salary as of the date of termination.

We reach this conclusion notwithstanding the fact that the Food and Drugs, Weights and Measures Departments are agencies of the University of Nevada. That the University is a creature of the Nevada Constitution and the Board of Regents right to control the University in their executive and administrative capacity is, in general, exclusive. (King v. Board of Regents, 65 Nevada 533.)

It is not an interference with the constitutional executive and administrative duties of the Board of Regents for the Legislature to provide classified and unclassified employees of the State, including employees of the University, with certain benefits and to reasonably prescribe the manner of exercising those benefits.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-66 University of Nevada—State Planning Board is not precluded under Chapter 458, 1959 Statutes, from accepting services of University Engineer, in preliminary planning work of University projects, despite fact that Planning Board does not compensate said engineer.**

CARSON CITY, June 23, 1959

HONORABLE CHARLES J. ARMSTRONG, *President, University of Nevada, Reno, Nevada.*

DEAR MR. ARMSTRONG: We have your letter of June 10, 1959, requesting a legal opinion or advice from this department upon a question hereinafter stated.

FACTS

The Forty-ninth Session of the Nevada Legislature passed Chapter 458, which was approved April 6, 1959. A part of this statute will be hereinafter quoted. Sufficient to state that this chapter, for the most part, in addition to making an appropriation, makes provision for the construction rehabilitation, remodeling, repairing and otherwise providing for modifying of state buildings, and makes provision for the investing of powers, duties and responsibilities of the State Planning Board and other officers in connection with the program.

Section 2 of the Act sets out in 19 subdivisions the several projects to be undertaken and the amount of money allotted to each, totaling, under this section, a proposed expenditure of \$1,583,964. The projects outlined are for the University and otherwise. It follows that if the cost of preliminary planning for any one university project were reduced, the sums available for the actual construction of the project would be commensurably increased.

Mr. James D. Rogers, University Engineer, has communicated with the State Planning Board and has made reference to the provisions of Chapter 458, Statutes of 1959, p. 790, and has asked permission to develop plans and specifications for certain facets of the utility rehabilitation and extension of the Reno campus, to the end that the cost of such planning might be somewhat reduced.

On May 26, 1959, Mr. W. E. Hancock, then Assistant Manager of the State Planning Board, replied to the inquiry of Mr. Rogers, and expressed uncertainty in regard to whether or not Mr. Rogers, under such plan, would be "employed" within the meaning of Section 4 of Chapter 458, Statutes 1959.

QUESTION

Would permission to the University Engineer by the State Planning Board, in accordance with his request that he be authorized to work without compensation from sums provided for under the Act, in the development of plans and specifications

respecting certain of the facilities that are provided for in Chapter 458, Statutes of 1959, be in conflict with Section 4 of said Act?

OPINION

Section 4 of Chapter 458, Statutes of 1959, p. 790 at 792, provides in part as follows:

Sec. 4. The state planning board is hereby charged with the duty of carrying out the provisions of this act as provided in chapter 341 of NRS. The state planning board shall insure that competent architects, engineers and other qualified persons are *employed* to prepare the plans and specifications required to accomplish the authorized work. (Italics supplied.)

Throughout this and other sections of the Act the over-all supervisory authority of the State Planning Board is repeatedly stated. In the above section it is clearly provided that the State Planning Board is not to do the work of competent architects and engineers, but is to employ such service.

Ordinarily when the professional services of architects and engineers are obtained, they are secured through employment. No other word would have served the purposes of this Section 4 as well. The drafter of this Section 4 did not imagine that any such services could be obtained except by employment. But this is not tantamount to a declaration that the State Planning Board is precluded from accepting the services of a competent engineer merely by reason of the fact that he is not compensated through such board. "Employ" has a limited meaning of to hire for wages to be paid. It also has a meaning of "to have or keep at work" or "to intrust with some duty or behest." It is this latter meaning that fits more closely into the spirit and intent of the statute. See: Webster Unabridged Dictionary.

For the reason heretofore given the question is answered in the negative.

This determination is in no way intended to divest the State Planning Board of its authority to accept the offer of the University Engineer or to reject it. We merely find that the State Planning Board does have the authority to accept such offer, should it in its exclusive judgment elect to do so.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-67 Annual Leave—County Employees. County officers and employees are not entitled to terminal leave pay for unused vacation time.**

CARSON CITY, June 24, 1959

HONORABLE JOHNSON W. LLOYD, *District Attorney, Eureka, Nevada*

DEAR MR. LLOYD: In your letter dated May 12, 1959, you requested the opinion of this office on the following question:

QUESTION

Are County officers whose terms expired on December 31, 1958, and who did not take vacations during the term of their office, entitled to terminal leave pay?

OPINION

Under the provisions of NRS 245.190 elective County officials, who have been in the service of the County for at least one year, shall be allowed a leave of absence with pay of 15 days in each calendar year. NRS 245.210 authorizes the Board of County commissioners of each County, upon such conditions as it deems proper, to grant employees and appointed officers of the County a vacation with pay after one year's service. The aforementioned statutes do not expressly or impliedly provide that vacation leave may be cumulative. Nor is it expressly or impliedly provided in said statutes that a terminating employee of a County is entitled to a lump sum payment for unused vacation time.

The creation of the State Department of Personnel by the Legislature in 1953 (Statutes of Nevada 1953, Chapter 351, now NRS Chapter 284) in no way alters or affects the provisions of NRS 245.190 and NRS 245.210. The former applies to State officers and employees. The latter applies to County officers and employees.

On January 28, 1959, this department had the occasion to render an opinion on a question similar to the instant one (Attorney General Opinion 2). In that opinion we held that a 1955 amendment (Statutes of Nevada 1955, Chapter 251, now NRS 284.350, paragraph 2) to Chapter 284 of NRS had the effect of making accumulated annual leave of a State employee a property right. For that reason a State employee, upon termination of his employment, is entitled to a lump sum payment for accumulated annual leave. We reiterate that Opinion 2, referred to above, applies only to State employees and officers, and not to County officers and employees.

Based upon the statutes heretofore cited, we are of the opinion that County officers and employees are not entitled to terminal leave pay for unused vacation time. The fact that many County officers serve without deputies and as a consequence do not have anyone to serve if they take a vacation does not alter the conclusion. If a hardship exists, the remedy lies in legislative action or in action by the Board of County Commissioners within the power delegated to it.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-68 Clark County—District Attorney. County Assessor. Statute requiring collection from vehicle owners of personal property tax at prescribed specific rate, which may vary from tax rate levied upon other personal property, construed and found to be questionable as violative of constitutional requirement that ad valorem property taxes be uniform and equal. Advice given that statute be compiled with pending final judicial determination of specific issue involved.**

CARSON CITY, June 29, 1959

HONORABLE GEORGE FOLEY, *District Attorney, Clark County, Las Vegas, Nevada*

DEAR MR. FOLEY: Reference is made to a letter dated June 3, 1959, relating to an inquiry from Mr. James A. Bilbray, Clark County Assessor, to your office, hereinafter set forth.

FACTS

Under the terms of Chapter 505, 1959 Nevada Statutes (S.B. 258), approved April 7, 1959, motor vehicles are expressly made subject to payment of a personal property tax at the rate of 4% of their assessed valuation, which tax shall be collected at the time of registration, in addition to the annual license fee prescribed therefor. Our attention is properly invited to the fact that this specifically fixed rate of taxation on motor vehicles will undoubtedly vary from the rate of taxation applied, or to be applied, to other personal property, in incorporated and unincorporated areas within individual counties, as among each of the seventeen counties of the State, and even the state-wide average of such tax rate applied to other forms of personal property. There is, therefore, entailed the question as to whether different tax rates may be imposed within the same tax district for the same tax period on property. Since the question and problem is state-wide in scope, moreover, it should be resolved, or treated, uniformly.

#### OPINION

While license and excise taxes are governed by other regulatory principles, general property, or *ad valorem*, taxes (such as the one here involved) must be based upon assessment at full cash value (NRS 361.225), and are definitely subject to the following constitutional limitation or restriction:

*The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory \* \* \*. (Italics supplied; Art. X, Sec. 1, Nev. Const.)*

Since we are not here concerned with a question regarding *valuation*, it will suffice merely to make a few general observations on this aspect of the matter.

While the cash or market value of property is definitely taken as a base, tax authorities generally only levy the tax on some predetermined percentage or market value of property, and not on the full cash or market value. However, since all property is taxed on the same percentage basis, there is no discrimination, and such assessment may be considered uniform and not violative of constitutional requirement.

In some cases (as, for example, railroads), a substituted method of taxation is justified and necessary, to determine the value of property or facilities within the state. This will be based upon the ratio of such property in the state to total property, resulting in a certain percentage applied to valuation of total property in accordance with accepted reasonable formulæ. Such substituted method, legally characterized as the "unit rule," always involves the question of the equality of taxation, or whether or not it is a fair equivalent for a tax on the property, considering its value. (See: *State v. Wells, Fargo & Co.*, 38 Nev. 505, 539, 150 Pac. 836; *State of Nevada v. C.P.R.R.Co.*, 10 Nev. 47, 63 et seq.; *Postal Tel. Co. v. Adams*, 155 U.S. 686, 696; *U.S. Express Co. v. Minnesota*, 223 U.S. 335; *Ashley v. Ryan*, 153 U.S. 436, 440.)

Finally, we may also call attention to the fact that intangible personal property, such as securities, etc., are constitutionally exempted from taxation, and that as regards mines and mining claims, the imposition of the tax is on net proceeds therefrom, rather than the cash or market value of the entire property. (Art. X, Sec. 1, Nev. Const.) Surface improvements on such type of real properties are, however, subject to taxation on an *ad valorem* basis.

Regarding the above described departures from the usual method of valuating or assessing property for tax purposes, the Nevada Supreme Court has stated the rule as follows:

All that is required is a uniformity of taxes, and not a uniformity in the manner of assessing or collecting them. (See *Sawyer v. Dooley*, 21 Nev. 390, 397, citing *San Francisco & N.P.R. v. Board of Equalization*, 60 Cal. 12, 30.)

Turning our attention to the *tax rate* aspect of the question, we merely note the general variation necessarily existing therein among the different counties within the state, based upon the differences in available taxable property and valuation thereof, in order to derive sufficient revenue to pay for the cost of government and other public purposes. It is only necessary to mention the obvious differences existing between such two extremes as largely rural or agricultural counties, and populous industrial urban centers, to see how such variations unavoidably result and exist. (NRS 361.010-361.785.) For better understanding at this point, a summary description of the taxation procedure is deemed desirable.

Each county prepares and submits to the State Tax Commission for auditing and approval its own budget (which will include the budgets of municipalities and other units within the county), and also its assessment roll and the rate of taxation which is calculated to produce the revenue required for its budgetary needs. This done, the State Tax Commission then determines the combined tax rate necessary to produce the amount of revenue required by the approved budget, including that of the State, for each of the seventeen counties in the State, and certifies such combined tax rates for each of the counties, broken down as to the budgetary funds, to the appropriate State and county officials. *The tax rates levied on all taxable property within the State are these combined tax rates varying among all the counties.* (See NRS 361.310; 361.335-361.410, 361.460; 361.455; Art. IX, Sec. 2, Nev. Const.) The apportionment or distribution of tax revenues derived from such tax levies are, however, made on the basis of the specific budget requirements of each county and tax rate submitted by each of them, which, as previously noted, will necessarily not be the same in all of the counties. (NRS 361.425.)

Moreover, the taxation procedure requires a considerable period of time for completion, before definite ascertainment and determination of the tax rate for any current year; and, as will be developed, this is important in connection with the specific question before us.

Under the law, the fiscal year for the State begins on the first of July, and ends on the 30th of June. The *lien for taxes* for each fiscal year attaches to property as of the first Monday in September prior to the date on which the taxes are levied upon all the property then within the county, and upon all other personal property on the day it is moved into the county. (NRS 361.450.) Completion of the assessment rolls must be accomplished by each of the counties on or before January 1 (NRS 361.310), and equalization concluded by them by the end of the month of January. (NRS 361.340.) Equalization by the State is made during the month of February, and must be completed by the third Monday of February (NRS 261.360, 361.380), and the State Board makes certification of changes in assessed valuations to county auditors on or before March 15. (NRS 361.405.)

NRS 361.445 provides that the assessment made by the county assessor and by the Nevada Tax Commission, *as equalized, shall be the only basis for property taxation* by any city, town, school district or other district in that county. NRS 361.485 provides for the extension and delivery of the tax rolls after levy, to be made not later than June 1 of each year, and NRS 361.480 provides for giving of notice to taxpayers through a newspaper publication and posting that taxes are due and payable on the first Monday of July, and may be paid in four equal quarterly installments on or before the first Monday of July, the first Monday of October, the first Monday of January, and the first Monday of March.

In other words, the foregoing process, as described, makes final determination and establishment of the *combined tax rate* on property, which will be applicable for the current year, impossible prior to March 15, and, more likely, not before the close of the month of March. *In general*, where the *real* property of a taxpayer is sufficient to secure the payment of all his taxes upon his *personal property*, as well as upon the realty itself, there is no problem since the assessment process can be completed as scheduled, the tax rates for State and county purposes determined for appropriate tax levy, and the taxes collected in due course. But where a taxpayer has no real property, or does not have

sufficient to secure the payment of his taxes, the assessor is required to collect the personal property tax at the time of making his assessment, and, in case of failure to pay, to sell sufficient of the personal property of the delinquent taxpayer to realize, at least, the amount of such taxes, with costs. As such collection must be enforced before the meetings of either state or county boards of equalization, *and before the rate for the ensuing or current year has been finally ascertained and fixed*, and levy made in accordance therewith, a problem definitely exists, as to what tax rate shall be levied and applied in the circumstances.

Some states provide for application of the rate levied the previous year. Since, however, the subsequent levy for the current year may be, and generally is, greater or less than the levy made, further provision for refund to the taxpayer of any excess in the collection and for payment by him of any deficiency is usual. (See *Rode v. Siebe*, 119 Cal. 518, 51 Pac. 869, 870.) While such method of resolving the problem has been challenged on the basis that such taxpayers suffer some hardship and disadvantages in that they are deprived of the use of their money for a longer period than other owners of personal property, the validity of such tax levy on personal property (where payment of the tax is not otherwise sufficiently secured) has, nonetheless, been sustained, the courts properly observing:

But it would be equally easy to imagine extreme cases in which honest taxpayers, whose taxes are perfectly secured by lien upon their real property, would suffer great injustice by the removal of personal property from the jurisdiction between (the date) when taxes accrue, and (the date) when secured taxes become delinquent. (See *Rode v. Siebe*, supra, at p. 870, 51 Pac.; *State ex rel. Taylor v. Mirabel*, 273 Pac. 928, 62 A.L.R. 296, 301 and cases cited therein.)

Other states have resolved the same problem by imposition of a *tax in lieu of all other taxes* on personal property such as vehicles, recognizing the facility with which such type of personal property can be removed from the jurisdiction of the taxing authorities, and the necessity of collecting the taxes due and payable at the time of registration of the vehicle. (See R.C.L. 37-38, Sec. 21 and footnote citations; West's Annotated California Codes, Sections 11251, 11252, 11401, 11403: These sections indicate a change in California law on the subject since the decision in the case of *Rode v. Siebe*, supra; see also, *State ex rel. Fargo v. Wetz*, 168 N.W. 835, 5 A.L.R. 731.)

Chapter 505 (S.B. 258), 1959 Nevada Statutes, does not affect existing law which authorizes the Nevada State Tax Commission to make valuations for assessment purposes, of motor vehicles (among other properties) and property found to be escaping taxation. (NRS 361.310 and 361.320-361.325.) As regards the payment of the personal property tax at the time of registration of the vehicle, it would appear that such tax shall be paid at the time of registration, *whether or not the applicant is the owner of real property*. To the extent that the new law recognizes the mobility of motor vehicles and their use of State and other road facilities beyond the county where their owners reside, and prescribes a uniform rate of 4% thereon throughout the entire State, it would seem to constitute an improvement, in that it necessarily reduces, or tends to reduce, the inequality of the tax burden among vehicle-owner taxpayers which presently exists on the basis of the variation in tax rates within and among the different counties, already noted.

Review of legislation of the kind here involved furnishes reasonable grounds for assuming that its enactment and approval are justifiable by reason of the facility with which motor vehicles can be removed from the county in which they are ordinarily taxed, their rapid depreciation in value, and the ever-increasing frequency in their exchange from one owner to another, resulting in great difficulty in collection of taxes thereon by the usual methods of distraint and sale, and consequent increase of opportunity in evasion of payment of taxes entirely. For these reasons it has been found necessary and desirable

to treat this kind of personal property in a special manner and differently from other forms of personal property. (See, generally, 103 A.L.R. 18, 97, et seq.; State ex rel. Fargo v. Wetz, supra; Anne Arundel County v. English, 35 A.2d 135, 150 A.L.R. 842; State ex rel. Taylor v. Mirabel, supra.)

The new law (Chapter 505, 1959 Statutes of Nevada) obviously constitutes another method of coping with this general problem. In all probability *a tax in lieu of all other taxes* might be more effective and desirable. However, such a tax would divert tax receipts and license fees from the funds established for highway construction and maintenance, which may, in part, account for the terms of the present enactment. (See Art. IX, Sec. 5, Nev. Const.; NRS 365.540-365.560.)

Be that as it may, the imposition of a tax rate of 4% on motor vehicle owners does involve a constitutional question, even though it is obviously a fairly close approximation of the average state-wide combined tax rate presently required and levied. Since said tax rate is, by the terms of the law, made to apply to all vehicle owners similarly, the constitutional requirement of uniformity would appear to be satisfied. And, as regards "equality," the following observations are certainly pertinent:

Responsibility for the fairness and justice of a tax measure rests upon the legislature. The courts may not declare the measure invalid merely because it does not come up to their conception of a proper method of taxation. No system of taxation which is free from inequalities has yet been devised. The attack upon this act is essentially an attack upon the classification as indefensible \* \* \*. (State ex rel. Taylor v. Mirabel, supra, 62 A.L.R. 296, 302, and cases cited therein; 26 R.C.L. 241, and footnote citations; Note, 60 L.R.A. 323, 324; Judson on Taxation, 2d Ed., pp. 549-555 and footnote citations).

In the construction of State constitutional provisions requiring equality and uniformity in taxation, *exact* proportion of uniformity is, therefore, recognized to be impossible. However, the aim of every statute must, nevertheless, be equality. Statutes which tend directly and necessarily to produce disproportion and inequality are unconstitutional. In some states, however, the constitutional requirement is held to be satisfied if, whenever the legislature levies a tax on property, the rate is in exact proportion to the value of such property; and, if a tax is imposed on any species of property, all property belonging to that species is taxed at the same rate, regardless of ownership. (Moreover, in such states, it is not deemed necessary that all property must be taxed; and exemptions from taxation are not prohibited, when constitutionally authorized, if not based upon unreasonable classification and not purely arbitrary or capricious.) (See 26 R.C.L. 242 and footnote citations.)

Based upon such a construction of Article X, Section 1, of the Nevada Constitution, the enactment here in question would undoubtedly be deemed valid. It would also probably be free of any constitutional question if it contained a provision for refund to the taxpayer of any excess paid by him over the combined tax rate levied on other personal property, or for the payment by him of any deficiency. However, such provisions are lacking in the enactment. Such omission might perhaps be deemed to be overcome by NRS 361.410 and 361.760, which appear to apply generally so as to secure to taxpayers their right to any refund, and to taxing authorities any right to collection of a deficiency (if the taxpayer, and property which can be levied upon, are available.)

The constitutional objection to the prescribed 4% tax rate on motor vehicles, as provided in the new law, might be deemed untenable for other reasons, already suggested. As we have seen, the tax actually accrues on all property prior to *final* ascertainment and establishment of the combined tax rate, and unless collection of *unsecured* personal property taxes is made at the time of registration of a vehicle, this kind of personal property, by reason of its character, may well be removed from the

jurisdiction of the taxing authorities. Some tax, therefore, must be imposed and collected. Prior to the present enactment, the exaction made was determined by use of the then current state *ad valorem* tax rate and the regular combined tax rate for the county, city and school district, as levied and applied for the *preceding taxable year*. (If the levy for the then current year was subsequently ascertained and established to be less than for the preceding year, no refund was authorized.) (See NRS 361.505, subsection 2.) *This being the case, it might well be argued that the prescribed 4% rate is no more objectionable, in the constitutional sense, than the application of the prior formula; neither rate exactly conforms or corresponds with the one finally established to be applicable to the taxable year for which the assessment is made and collected.*

\* \* \* The object of the constitution is to make the burdens of taxation equal in proportion to the value of all taxable property. To accomplish this object, it is not only necessary that assessments should be duly made and equalized, and the rate levied uniformly, *but measures must be taken to secure the collection from all alike.* The law imposes upon real estate a lien, dating from the first Monday in March of every year, for all taxes levied upon the owner for the ensuing fiscal year. It makes such taxes perfectly secure, by a lien upon immovable property, and the burden of the lien is in many instances an inconvenience and disadvantage to the owner. If the owner of *personal property* has no real property to secure the payment of his taxes, *must the state leave him for more than six months at liberty to remove himself and his property without its jurisdiction, and risk the loss of the tax altogether, to the prejudice of those whose taxes are secured?* (See *Rode v. Siebe*, 51 Pac. at p. 871; italics supplied).

As regards specific constitutional restrictions, our Supreme Court has indicated and affirmed the right of the Legislature to classify property for the purpose of taxation. It has further held that, in order to declare a statute unconstitutional, one must be able to point to specific restrictions upon the power of the Legislature, and show that the case involved comes within such restrictions. Moreover, that it will not suffice to base a constitutional question upon any general theory that the statute is unjust, oppressive, impolitic, or that it conflicts with a spirit supposed to pervade the constitution, but not expressed in words. (See *Sawyer v. Dooley*, supra.) In other words, there is a presumption in favor of the validity and constitutionality of legislative enactments which must be conclusively overcome. (*King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221.)

We are satisfied that the constitutional restriction here involved and cited at the outset of this opinion, certainly applies to the prescribed 4% tax rate imposed upon motor vehicle owners and taxpayers. We have shown also that, as a virtually certain matter, such prescribed 4% rate must vary and differ from that imposed upon other property, both real and personal. And we are concerned with the consideration that if such classification be sanctioned, as regards motor vehicles, then why can't the same be done with respect to other forms of personal property? In other words, where can, or shall, the line be drawn? Will not the constitutional restriction and safeguard be virtually rendered a nullity? And is not such legislative action specifically and expressly just what such constitutional restriction was intended to prevent and prohibit?

A review of the cases fails to show a judicial determination of the specific question here involved. The Nevada cases generally construe the cited constitutional restriction as expressly requiring that all *ad valorem* taxes shall be at a uniform rate or percentage, and that one species of property shall not be taxed at a higher rate than another. (See Revised NRS 482.260, subsection 2, Chapter 505, 1959 Nevada Statutes; *State of Nevada v. Earl*, 1 Nev. 334; *State of Nevada v. Estabrook*, 3 Nev. 173, 177; *State of Nevada v. Manhattan Silver Mining Company*, 4 Nev. 318; *Gibson v. Mason*, 5 Nev. 283; *Goldfield Con. M. Co. v. State*, 35 Nev. 178; *State v. Wells, Fargo & Co.*, supra; *State v. Churchill County*,

43 Nev. 290; 185 Pac. 459.) Strict and literal application of such construction of the constitutional restriction would undoubtedly invalidate the enactment here under consideration.

We have tried to show, objectively, the real and substantial problem involved as regards motor vehicles, and the need and desirability of adequate control to prevent the evasion of taxes, especially when their payment is not otherwise secured. And, of course, there exists the presumption in favor of the validity and constitutionality of this, as well as all other, legislative action. We deem it proper, therefore, merely to indicate our opinion that the specific enactment here involved is not free of doubt as to validity on constitutional grounds. It should, of course, be enforced pending judicial determination of the specific question discussed herein.

Before concluding, it may not be improper to note, without undue elaboration, that as revised by Chapter 505, 1959 Statutes of Nevada, NRS 482.400, subsection 2, appears to authorize the collection of a second personal property tax from the transferee of a vehicle. Such collection involves the question of *double taxation* on the same item of personal property during the same taxable year, a matter which is also open to constitutional objection. Such provision did not exist in the prior law. Another questionable provision, though not *constitutionally* objectionable, is the division of jurisdiction between the department and county assessors as regards allowance of authorized exemptions, with resultant conflict in jurisdiction and confusion in administrative control of such exemptions. (See Section 16, Chapter 505, 1959 Nevada Statutes, NRS 361.080-361.150.)

Finally, as herein qualified, it is our opinion that the question hereinbefore stated must be answered in the affirmative.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-69 Taxation—Mosquito Abatement District. Sums exacted by the taxing authorities upon all taxable property of a district within a county upon an ad valorem basis, for health purposes solely, are taxes and not “assessments” and must be considered under the provisions of Article X, Section 2, of the Nevada Constitution.**

CARSON CITY, July 9, 1959

HONORABLE WILLIAM J. RAGGIO, *District Attorney, County of Washoe, Reno, Nevada*

Attention: MR. EMILE J. GEZELIN

DEAR MR. RAGGIO: In your letter of April 21, 1959, you have requested that Attorney General Opinion No. 46 of April 19, 1951, be reviewed.

In that opinion it was determined that “the tax contemplated by the Mosquito Abatement District Act is a Special Tax, and not within the \$5.00 constitutional limit.”

QUESTION

We are now asked to review that opinion and determine whether or not the tax provided for by the provisions of Chapter 313 NRS is a tax to be included within the \$5.00 total ad valorem tax limitation. The reference is to Article X, Section 2 of the Constitution.

OPINION

The Nevada Constitution, Article X, Section 2, provides as follows:

Total tax levy for public purposes limited. The total tax levy for all public purposes including levies for bonds, within the state, or any subdivision thereof, shall not exceed five cents on one dollar of assessed valuation.

When the question of allowance of a veteran's exemption from taxation was involved, the tax claim (assessment) being by and for the State Apiary Commission, to obtain funds for the regulation of the bee industry, Attorney General Diskin ruled on October 28, 1925, in Opinion No. 207, that the exaction was for the regulation of the bee industry and not a tax within the meaning of the soldier's exemption from taxation law.

When the question was the allowance of a veteran's exemption from taxation and the exaction was by the State Board of Stock Commissioners, Attorney General Bible ruled in Opinion No. 342, of August 14, 1946, that the tax (assessment) was to go for the regulation of the livestock industry under the supervision of the State Board of Stock Commissioners and not for the support of the government of the State and county and hence was not a tax within the meaning of the tax exemption statutes.

Chapter 552 NRS provides for the creation and administration of the State Apiary Commission. The tax that is provided by Section 552.130 is a tax upon each stand of bees and is not an ad valorem tax. The sums thus made available from the industry solely are used exclusively for the welfare of that industry. The tax is not from the public generally and the sums are not used for the benefit of the public generally.

The same observations apply to the provisions of NRS Chapter 561, providing for the State Board of Stock Commissioners. The exaction under NRS 561.240 et seq., is from the livestock industry exclusively and the moneys so derived are expended exclusively in the regulation of the livestock industry. In both cases the exactions made from each industry are not for a health or other police power purpose, but solely connected with the profit motive of those persons engaged in the respective industry.

The formation and administration of Mosquito Abatement Districts are regulated by the provisions of NRS Chapter 313. The funds required for the administration of the chapter are not upon an assessment of the product of an industry. For there is no product to be sold, or upon which to make an assessment. Here the regulation is purely for health and welfare purposes. The sums required for administration of the chapter are derived from a general ad valorem tax upon all taxable property of the district in the county, purely for health purposes. In the former two cases (bees and livestock) the sums raised are special funds and the manner of deriving them is strictly an assessment, and not a tax. Not so of the latter.

That "taxes" of this kind must be considered by the taxing authorities which operate under a constitutional limitation such as ours, there can be no doubt.

Constitutional limitations on the rate or amount of taxes which may be levied render illegal and void taxes imposed in excess of the limitation \* \*

\*. 84 C.J.S. Taxation, Art. 56, p. 154.

Constitutional limitations on the rate or amount of taxes ordinarily apply to the taxes levied by local subdivisions of the state. 84 C.J.S. Taxation, Art. 56b, p. 156.

We are, therefore, of the opinion that the sums raised under the provisions of NRS 313.265 et seq., are strictly and correctly termed "taxes" and must be included with other

taxes of an area in determining whether or not Article X, Sec. 2, of the Nevada Constitution, is violated.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-70 Assemblyman—Elko County, Continuing residence (domicile) in county requisite to holding office. Mere absence from county standing alone insufficient to constitute abandonment of residence.**

CARSON CITY, July 16, 1959

HONORABLE GENE EVANS, *Assemblyman, Elko County, Post Office Box 404, Sparks, Nevada*

STATEMENT OF FACTS

DEAR MR. EVANS: In 1958 the Honorable Gene Evans was elected to his second term in the State Assembly representing Elko County.

Following the conclusion of the Forty-ninth Session of the Legislature in 1959, Mr. Evans took a job in public relations work in Reno, Nevada. Since that time he has been living and working in Reno. His family joined him in Reno shortly after he departed from Elko and are presently living with him. Mr. Evans has not sold or otherwise disposed of his home in Elko County. He is renting a home in Reno at the present time.

QUESTION

Has Assemblyman Evans vacated his legislative office by working and living in Reno?

CONCLUSION

In the absence of evidence indicating Mr. Evans has abandoned his Elko residence, we conclude that he is still qualified to retain his legislative office of Assemblyman from Elko County.

ANALYSIS

It is provided in our State Constitution (Article IV, Section 5) that all members of the Assembly shall be duly qualified electors in the respective counties they represent. To be a qualified elector in the county, residence in that county is required (NRS 292.0170). It follows that if a person abandons his residence in the county, he is no longer a qualified elector of that county. It has been urged, insofar as the residence requirement to hold office of Assemblyman is concerned, that all that is required is that the incumbent be a resident in the county he represents at the time of his election. There will follow a more detailed discussion of the requirement of residence at the time of election and continuing residence during the term of office.

NRS 283.040 provides that a public office becomes vacant if the incumbent ceases to be a resident of the county that elected him. Said section, in part, reads as follows:

1. Every office shall become vacant upon the occurring of either of the following events before the expiration of the term: \* \* \* (f) The ceasing of the incumbent to be a resident of the state, district, county, city or precinct in which the duties of his office are to be exercised, or for which he shall have been elected or appointed.

The language used in the foregoing section clearly indicates the Legislature intended no exceptions. For that reason, we think the office of Assemblyman becomes vacant if the incumbent ceases to be a resident of the county which elected him. Such an interpretation is consistent with Article IV, Section 5 of the Nevada Constitution, referred to above.

The term resident, when used in the Constitution or in statutes relating to the subject of political rights and eligibility to hold public office is, in nearly every case, synonymous with "domicile" (State v. Moodie (North Dakota) 258 N.W. 558.) A man may have more than one residence, but can have but one domicile at any given time. He retains that domicile until it is abandoned. To abandon a domicile and establish a new one requires a concurrence of intention to establish a new domicile plus physical presence in the place of the new domicile.

Hereafter in this opinion, when reference is made to residence, it should be interpreted as synonymous with domicile.

The language of the statutes in defining residence with reference to eligibility to hold office (NRS 281.050) is identical with the language with reference to the right of suffrage (NRS 292.080). That is to say, in either event, legal residence is that place where a person is actually present within the State or county, as the case may be, during all the period of time for which residence is claimed by him. Should a person absent himself from the place of his residence with the intention, in good faith, to return without delay and continue his residence, the time of absence is not considered in determining the fact of residence.

Our Supreme Court had the occasion to construe that statute in 1901 in the case of State v. Van Patten, 26 Nev. 273. There a school trustee, duly elected, resided in the town of Austin, Lander County. By law residence in the school district was a legal requisite to holding the office of trustee. He had been a registered voter of the town for eighteen years and had resided with his wife in the same house for sixteen years. Upon becoming unemployed, he went to work in Nye County. He returned to his home in Austin two or three times a month for three months. Then he took his wife and children with him to Nye County, with a trunk of clothes. All furniture, bedding and provisions were left in the house. The entire family remained away seven months. He always intended during that time to return to Austin. The school board met once a month. He attended all meetings except one. At the end of seven months the family returned. With those facts the Court held that he had not lost his residence or right to the office of trustee.

Based upon the foregoing authority, it is apparent that our Supreme Court has clearly indicated that an incumbent of an office does not vacate that office by removing himself, his family and certain personal belongings, from the county that elected him and to thereafter engage in gainful employment in another county and remain away from his former home for many months.

The Court in State v. Van Patten, supra, indicated that so long as the incumbent intended to return and continue his residence, he is eligible to hold office. We think that unless Mr. Evans has clearly expressed an intention not to return and continue his residence, either by word or act, that it should be presumed that he intends to return and continue his residence.

Based upon the facts in the instant case, it would be contrary to the law of this State, as interpreted by our Supreme Court, to conclude that Mr. Evans has abandoned his residence in Elko County and thereby vacated his legislative office. So long as Mr. Evans

is a duly qualified elector in Elko County, he is entitled to retain his office as Assemblyman.

Our predecessor, in Attorney General Opinion 93, of August 11, 1955, was confronted with a problem similar to the instant one.

In that opinion he concluded that the legal residence of a State Senator, with reference to his eligibility to that office, meant legal residence at the time of election. That is to say, if a State Senator, duly elected, thereafter removes his residence to a different county during the term of his office, he is not barred from serving as State Senator of the former place of residence during the remainder of the term for which he was elected. We do not think that the eligibility to office, insofar as the residence requirement is concerned, should be interpreted in such a restricted sense. Our Nevada Supreme Court, in the case of *State v. Clarke*, 3 Nev. 566, was called upon to interpret the term "eligible" as used in Article IV, Section 9, of the Nevada Constitution, providing that no person holding a lucrative office under the Federal Government shall be eligible to an office of profit under this State. That Court said that eligibility to an office means capable at the time of being legally chosen and capable of legally holding. We know of no reason why a different interpretation should be placed upon the office of State Assemblyman. If, by our Constitution, he is required to be an elector of the county that elected him, in order to be eligible to the office of Assemblyman, then, in our opinion, he must continue to be a qualified elector of that county for the period of time that he holds office. That is the only interpretation that is consistent with the provisions of the statutes referred to hereinabove.

Based upon the reasoning and authority cited, we are of the opinion that mere absence from Elko County, even for a number of months, standing alone, is not sufficient to conclude that Mr. Evans has abandoned his residence.

It should be noted that Article IV, Section 6 of the Nevada Constitution provides that each house of the Legislature shall be the judge of the qualifications of its own members.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-71 Executive Director of the Employment Security Department has Authority to Employ Public Relations Counsel and Claim for Services of Such Counsel is Valid Despite Noncompliance with State Personnel Act.**

CARSON CITY, July 15, 1959

HONORABLE GRANT SAWYER, *Governor of Nevada and Chairman, State Board of Examiners, Carson City, Nevada*

STATEMENT OF FACTS

DEAR GOVERNOR SAWYER: On April 1, 1959, a written agreement was entered into between Allen B. Abel, doing business as Northern Nevada Talent, and Richard Ham, Executive Director of the Nevada State Employment Security Department. The pertinent provisions of said agreement are as follows:

1. The first party hereby covenant and agree to furnish to the second party, upon request, public relations suggestions and materials, news releases and informational material when requested, furnishing necessary

stenographic services and consultations, including public appearances, as may be required by the second party.

2. The second party agrees to furnish the first party all necessary information concerning the department's interpretation of the Unemployment Compensation Law, its rules or regulations, facts, figures, and statistical information, as may be required.

3. The second party, in consideration of the services rendered, agrees to pay the first party regular monthly payments of \$400 for the months of April, May, and June, 1959.

We are informed that Mr. Abel has been paid \$400 for services rendered for the month of April, 1959, and there are pending claims totaling \$800 for services rendered by Mr. Abel during the months of May and June, 1959.

#### QUESTIONS

1. Did the Executive Director have the authority to employ Mr. Abel to furnish the public relations services described in paragraph 1 of the contract above quoted?
2. Did the Executive Director employ Mr. Abel in the manner required by law?
3. Should the State of Nevada allow Mr. Abel's claims for services for the months of May and June, 1959, in the sum of \$800?

#### CONCLUSIONS

1. The Executive Director of the State of Nevada Employment Security Department has the legal authority to employ public relations counsel.
2. Mr. Abel should have been employed in the classified service and should have been selected by the Executive Director from registers prepared by the State Department of Personnel.
3. Despite the Executive Director's failure to comply with the law in the manner of employing Mr. Abel, the said contract is, nonetheless, a valid and binding obligation of the State of Nevada and the said claims of Mr. Abel, totaling \$800, should be allowed and paid.

#### ANALYSIS

NRS 612.215, subsection 3, reads as follows:

3. The executive director shall have full administrative authority with respect to the operation and functions of the unemployment compensation service and the state employment service.

NRS 612.220 reads, in part, as follows:

2. He (the Executive Director) shall have power and authority \* \* \* to employ, in accordance with the provisions of this chapter, such persons, make such expenditures, \* \* \* as he deems necessary or suitable \* \* \*.

NRS 612.230, subsection 1, reads as follows:

For the purpose of insuring the impartial selection of personnel on the basis of merit, the executive director shall fill all positions in the employment security department, except the post of executive director, from registers prepared by the state department of personnel, in conformity

with such rules, regulations and classification and compensation plans relating to the selection of personnel as may from time to time be adopted or prescribed by the executive director for the employment security department.

NRS 612.230, subsection 2, reads in part, as follows:

2. \* \* \* The executive director is authorized to fix the compensation and prescribe the duties and powers of such personnel, including such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of the duties under this chapter \* \* \*.

In regard to question number 1, it is our view that NRS 612.215, subsection 3, and NRS 612.220, subsection 2, clothe the Executive Director with full administrative authority and empower him to employ such persons as he deems necessary to the operation and functions of the unemployment compensation service and the State employment service.

The Executive Director, as the administrator of the Employment Security Department, and he alone, has the power and responsibility to determine whether or not the employment of public relations counsel is necessary and suitable to the operation and functions of the unemployment compensation service and the State employment service.

It should be noted that Mr. Ham, by letter to this Department of July 6, 1959, advises that the Employment Security Department has on former occasions employed public relations counsel, that the Bureau of Employment Security of the United States Department of Labor has strongly urged the employment of public relations counsel, and the said Bureau has been critical of the Nevada Employment Security Department for not utilizing the services of such public relations counsel.

In support of our conclusion regarding question number 2, we believe that the above quoted language from NRS 612.220 "to employ, in accordance with the provisions of this chapter" means in accordance with NRS 612.230. Under this later section the Executive Director must fill all positions from the registers prepared by the State Department of Personnel. However, the Executive Director himself is authorized to establish classification and compensation plans for such personnel.

As we understand it, Mr. Abel was not selected from registers prepared by the Personnel Department, but was employed directly by the Executive Director.

It is our belief that unless Mr. Abel's position is one in the unclassified service, excluded from the classified service by NRS 284.140, he could only be employed, if at all, in accordance with the procedure set forth in NRS 612.230, by being selected from the register of the Personnel Department.

NRS 284.140 defines the unclassified service in eleven subparagraphs. The only subparagraph that could be applicable in this instance is subparagraph 11, which reads as follows:

11. Part-time professional personnel who are paid for any form of medical, nursing or other professional service, and who are not engaged in the performance of administrative duties.

We take the position that Mr. Abel is not a professional person and that the contract under which he was employed is not one for professional services within the meaning of this subsection 11 of NRS 284.140, and, therefore, the Executive Director did not comply with the procedural aspects of the law in the employment of Mr. Abel.

"Profession" implies professed attainments in special knowledge as distinguished from mere skill. *Teague v. Graves*, 27 N.Y.S.2d 762.

A "profession" is a vocation in which a professed knowledge of some department of learning or science is used in its application to the affairs of others and in the practice of an act founded on it; a vocation founded upon prolonged and specialized intellectual training which enables a particular service to be rendered. *State ex rel Sisemore v. Standard Optical Co.*, 188 Pac.2d 309.

While literally the word "profession" may be applied to any calling requiring special knowledge of some branch of science or learning, historically and ordinarily it is limited to such associations as the law, the ministry, medicine, military science, engineering and the like. *Dvorine v. Castelberg Jewelry Corp.*, 185 Atl. 562.

Furthermore, it is our opinion that even were public relations counsel to be determined to be professional persons, as that term is used in subsection 11 of NRS 284.140, the services rendered by Mr. Abel were administrative, rather than professional, and, therefore, such employment would not be exempt from the classified service.

We recognize the widespread practice of state agencies and departments of employing directly part-time specialists, and even part-time and full-time labor. But despite such practice and the convenience thereof, both to the employing agency or department and the State Department of Personnel, we believe that the Legislature intended, by subparagraph 11 of NRS 284.140, to exclude only part-time professional people not engaged in administrative duties, professional being taken in its literal sense as defined by the cases above cited.

In answer to question number 2 we said that, despite the noncompliance with the law in the manner of employing Mr. Abel, the contract is a valid and binding one and the claims of Mr. Abel should be allowed and paid.

It is our opinion that the requirement of NRS 612.230, directing the filling of Mr. Abel's position from the registers prepared by the State Department of Personnel, is directory only and not jurisdictional. The noncompliance with this statute does not deprive the Executive Director of his administrative authority and of the power to employ such persons as he deems necessary to the operation and functions of his department.

Furthermore, Mr. Abel, as the employed person, has the right, as any contractor who has agreed to furnish services or materials to the State, to rely upon at least the ostensible, if not actual, authority of the public official entering into the contract for such services and materials on behalf of the State, unless, of course, such contractor for services or materials has actual notice of the lack of authority.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-72 Personnel—Unclassified, as well as classified, State employees entitled to compensation for overtime work by compensatory time off or overtime pay. Determination to be made by department head. Annual leave credits: Each department must keep written records for both classified and unclassified personnel.**

CARSON CITY, July 16, 1959

MR. FRITZ L. KRAMER, *Chairman, State Park Commission, Carson City, Nevada*

STATEMENT

DEAR MR. KRAMER: The State Park Commission has presented two questions to this office which require an opinion.

#### QUESTIONS

1. What regulations or law, if any, govern overtime work and compensatory time off for unclassified employees of the State?
2. Is each department of the State required to maintain written records reflecting annual leave accumulated and taken by unclassified personnel before claims for accumulated annual leave may be granted at the time of termination of employment?

#### CONCLUSION

(1) Unclassified personnel of the State are entitled to the same consideration as classified personnel in arriving at the manner of compensating such employees for overtime worked.

(2) Each department at all times is required to maintain written records of annual leave credits for all employees of that department, whether classified or unclassified.

#### ANALYSIS

The questions will be discussed in the order previously stated.

There is no provision in our statutes for compensating State employees, both classified and unclassified personnel, for overtime worked.

Section 4.03 of the Rules of the State Personnel Administration provides for the manner of compensating employees in the public service for overtime worked, but does not expressly provide if said section applies to classified personnel only.

As we interpret the language of Section 4.03, we are of the opinion that the framers of those rules intended that only classified personnel of the State were to be covered thereby. This conclusion is supported by the fact that the class grade of an employee working overtime is used to determine if that employee is entitled to compensation for overtime worked or compensatory time off. Employees below a specified class grade are entitled to compensation or compensatory time off, as determined by the department head.

Personnel above a specified class grade are entitled to compensatory time off unless overtime compensation is expressly authorized by the Personnel Advisory Commission. The use of class grades as the determining factor leads to the conclusion only classified personnel are covered by Section 4.03 of the Personnel Rules.

Notwithstanding the conclusion reached, namely, neither by statute nor by the rules of the personnel department, is provision made for compensating unclassified personnel for overtime worked, we are of the opinion that it was not the intention of the Legislature to discriminate against unclassified personnel by denying them compensation in some form for overtime worked.

Since salaries and wages of unclassified personnel are set by the appointing authority within budgetary limitations and approved work programs, we are of the opinion that unclassified personnel are entitled to reimbursement in some form for overtime worked. As to whether this reimbursement should be in form of overtime pay or compensatory time off, is a matter for the department head, commission or board to establish. We feel it to be incumbent upon us to point out that in our opinion reimbursement for overtime worked in the form of compensatory time off is a safeguard to possible abuses of overtime compensation.

As to question (2) as stated above, it is provided in Section 8.02 of the Rules for the State Personnel Administration that each department head shall keep necessary records of vacation leave of employees.

Under NRS 284.345, it is provided that the director of the State Personnel Department shall prescribe rules and regulations for leaves with or without pay in the various positions in the public service. "Public service" as used in that section is defined to embrace both classified and unclassified personnel employed by the State. For that reason we conclude that Section 8.02 of the Personnel Rules applies to both classified and unclassified personnel. This is further supported by the fact that NRS 284.350 specifically states all employees in the public service, both classified and unclassified, are entitled to annual leave with pay. Here the Legislature has expressly provided that no distinction between classified and unclassified personnel shall be drawn insofar as annual leave is concerned.

Keeping in mind that duly enacted rules and regulations of administrative bodies have the force and effect of law, it is apparent that each department must maintain leave records for its employees, both classified and unclassified. In practice we fail to see how any department of the State could submit a claim for terminal leave payment for an employee without maintaining a record of the leave entitlement and the leave used by that employee.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-73 Welfare, Nevada State Department of—"Medical and Remedial Care" expenditures for aid to the blind recipients are to be added to cash allowances, under statutory provision of \$100 per person as presumed minimum need. Chapter 122, Stats. 1959 (NRS 426.420) construed.**

CARSON CITY, July 16, 1959

MRS. BARBARA C. COUGHLAN, *Director, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada*

DEAR MRS. COUGHLAN: We have your letter of June 22, 1959, requesting an opinion of this department upon a question as hereinafter set out.

The Legislature of 1959 enacted Chapter 122, which amends NRS 426.420, respecting aid to the blind effective March 10, 1959, in such a manner as to provide that the presumed minimum need of recipients shall be not less than \$100 per month. The full problem, hereinafter more specifically spelled out, has to do with whether or not a portion of the \$100 may properly be expended for medical and remedial care. Your conclusion is that it may and you are so administering the law.

QUESTION

Is the interpretation and administration of Chapter 122, Statutes of 1959, by the Nevada State Welfare Department in conformity with the law?

OPINION

We have concluded that your department has properly interpreted and is properly administering the law, in this respect, for the reasons hereinafter set out.

The Legislature of 1953, enacted Chapter 369, p. 703, which was an act to provide for aid to blind persons, and placed the administration of same under the Nevada State Welfare Department. This statute with amendments has become NRS Chapter 426.

Section 39 thereof allowed for flexibility, depending in part upon ownership and income from other property and other income, but subject to such exceptions, provided that the presumed minimum need of recipients would be not less than \$75 per month. Said statute of 1953, however, does not make provision for medical and remedial care. The services authorized by this statute were discharged and performed by the payment of cash only.

The Legislature of 1957, Chapter 255, amended NRS 426.050, in a number of respects. Before amendment NRS 426.050 provided:

As used in NRS 426.010 to 426.500, inclusive, "aid to the blind" means money payments to blind individuals.

After amendment of 1957, NRS 426.050, in part, provided as follows:

As used in NRS 426.010 to 426.500, inclusive, "aid to the blind" means money payment to, or medical care in behalf of or any type of remedial care in behalf of, blind individuals who are needy, any such payment \* \* \*."

It is, therefore, clear that by the amendment of 1957, the Legislature altered the duty of the Welfare Department respecting the blind, from providing money solely to providing money and medical and remedial care.

In this Chapter 255 of 1957, hereinabove mentioned, the Legislature increased the presumed minimum need of blind individuals from \$75 to \$90, and added a new section to Chapter 426 of NRS by which it provided for the creation and administration of a fund in the state treasury under the Welfare Department for medical and remedial care of blind persons.

As formerly stated, the Legislature of 1959 enacted Chapter 122, p. 133, which amends NRS 426.420, in such a manner as to increase the presumed minimum need of aid to the blind recipients to \$100 per month. But, of course, under the authority of the Statutes of 1957, part of the minimum may be in medical and remedial care.

This conclusion is not arrived at lightly or hurriedly and is supported by the fact that the Research and Finance unit of your Department presented before a joint conference of the Assembly Ways and Means Committee and Senate Finance Committee on February 25, 1959, a fiscal breakdown of recommended appropriations for Aid to the Blind. Each member of the conference received a copy of this documentary release of recommendation. We shall not copy the release, but it did provide for the period 1959-1960 (fiscal year) \$100 presumed minimum need and provided for medical and remedial care of \$7 per person and cash of \$97.75 per person, or a total of \$104.75. We understand that this is the formula of administration that you are following. This fiscal release also sets forth the recommendation of an appropriation of \$152,547, and a projected monthly average of caseload of 201 persons. In your letter you have set out that this was projected to be divided as follows: \$142,899 for the payment in money, and \$9,648 for the medical and remedial care. We note that by Chapter 433, Statutes 1959, p. 701, at 704, (the general appropriation statute) the sum that your department requested for the aid to the blind, namely, \$152,547, was appropriated. It is noted also that the average in money payments is \$97.75 and the average in medical and remedial care is \$7, or a total of \$104.75, and the spirit of the statute of \$100, "presumed minimum need" is, therefore, complied with.

For the reasons heretofore given, it is, therefore, concluded that the Legislature intended the cash payment and medical and remedial care benefits of each recipient to be not less than \$100 in the aggregate, unless in the specific case ownership of property or the receipt of creditable income by or of the recipient, as by statute provided, requires a reduction in such allowance. The statute is being administered in accordance with the intent of the Legislature.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-74 County Commissioners—Petroleum leases. County Commissioners have the power to enter into lease contract, to permit petroleum drilling upon county-owned realty, despite fact that provisions of contract will remain effectual beyond their terms of office. NRS 244.320 construed.**

CARSON CITY, July 22, 1959

HONORABLE RAYMOND FREE, *District Attorney, County of Churchill, Fallon, Nevada*

STATEMENT OF FACTS

DEAR MR. FREE: The Fallon Exploration Co., Inc., a Nevada Corporation with offices located at 310 Triune Building, Reno, Nevada, proposes to commence drilling operations for petroleum, in the Fallon area, almost immediately after the disposition by this office of the question hereinafter stated. In order that it will be protected, insofar as it may legally be protected, this corporation has taken petroleum leases from landowners in the area, in the usual form, which we understand has more or less become standardized throughout the industry. Most of the private landowners within the area have signed up this proposed lease, which form you have supplied to us for our study. The county of Churchill owns some 35,000 acres outright and has an equity in some 4,000 acres which parcel is subject to redemption by delinquent taxpayers. The lease and escrow agreement which together constitute the full proposed contractual arrangement between the landowner (lessor) and the company (lessee) proposes to be effectual and to extend for a period of ten years. The provisions of the lease would not require the lessor to perform any service or pay out any money.

QUESTION

Despite the provisions of NRS 244.320, may the Board of County Commissioners of Churchill County enter into the proposed contract, with the Fallon Exploration Co., Inc., as to its land held in fee simple title and as to its land held subject to the right of delinquent taxpayers, to redeem?

CONCLUSION

We are of the opinion that the Board of County Commissioners may bind the 35,000 acres, absolutely with the provisions of the proposed contract, with rights and privileges of the owner thereunder to pass with the fee, as to the several parcels, should the county sell any of them; and may bind the 4,000 acres by the provisions of the proposed contract, effective until redeemed by delinquent taxpayer, and effective as to him upon such contingency, if so contracted, by the persons possessing the right of redemption.

ANALYSIS

The Fallon Exploration Co., Inc., will be referred to hereinafter as the "company," and the Board of County Commissioners, as the "board."

When reference is made to 35,000 acres, the meaning will be assumed to be all land within the county that is owned outright by the county, in which there is no equity of

redemption by reason of delinquent taxes, by anyone, and will include even those portions of land under lease to the Nevada Fish and Game Commission, for wildlife conservation purposes. Such description will be used of land of this class, regardless of the fact that the actual amount of the land so held may be substantially more or less than such descriptive amount. When reference is made herein to 4,000 acres, the meaning will be assumed to be all land within the county upon which there are delinquent taxes assessed by and due, but remaining unpaid to the county, as to which land trustee certificates have issued to the county treasurer, pursuant to the provisions of NRS 361.570, and in which the equity of redemption by delinquent taxpayer, still exists, regardless of the fact that the amount of land so held, filling this description, at the date hereof, may be substantially more or less than the amount descriptively mentioned.

NRS 244.320 in part provides as follows:

1. Except as otherwise authorized by law, no member of any board of county commissioners shall be allowed to vote on any contract which extends beyond his term of office.

NRS 244.320 provides that county commissioners shall hold office for 2 or 4 years as the case may be (short term and long term county commissioners) from the first Monday in January succeeding their election to 12 p.m. of the day preceding the first Monday in January following a general election. It will, therefore, be observed that a contract, effective for ten years, would appear to be in conflict with NRS 244.320.

NRS 244.264 et seq., has reference to the power and duty of the board of county commissioners to preserve and protect the county property.

NRS 244.275 provides the following:

244.275 1. The board of county commissioners shall have the power and jurisdiction in their respective counties to lease or purchase any real or personal property necessary for the use of the county.

2. No purchase of real property shall be made unless the value of the same be previously appraised and fixed by three disinterested persons to be appointed for that purpose by the district judge. The persons so appointed shall be sworn to make a true appraisalment thereof according to the best of their knowledge and ability.

3. Notwithstanding the provisions of NRS 354.010, the board of county commissioners may enter into conditional sales contracts or other contracts providing for deferred payment of the purchase price of any equipment, supplies, materials or other personal property purchased for the county, but as provided in NRS 244.320, no member of the board shall be allowed to vote on any contract which extends beyond his term of office.

The reference to NRS 354.010, in subsection 3, above, is a reference to county finances and a requirement that counties operate upon a budgetary and cash basis.

It will be noted that subsections 1, 2 and 3, above, all indicate that the prohibitions and restrictions mentioned are to be limited to situations and deals in which the county pays out money. The inference is that a transaction in which the county would receive money is not affected by the provisions of NRS 244.275. Be that as it may, the distinction is somewhat nebulous and the conclusions reached are not based upon this distinction.

Under NRS 244.280 the county commissioners are authorized to sell real or personal property belonging to the county.

Under NRS 244.305 the county commissioners may purchase land for park or recreational purposes, and may enter into a contract containing terms of payment not to be completed during their term of office.

Although these authorizations are contained in the statutes (to lease or purchase real property for county use, to sell real or personal property owned by the county, to purchase land for recreational purposes, upon a long term contract), we find no authorization to the board, authorizing it to lease out the real property belonging to the county, and we do find the provision mentioned (NRS 244.320) purporting to prevent each member of the board from voting upon a contract which would, if entered into, extend beyond his term of office. We are clearly of the opinion that this omission (failure to authorize the board to lease real property belonging to the county) was not accidental. If the authority had been granted it would have encouraged proprietorship by the county, i.e., the entry into private business in competition with the business people of the community. It would have even encouraged risk taking which is quite inharmonious with the view that business people believe to be the proper role of government. This view of business people is consonant with the provisions of NRS 354.010, to the effect that county government must be conducted upon a cash and budgetary basis. Such provisions are common for the regulation of the governing bodies of cities, and counties, and are intended to prevent a governing body from enforcing its will upon and from diminishing the powers of the personnel of the governing body or bodies that follow it. By judicial determination, what is the meaning of such a regulation?

Respecting the power of public officers to enter into contracts that extend beyond their term of office, we quote from Section 292 of 43 Am.Jur. under the title, "Public Officers," as follows:

The power of public officers to enter into contracts which extend beyond the terms of their offices depends primarily on the extent of their authority under the law. A distinction has been drawn between two classes of powers, governmental or legislative and proprietary or business. In the exercise of the governmental or legislative powers, a board cannot make a contract extending beyond its own term. But in the exercise of business or proprietary powers, a board may contract as an individual, unless restrained, by statutory provision, to the contrary. Obviously, contracts extending beyond the term of the officers executing them will be held invalid where the making of the contracts tends to limit or diminish the efficiency of those who will succeed the incumbents in office, or usurps power which was clearly intended to be given to the successors.

See: "Power of board to appoint officer or make contract extending beyond its own term," 70 A.L.R. 794, from which we quote:

The power of a city council to lease municipal property to private persons was sustained, although it extended beyond the term of the council executing it, in *Biddeford v. Yates* (1908) 104 Me. 506, 72 Atl. 335, 15 Ann.Cas. 1091. In this case, in answering the contention that the city council had no power to enter into contracts which could not be completed before the expiration of the term of the council, even though the power to lease was delegated in general terms, the court said: "It appears to us that the logic of the plaintiff's contention tends to limit a city council to action with respect to such matters only as are to go into effect under its own administration. Such limitation would segregate a municipal government from all other corporations and business institutions, in the methods employed for the transaction of business, and might, it seems to us, prove highly detrimental."

The above we believe to be the general rule and is determinative of the question as regards the board's power to lease the mineral rights in and to the 35,000 acres.

In so determining, we have in mind that this act on the part of the present board of county commissioners is proprietorship or business and not governmental. We have in mind that this contract will not deprive a board of county commissioners, or boards later to be elected, of any rights or privileges, the right to select and control employees, the right to select and make purchases, or any other right to require or permit a decision during the next ten years. Neither does the board by this contract diminish the value of the real estate that is affected. Instead it will tend to increase the value of county-owned real estate and privately owned real estate within the county. Neither is the contract objectionable in that it will or would contingently create a financial obligation, for there are no such terms contained therein. Neither does the board render the county-owned real estate less salable by entering into this contract. All objections to such a contract that are ordinarily advanced are therefore overcome. The reasons for the rule of denying the commissioners the power are not present here. The residents of the area could gain nothing by denying the power to the commissioners. They could lose substantially by such denial.

We now consider the rights of the board to enter into a lease contract, of the conventional type, as to lands of the 4,000 acre variety heretofore mentioned.

Under the provisions of NRS 361.565 and 361.570, it is provided that as to those property taxes which fall delinquent in March, the tax receiver shall, within 20 days after the first Monday in March, give notice of delinquency of taxpayers, in the manner provided, and shall give notice that if the delinquent taxes and penalties are not paid on or before 1:30 p.m. of the fourth Monday of April following, he will issue to the county treasurer a certificate authorizing the county treasurer as trustee for the State and county to hold the property for a period of two years unless sooner redeemed. If such certificate is so issued, it is provided that the property may be redeemed for a period of two years only from the date of such certificate by paying to the treasurer all delinquent taxes and all penalties thereon, together with interest at the statutory rate, and all taxes due, and if not so redeemed by the delinquent taxpayer or someone in his behalf, the deed will issue at the appointed time by the tax receiver to the treasurer, and the equity of redemption will then cease and no longer exist.

We mention these regulations and proceedings with reference to the time that the rights of the county in and to the land shall commence, when and upon what conditions those rights shall be terminated and defeated by payment of the part of taxpayer, or upon his failure when the rights of the county in and to the land shall become absolute.

Clearly, the county has some right in and to the land from the time of the issuance and delivery of the certificate to the treasurer under the provisions of NRS 361.570.

Clearly, too, those rights are less than a fee simple title, and since one cannot sell or grant more than he has in and to property, he cannot, except with the concurrence of the delinquent taxpayer, execute an effective lease, good as to every eventuality. Except for such concurrence any lease executed by the board would, of necessity, contain a defeasance clause, to the effect that all rights thereunder running to the company would terminate upon the payment of delinquent taxes, interest, and penalties, within the two-year period allowed for redemption. Anticipating that some of the delinquent taxpayers may pay, or would be very likely to pay, if petroleum were developed in the area, and developed within the time allowed for redemption, the company could take the lease affecting such lands executed by the board, and with a proper defeasance clause stated therein, and could at the same time enter into a similar contract affecting the same land with the delinquent taxpayer, reciting that in the event of redemption of the delinquent tax, with interest and penalties, said lease contract would delineate the rights and obligations of the parties, and that if not redeemed the provisions thereof would remain inoperative and without legal effect.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-75 Planning Board, State—The State Planning Board has the power to acquire certain real property for designated state activities by voluntary sale or condemnation. Chapter 458, 1959 Statutes, construed.**

CARSON CITY, July 22, 1959

HONORABLE M. GEORGE BISSELL, *Secretary, State Planning Board, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. BISSELL: The Legislature of 1959 enacted Chapter 458, under the provisions of which it appropriated \$1,915,518, for the support of the State Planning Board in carrying out a program of capitol improvement, physical plant design, construction, rehabilitation, remodeling, repairing, the building additions, and acquiring of land, for a number of projects specifically set out in the act. (See Stats. 1959, Ch. 458, p. 790.) In Section 2 thereof, specific projects are set out in subdivisions 1 to 19. Most of these projects and proposals are to be upon land then (at the date of passage and approval of the act) owned by the State. Subdivisions 1, 10 and 12, of Section 2, contemplate the acquisition and use of land not then owned by the State. Certain land has been acquired, by authority of the act, in Carson City, by contract. But certain land in the proposed area is not available by the contract procedure, at least at the price offered by the State through its State Planning Board.

QUESTION

Does the State of Nevada Planning Board have the legal authority to acquire the subject property by condemnation?

CONCLUSION

We are of the opinion that the State of Nevada Planning Board does have the legal authority to acquire the subject property by condemnation.

ANALYSIS

Chapter 458, Statutes 1959, Section 2, subdivisions 1, 10 and 12, provide as follows:

1. The design, rehabilitation and replacement of a portion of the state water supply and distribution system, Ormsby County, Nevada—\$63,196.
10. The acquisition of real property in Carson City, Nevada, for the proposed development of capital facilities in Carson City, Nevada—\$739,615.
12. The acquisition of real property for the University of Nevada, Reno, Nevada—\$150,000.

Chapter 341 NRS provides for the creation and functioning of the State Planning Board. NRS 341.110, respecting the powers of the board, provides as follows:

341.110. General powers of board. In general, the board shall have such powers as may be necessary to enable it to fulfill its functions and to carry out the purposes of this chapter.

In Section 1 of said Chapter 458, Statutes 1959, it is pointed out that among other things the State Planning Board is vested with the power of "land acquisitions." Of course, it would be too much to hope that all residents within a city block occupied by residential housing, would voluntarily sell their properties at prices fixed and offered and believed to be reasonable by the State Planning Board. To infer, then, that the Legislature intended to vest the said board with the power of condemnation, under its general powers, heretofore mentioned, respecting the properties referred to in this chapter, is not unreasonable.

The right and power of the State Planning Board to acquire the real property designated in subsections 1, 10, 12, heretofore set out, by condemnation, rests, not upon inference, however, but is established without question, upon firmer grounds.

Chapter 37 NRS, entitled "Eminent Domain," in Section 37.010, provides, in part, as follows:

37.010. Public uses for which the right of eminent domain may be exercised. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. Federal activities. \* \* \*
2. State activities. Public buildings and grounds for the use of the state and all other public uses authorized by the legislature.

The land to be acquired is for the use of the State for the State water supply, for the proposed development of capital facilities, and for the use of the University of Nevada. All three uses are clearly State activities.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-76 University of Nevada—Retroactive refund of excess in payment of tuition charges, based upon mistake of law, held authorized only for semester in which error was discovered, and for prior periods in those cases only where "protest" as to such excess in payment was made in writing.**

CARSON CITY, July 28, 1959

DR. CHARLES J. ARMSTRONG, *President, University of Nevada, Reno, Nevada*

STATEMENT OF FACTS

DEAR DR. ARMSTRONG: Pursuant to request therefor, this office rendered an opinion (A.G.O. No. 9, February 18, 1959) indicating that any resident aliens whose families are bona fide residents of the State, or who themselves have established bona fide residence for at least six months prior to their matriculation at the University of Nevada, are entitled to the same benefits as resident citizens with regard to exemption from payment of the out-of-state tuition charge. We are informed that, pursuant to this opinion, the Registrar

of the University authorized the refund of the non-resident tuition fees charged certain students for the semester then in session, entitled to such exemption under the conclusion of our said opinion. We are further informed that such refund was not made retroactive beyond said semester, on the basis that our interpretation of the law was rendered after the beginning of the second semester of the academic year, 1958-1959.

Our advice is presently requested as to the legal aspects of an inquiry for retroactive refund of excess tuition charges paid for semesters prior to the one in which this office rendered A.G.O. No. 9, February 18, 1959. You invite our consideration to the considerable difficulty which would necessarily be entailed in making such refunds retroactive to some indefinite period in the past, as well as the financial problem posed to the University if now required to make such retroactive refunds for any period prior to the second semester of the academic year, 1958-1959.

We are uncertain from both the contents of your letter dated July 22, 1959, and the thermofax copy of the inquiry, dated June 22, 1959, as to whether the particular individuals and students for whom such additional retroactive refund is now sought took exception to, or otherwise protested, in writing, the tuition charge made of them for semesters prior to the second semester of the academic year, 1958-1959. This point is material to determination of the specific issue presented by the request for such additional retroactive refund. In contemplation of the possibility that said particular persons or students may, in fact, have registered written exception to payment of the tuition charge imposed and exacted by the University prior to the second semester of the academic year, 1958-1959, our analysis and opinion will, therefore, be concerned with the following questions:

#### QUESTIONS

1. Should retroactive refunds be made by the University of Nevada to persons or students of any tuition payments made by them in excess of the amount properly authorized, based upon allowable exemptions, for any period prior to the second semester of the academic year, 1958-1959, if exception or protest to the imposition or exaction of such excess in tuition charge was made in writing at the time of said payment and enrollment at the University?
2. Where no written exception or protest was registered by a person or student at the time of payment and enrollment at the University of Nevada to any excess in tuition charge, as authorized on the basis of allowable exemptions, would it be proper and would the University of Nevada, at this time, make retroactive refund of such excess in tuition payment for any period prior to the second semester of the academic year, 1958-1959?

#### CONCLUSIONS

To question No. 1: Affirmative: Yes.

To question No. 2: Negative: No

#### ANALYSIS

We have been unable to find any applicable statutory provision as regards the specific questions stated above, and we must assume that there are no rules or regulations promulgated by the University of Nevada which would be pertinent or determinative as regards an answer to these questions. We are, therefore, governed by general principles of law for our above conclusions.

As regards private educational institutions, established rules of contract law are alone controlling with respect to recovery of any excess or unauthorized payment. With some

slight modification, justified on the basis of the *public* character of the institution, the same principles of contract law undoubtedly also apply to such claims and recovery, in the instant case.

In the case of claims against the State, NRS 353.095 provides that, unless presented to the next succeeding session of the State Legislature, such claims would be barred. NRS 353.115 provides that a claim for refund must be presented to the State Board of Examiners within one (1) year from the time such claim was incurred, in specifically enumerated cases, as set forth in NRS 353.110, which includes situations where, in the opinion of said Board, an applicant has "just cause for application and granting of refund would be equitable." NRS 353.125 provides for appeal from a decision of said Board to the courts, if a claimant considers himself aggrieved by the action of the Board.

Though a State institution, the University of Nevada, in the absence of express legislative or constitutional provision, has exclusive jurisdiction over matters of internal administration and operation, which undoubtedly, would include claims for refund, as here involved. (See *King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221.)

The present situation is an unfortunate one. Through a mistake in interpretation of the law, some persons or students enrolling at the University of Nevada, were subjected to tuition charges, without allowance of authorized, legal exemption as regards a portion of the payments made by them. There is no question concerning the honest mistake made by the University in imposing such excess in payment or its good faith in collecting and receiving same. The mistaken interpretation of the law was brought to light, when, upon a question being raised by a person seeking admission to the University, the matter was submitted to this office for legal advice and opinion. In conformity with such advice, given in February, 1959, the University, through its Registrar, authorized refund in the excess of such payments for the second semester of the academic year 1958-1959, not only to the particular person who had protested the amount of tuition which the University thought it proper to charge, but also made like refund to others similarly affected. Having been informed of the erroneous application of the law, such corrective action on the part of the University authorities was not only proper, but fair and equitable to all person so affected.

Based upon such corrective action, the University is now requested to make retroactive refund for a period beyond that in which question or protest was made as regards the excess in payment charged for tuition, and discovery of the erroneous prior interpretation of the law. Such a request, fair and equitable though it may appear to be, involves consideration of well-established principles of both law and equity, *as applicable to both such affected persons and the University*.

Admittedly, as a *general* principle of both law and equity, it is undoubtedly true that the obtaining of money or property of others without authority of law ordinarily justifies restitution, on the theory that an obligation rests upon all persons, natural or artificial, to do justice. (*Humboldt County v. Lander County*, 24 Nev. 461, 6 Pac. 228). Also, because of the relative inequality in position, and public policy intended to prevent extortion by officials, it is established that where money is exacted by, and paid to, a public officer in excess of his legal fees, in order to obtain the performance of an official duty to which the party is entitled without such payment, recovery is generally permitted of the excess, on the assumption that the payment of the excess was *involuntarily* made. (See 40 A.J. 835, Sec. 176). And a distinction would appear to exist as between payment made for the purpose of protecting or securing the present enjoyment of a right to which a person is immediately entitled, and payment made to prevent a threatened disturbance of such a right where there is no authority to interfere with its enjoyment until the right of the threatening party shall be established in a judicial proceeding in which the rights of the respective parties may be adjudicated. In the former case, the payment would be considered *compulsory*, while in the latter case, it would be deemed *voluntary*. (See 40 A.J. 835-836, Sec. 176.) Finally, it is a well-established *general* rule that money paid to another under the influence of a mistake of fact, which payment would not have been

made if the payor had known that the fact was otherwise, may be recovered. (See 40 A.J. 844, Sec. 187.)

But *voluntary* payments, or payments made on the basis of *mistake of law*, are not recoverable. (See 40 A.J. 820-823; and p. 850 et seq.) And, even in the case of payment under a mistake of *fact* (where, as previously noted, recovery or refund would ordinarily be allowed), circumstances might render such recovery inequitable and be denied if there had been such change of position on the part of the payee as to make it unjust to require such refund. (40 A.J. 852, Sec. 201.)

In the absence of any question or protest made at the time of payment as to any unauthorized excess, it may reasonably be assumed that the payments made to the University were *voluntary*.

In addition, such excess payments definitely were based upon a *mistake of law*, or misinterpretation of the applicable law. The basis of the rule that payments based upon mistake of law are not recoverable, though recognized as sometimes unjust in operation, is that of expediency and public convenience, since refund or recovery in such cases would otherwise be predicated upon ignorance of the law, inevitably resulting in endless litigation rendering the administration of justice impracticable. "Ignorantia legis neminem excusat," or "ignorance of the law is no excuse," is the pithy maximatic statement of the rule, defined as an erroneous conclusion as to the legal effect of the facts fully known, or *constructively, presumed to be fully known*, to a person—in the instant case, those persons making payment of the excess, without question or protest, to the University. (See 40 A.J. 857, 858.) Moreover, and without doubt, the University's position has been materially changed on the basis of receipts and use of such moneys as were paid in excess. Presumably, they were used as part of its general funds, and its budgetary requests and legislative appropriation for present administration of its public educational functions were, and are, predicated on the expenditure and prior utilization of such moneys. To require refund of such excess payments at the present time would, therefore, manifestly, be unjust and operate as an undue hardship, prejudicial to paramount public interest.

To sanction refund of any excess in payment to any one person would mean the establishment of a precedent which would justify retroactive refunds for an indefinite period in the past, in order to effect restitution to all persons similarly affected and concerned. It should suffice merely to indicate the logical consequences which would result in such case, to justify the necessity for the position here taken, namely, that refund of any excess in payment of tuition charges shall be confined to the second semester in the academic year, 1958-1959, and only such other cases, where written "protest" payments were made, thus securing to such payors, both their legal and equitable rights.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-77 Nevada Tax Commission—Cigarette and Liquor Tax Division. Affidavit by licensed wholesale cigarette dealer, for tax refund, by reason of stale cigarettes destroyed, must show that the cigarettes were actually destroyed in his presence, and by him.**

CARSON CITY, July 29, 1959

HONORABLE GROVER HILLYGUS, *Supervisor, Cigarette and Liquor Tax Division, Nevada Tax Commission, Carson City, Nevada*

## STATEMENT OF FACTS

Dear Mr. Hillygus: The Legislature of 1959 amended NRS 370.280 in such a manner as to more specifically spell out the requirements to be met by a licensed wholesale cigarette dealer in applying for and receiving a tax refund from the Nevada Tax Commission, for the face value of cigarette revenue stamp tax paid, less deductions allowed the dealer, if any, in those cases in which the cigarettes are intentionally destroyed by such dealer by reason of the fact that they have become stale. This section before amendment allowed such refunds. After amendment the conditions to be met to obtain the refund are specifically provided and the requirements are with precision set out. The federal tax rate upon packages of twenty is eight cents and the state rate upon such packages is three cents.

When stale cigarettes are destroyed at the factory, the federal tax of eight cents per package is rebated by the government. However, if a state cigarette wholesaler destroys the cigarettes here in Nevada, he would avoid the loss of the state tax of three cents per package but would not avoid the loss of the federal tax. Consequently, the licensed wholesale cigarette dealer in Nevada, in applying to the Nevada Tax Commission for a refund, under the statute, desires to submit not his own affidavit, but an affidavit of a factory official to the effect that certain cigarettes, bearing Nevada tax stamps were destroyed under his supervision. It is not clear how this would come about. Perhaps a Nevada retailer would complain to his wholesaler about the condition of cigarettes. The Nevada wholesaler would retake into possession the objectionable cigarettes, already stamped with the Nevada stamp. The Nevada wholesaler would then perhaps return the cigarettes to the factory for destruction and upon destruction there, the affidavit by the factory official would be issued, to be presented by the Nevada wholesaler to the Nevada Tax Commission. The purpose of such procedure, of course, would be to salvage both stamps, the state and federal.

## QUESTION

If the affidavit respecting the destruction of the cigarettes is taken by the factory official, and presented by the duly licensed Nevada wholesale cigarette dealer to the Nevada Tax Commission for tax refund, under the provisions of NRS 370.280, as amended (Chapter 281, 1959 Statutes), may refund be lawfully granted to the Nevada wholesale cigarette dealer?

## CONCLUSION

We have concluded that such procedure as contemplated in the question would not satisfy the Nevada law and would not warrant the stamp refund by the Nevada Tax Commission.

## ANALYSIS

Chapter 281, 1959 Statutes, p. 371, amends NRS 370.280 by adding certain new material. As amended the section provides the following:

370.280 1. Upon proof satisfactory to the tax commission, refunds shall be allowed for the face value of the cigarette revenue stamp tax paid, less any discount previously allowed on any such tax so paid, upon cigarettes that are sold to:

(a) The United States Government for Army, Air Force, Navy or Marine Corps purposes and are shipped to a point within this state to a place which

has been lawfully ceded to the United States Government for Army, Air Force, Navy or Marine Corps purposes; or

(b) Veterans hospitals for distribution or sale to disabled service or ex-service men interned therein, but not to civilians or civilian employees.

2. Upon proof satisfactory to the tax commission, refunds shall be allowed to *licensed wholesale cigarette dealers* for the face value of the cigarette revenue stamp tax paid, less any discount previously allowed on any such tax so paid, upon cigarettes *destroyed by them* because such cigarettes had become stale. Applications for refunds shall be submitted no oftener than once in any 3-month period, shall be in an amount of not less than \$15 and shall be accompanied by an affidavit of the applicant setting forth:

(a) The number of packages of cigarettes destroyed for which refund is claimed;

(b) The date or dates on which such cigarettes were destroyed and the place where destroyed; and

(c) That the cigarettes were actually destroyed *in his presence* because they had become stale. (Italics supplied.)

3. Any refund shall be paid as other claims against the state are paid.

The above act became effective on March 26, 1959. Subsection 1(a) and (b) thereof were contained in the statute before the 1959 amendment. Also subsection 3 (then subsection 2) was contained in the old act. Subsection 2, also (a), (b) and (c) thereof are new material.

The statute as now constituted is more exacting and more demanding than was formerly the case. The Legislature has clearly shown an intent by this new provision to permit no one to apply for such tax refunds under this section than a "licensed wholesale cigarette dealer," and that if a rebate under this statute to such dealers is to be made the cigarettes must be "destroyed by them," and the destruction has been, as to the applicant for tax rebate, "in his presence." These are minimum requirements, which the affidavit must show, and in the absence of the applicant's affidavit reflecting such facts, a rebate could not properly be made. Clearly, if the cigarettes are destroyed at the factory, by or under the supervision of an official of the factory, the affidavit by the Nevada wholesale cigarette dealer could not contain the necessary averments.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-78 Planning Commissions—Regional Federal Grants in Aid. Under present statute Regional Planning Commissions are authorized to receive moneys through "grant, gift or other means," and disburse for authorized expenses. A.G.O. No. 371 of 4-10-58 modified.**

CARSON CITY, July 29, 1959

HONORABLE JAMES A. CALLAHAN, *District Attorney, County of Humboldt, Winnemucca, Nevada*

STATEMENT OF FACTS

DEAR MR. CALLAHAN: Attorney General's Opinion No. 371 of April 10, 1958, held that under the provisions of Chapter 278 NRS, which provides for planning and zoning and makes provision for the creation of Regional Planning Commissions, that no power had been conferred upon such commissions, by express grant or reasonable inference, to accept or contract for Federal Grants in Aid, and that, therefore, the power to contract for or to accept such aid did not exist.

The Legislature of 1959 enacted Assembly Bill No. 4, approved March 5, 1959 (Stats. 1959, Ch. 80, p. 84), which amended NRS 278.110, and added to the powers of Regional Planning Commissions.

#### QUESTION

Under the present law may Regional Planning Commissions contract for services and other expenses, as may be necessary and proper, and pay for such services and expenses by sums made available from annual appropriations of the participating county or counties and municipalities, together with such other funds as may be made available through grant, gift or other means?

#### CONCLUSION

We are of the opinion that Regional Planning Commissions do possess such authority under the recent statutory amendment, and that such commissions may now receive sums of money through "grant, gift or other means."

#### ANALYSIS

In the said Opinion No. 371 it was concluded that since boards, commissions and public officers have only such powers as are expressly conferred upon them or reasonably inferred from the powers expressly granted, and that under NRS 278.110, or otherwise, no power was granted to regional or local planning commissions to contract for or accept Federal Grants in Aid, and that therefore the power at that time did not exist.

By reason of the amendment of 1959, as aforesaid, NRS 278.110, now provides the following:

278.110 1. Annually, each county or regional planning commission shall elect a chairman from its members.

2. It shall have power to employ experts, clerks and a secretary, and to pay for their services and such other expenses as may be necessary and proper, not exceeding, in all, the annual appropriation that may be made by the county or counties or municipalities for the commission, *together with such other funds as may be made available through grant, gift or other means.*

(The part italicized was added by the Legislature of 1959. The remainder of the section remains without modification.)

It is, therefore, clear that the Legislature of 1959 intended to make available to Regional Planning Commissions, sums of money, with which to pay the costs of operation, through "grant, gift or other means," which Opinion No. 371 had declared such commissions were not authorized to accept.

This opinion is compatible with the conclusion reached in Attorney General's Opinion No. 143 of January 31, 1956, in which this department concluded that the State Planning Board was authorized to accept grants in aid under Section 701 of the Federal Housing Act of 1954.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-79 Insurance, State Department of—Funds or assets deposited with Commissioner of Insurance under NRS 682.180, not available to immediately pay a final judgment entered by court of sister state against a domestic company.**

CARSON CITY, July 30, 1959

HONORABLE PAUL HAMMEL, *Insurance Commissioner, State of Nevada, Carson City, Nevada*

Attention: MR. LOUIS T. MASTOS, *Chief Deputy*

STATEMENT OF FACTS

DEAR MR. HAMMEL: Insurance from its very nature is a business carried on over a wide area. Accordingly, an insurance corporation ordinarily or perhaps invariably, follows the procedure of doing business beyond the state in which it is incorporated. It incorporates in one state and meets the requirements of the laws of that state to be licensed to do business in the state of incorporation. In addition it qualifies to do business in other states, by compliance with the laws of such other states. As to the state in which a corporation is created it is said to be "domestic." As to the state in which it qualifies to do business it is said to be "domesticated."

It is provided in NRS 682.080 and 682.090, that immediately after filing the articles of incorporation the incorporators shall post a bond of \$50,000, for the protection of subscribers, shareholders and creditors, and deliver same to the commissioner, to remain (either as a bond or liquid asset) with the commissioner for such purpose until issuance of a license to the company. Under these provisions, which we mention in passing, the concern of the state is manifested, in the protection of subscribers, shareholders and creditors, to the point of licensing of the company to enter into an insurance business.

Under NRS 682.180, which is hereinafter quoted, it is provided that companies that are domestic to Nevada shall deposit and keep on deposit with the commissioner, cash or securities of definite amounts "for the protection of all policyholders or policyholders and creditors of the company." Under this section it is, therefore, observed that such deposits of cash or securities with the commissioner, which provision has reference only to domestic companies, is for the protection of "all policyholders or policyholders and creditors of the company," wheresoever residing. We are informed that similar provisions are common to the statutes of other states.

The Attorney General of Florida has issued an official opinion which holds:

The deposit of securities with officials of another state will meet the requirements of Florida Statutes *only* if under the laws of the state where the deposit is made a Florida judgment obtained on a policy is payable out of such deposit by the filing with the appropriate official of such other state duly authenticated records thereof without necessity of proceedings in such other state.

QUESTION

If a judgment is obtained in Florida by a policyholder or policyholder and creditor, against an insurance company domestic to Nevada, and domesticated in Florida, and such judgment duly authenticated is sent to the insurance commissioner of Nevada, for payment, may same be paid out of the deposit required by NRS 682.180, by the commissioner without the necessity of proceedings to be conducted in the State of Nevada?

#### CONCLUSION

We are of the opinion that the question must be answered in the negative and that in such case payment of the Florida judgment would be deferred, and after deferral would be discharged by the company or by the commissioner (fully or partially) as might be ordered by the Nevada Court in a receivership proceeding.

#### ANALYSIS

It is clear that the provisions of NRS 682.080-682.090, are intended to protect “subscribers, shareholders and creditors” of the domestic corporation during the organization period, and that the bond or deposit is to be returned to the corporation when the commissioner issues a certificate of authority to do an insurance business.

It is also clear that the provisions of NRS 682.180 and the deposit of cash or securities there provided is for the purpose of protecting “all policyholders or policyholders and creditors” of the company. The situation envisioned in the question then would fall under the provisions of NRS 682.180.

NRS 682.180 provides the following:

1. In the case of a stock company, a deposit of cash or securities which are authorized investments under NRS 682.340 to 682.410, inclusive, in an amount equal to the minimum capital required by NRS 682.160, shall be made and maintained with the commissioner for the protection of all policyholders or policyholders and creditors of the company.
2. In the case of a mutual company, a deposit of cash or securities which are authorized investments under NRS 682.340 to 682.410, inclusive, shall be made and maintained with the commissioner for the protection of all policyholders or policyholders and creditors of the company equal to 50 percent of the required original minimum surplus.

Chapter NRS 687 makes provision for Rehabilitation and Dissolution. Section NRS 687.020 provides grounds for rehabilitation, reorganization, liquidation of domestic companies. Subsection 14 thereof provides as follows:

Whenever any domestic company:

Has refused or neglected to pay any valid final judgment within 30 days after the rendition thereof, such fact shall be grounds for the rehabilitation, reorganization and liquidation of such domestic company.

NRS 687.030 provides that if the commissioner shall find that any of the grounds specified in NRS 687.020 exist, and cannot be reasonably and expeditiously removed, he shall report same to the Attorney General, who shall file a petition in the name of the commissioner with the First Judicial District Court of the State of Nevada, in and for the County of Ormsby, praying that the commissioner be appointed receiver.

NRS 687.040 makes provision for the appointment of the commissioner as receiver of such domestic company and provides that he shall have such powers as are now or may hereafter be conferred upon receivers under the laws of this State.

It is, therefore, our opinion that in the event that a judgment were duly proven, as aforesaid, to the commissioner, he would communicate with the company and convince himself whether or not the judgment would promptly be taken care of by the company, and if convinced that it would not, a petition would be prepared by this department for the commissioner in the designated court praying that the commissioner be appointed receiver of the delinquent company. After the appointment of the commissioner as receiver, all assets of the company would be taken into charge by the commissioner, including assets already deposited under NRS 628.180, and all liabilities would be considered, collected and classified as to preference and in due time under the orders of the court the affairs of the delinquent company would be cleared up, either by reorganization or liquidation, and the judgment rendered by the Florida court would be paid and discharged or partially paid with other claims of like preference, under the laws appertaining to receiverships.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-80 Douglas County—District Attorney, County School District—Chapter 333, 1959 Statutes of Nevada construed, and held to have perspective effect only. Bond election and bond issue authorized under previously existing law, as well as vested rights thereby involved, deemed not to be affected by said new enactment.**

CARSON CITY, July 31, 1959

HONORABLE CARL F. MARTILLARO, *District Attorney, Douglas County, Minden, Nevada*

STATEMENT OF FACTS

DEAR MR. MARTILLARO: Our opinion and advice is requested as to the effect of the provisions of Chapter 333, Statutes of Nevada 1959, upon the issuance by Douglas County School District, Nevada, of General Obligation Building Bonds, Series April 1, 1959, in the amount of \$490,000.

In this connection, you have submitted to us the letter from Mr. Gene L. Scarselli, County Superintendent, Douglas County School District, dated July 20, 1959, containing said inquiry, and verifying your statement that said bonds have already been sold to the First National Bank of Nevada; moreover, that the printing of the bonds is nearly completed and that invitation to bid on construction of the school has been scheduled for August, 1959.

The question, as hereinafter stated, arises from the view stated by the bonding attorneys concerned in the bond issue, as contained in a communication from them dated July 16, 1959, that, while construction of the 1959 legislative enactment is not free of doubt, it does, apparently, prevent school districts from issuing any bonds, including those here involved, in any fiscal year commencing prior to July 1, 1960. According to the opinion of said bonding attorneys, this conclusion is based upon the requirement of the legislative enactment that bonds for school purposes can be issued in any fiscal year only if the Board of Trustees of a school district notify the Board of County Commissioners of the school district's intent to make such bond issue in a designated

fiscal year, *at least six months prior to the date that a fiscal year commences*. Because the legislative enactment is lacking in any saving clause which would avoid such result, the bonding attorneys maintain, a school district's power to issue bonds for school purposes, prior to July 1, 1960, must be deemed to have been suspended by such legislative action.

Other school districts, besides Douglas County School District, may be seriously affected, as regards bond issues for school building purposes, on the basis of such construction of the 1959 enactment. Also, our consideration is invited to the fact that Chapter 333, Statutes of Nevada, 1959, was approved March 30, 1959, while the election approving the bond issue by Douglas County School District was held prior to the enactment, namely, March 3, 1959. Finally, it is indicated, if the construction of the law as submitted by the bonding attorneys is correct, the Douglas County School District, and possibly others similarly affected, would have to go through the entire procedure required for authorization of a bond issue, thus delaying any building program which they might have in process for a period of one year.

#### QUESTION

Do the provisions of Chapter 333, Statutes of Nevada, 1959, in effect, invalidate the proposed issue of Douglas County School District, Nevada General Obligation Buildings Bonds, Series April 1, 1959, \$490,000?

#### CONCLUSION

Negative: No.

#### ANALYSIS

Chapter 333, Statutes of Nevada, 1959, approved March 30, 1959, contains no provision as to effective date thereof. Pursuant to general law, therefore, it became effective on July 1, 1959. (See NRS 218.530.)

The 1959 legislative enactment, as regards our specific inquiry, amended prior existing law as follows:

Section 1. Chapter 387 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. On or before January 1 preceding any fiscal year in which the board of trustees of a county school district intends to issue bonds, the clerk of such board of trustees shall notify, in writing, the board of county commissioners of the county whose boundaries are coterminous with the boundaries of such county school district of such intent. If the issue of such bonds was authorized by a prior bond election, the notice shall indicate the amount of such bonds to be issued in such year. If the issue of such bonds is contingent upon the outcome of a bond election to be held in such year, the notice shall indicate the amount of the bonds to be issued in such year if the issue thereof is authorized.

\* \* \*

Sec. 4. NRS 387.340 is hereby amended to read as follows:

3. Prior to the adoption of any such resolution (the calling of a bond election) the clerk of the board of trustees shall notify, in writing, the board of county commissioners of the county whose boundaries are coterminous with the boundaries of the county school district of the intention of such board of trustees to consider any such resolution.

\* \* \*

(Chapter 333, Sections 3 and 5, Statutes of Nevada, 1959, contain similar provisions to the above, applicable to joint school districts.)

The fiscal year is that which is constitutionally established to commence on July 1 of each year. (See Art. IX, Sec. 1, Nev. Const.; NRS 354.020 and 354.350.)

Because of the omission of a saving clause of any kind in said Chapter 333, Statutes of Nevada, 1959, Section 2 thereof, above quoted might be deemed to apply so as to limit the issuance of any bonds by a county school district, on or after July 1, 1959 (the effective date of the act), regardless of the status of any proceedings or measures taken preliminary to the issuance and delivery of the bonds at that time.

Obviously, since Chapter 333, Statutes of Nevada, 1959, was not approved until *March 30, 1959*, the notice required of the school trustees to a board of county commissioners, as provided by the above-quoted Section 2 therein, could not have been given on or before January 1, 1959 (a date substantially before convening of the legislative session which adopted said act). Consequently, any such notice of an intention to issue bonds, given to a board of county commissioners after adoption of said Chapter 333, in the calendar year 1959 could not designate any fiscal year for the issuance of school district bonds, prior to the one commencing on July 1, 1960.

The memorandum from the firm of bonding attorneys on the matter properly construes NRS 387.340 (3), as revised by said Chapter 333, Statutes of Nevada, 1959, as a condition precedent to any adoption of resolution calling for a school bond election. Their memorandum further properly points out that said condition precedent did not, in fact, exist prior to July 1, 1959, the effective date of said Chapter 333, Statutes of Nevada, 1959. Such being the case, (even as concluded by the bonding attorneys) any school bond election called by resolution of a school board adopted prior to July 1, 1959, was validly called, even though such election be held after July 1, 1959. Therefore, as stated in the memorandum of the bonding attorneys: “\* \* \* the authorization from the electors of the school district to issue bonds will not be affected by the adoption of Chapter 333.” (See last sentence, page 3, Memorandum, Nevada School District.)

We next consider implementation of the *mandate* of the voters, as expressed through the validly-held bond election, involving the *actual sale and delivery of the bonds*. Because of the absence of any “saving clause” in the act, a literal reading of Section 2 thereof would appear to apply to any *issue* of such bonds on and after the effective date of the act, namely, July 1, 1959. It is on the basis of such a *literal construction* of the above-mentioned section of the enactment that the firm of bonding attorneys predicates its opinion that the act “\* \* \* probably suspends the power of a school district to issue bonds prior to July 1, 1960.” (See Ltr., July 16, 1959, written by bonding attorneys to Douglas County School District Superintendent.)

In our view, said enactment relates only to procedural or regulatory, and not substantive, matters. It may be presumed as intended to establish some further control over bond issues, so that county authorities would be in a better position to assess the merits of each proposed bond issue in the light of the over-all, comprehensive public needs and requirements, within the limitations of foreseeable public revenues, and the total burden imposed upon, and obligating, the taxpayer.

It cannot be presumed that it was the legislative intent to invalidate a bond election already regularly held, and render the voters’ mandate as expressed and imposed thereby, effectually, a nullity. To give the enactment such an application is, *in substance*, to give it retroactive or retrospective effect, so as to result in undesirable consequences, most prejudicial to the public interest and convenience, in the present, and other similar, cases. Undoubtedly, considerable expense was entailed in the conduct of the specific bond election here involved. A definite commitment for sale and purchase of the bonds to finance the school building construction has been made, and the submission of bids for

actual construction work has been scheduled for August, 1959. While we do not have before us sufficient information to determine whether or not vested rights have, in fact, been created, in the technical legal sense, there can be no doubt that such rights have been established in the moral or equitable sense. And, it should be noted, the mandate of the people for *actual issuance of the bonds* was predicated on the assumption that same would be done as soon as possible to secure completion of construction of the school facilities contemplated thereby, *under then existing law*, so as to satisfy, immediately, public needs and requirements *then deemed to exist*. Can it reasonably be presumed that the Legislature intended to cause the mischief which would result from invalidation of all such action regularly taken, as indicated, under the requirements of previously existing law?

While it is undoubtedly true that such undesirable consequences could have been avoided by inclusion in the act of an express "saving clause," it is undeniably and equally true that if the Legislature had, in fact, intended the drastic results which would be entailed by the suggested literal construction, *it lay within its power to do so in plain and unambiguous language*. This it did not do, and the doubt and ambiguity now suggested and presumed to exist in the act, may properly, reasonably, and, with equal cogency, be resolved so as to avoid the undesirable and prejudicial consequences to the public interest indicated above.

We find further support for our conclusion in the well-established rule that in the absence of clear or express legislative intent to the contrary (where constitutionally sanctioned), a law will be presumed to operate prospectively only. (See 50 A.J. 492, et seq.; Perm. A.L.R. Digest, Vol. 10, p. 572, et seq.; Horack, Sutherland Statutory Construction, 3rd Ed., Vol. 2, p. 114 et seq. and p. 227 et seq.; Wildes v. State, 43 Nev. 388, 187 Pac. 1002.) Moreover, to the extent that it would affect rights already vested, a retrospective law, or a law given retrospective application, would be violative of constitutional guarantees, as an impairment of contractual obligations, and therefore, invalid. (Art. I, Sec. 15, Nev. Const.) *The mandate of the voters*, as expressed through the regularly-held bond election, in our opinion, may not be presumed to have less legal effect, or be construed as meaningless. Equally valid rights have been "vested" sufficient to authorize the actual issuance and delivery of the bonds already committed for sale and purchase, in conformity with the proper, regular, and valid bond election procedure, held prior to July 1, 1959, the effective date of the new enactment.

We are, of course, aware of the fact that without a letter of approval from the firm of bonding attorneys, a prospective purchaser of any such school bonds might see fit to withdraw his offer since, undoubtedly, such a purchase has been made subject to the condition that such approval, in writing, would be available in connection with any such bond issue. However, for the reasons hereinbefore set forth, it is our considered opinion that the withholding of such approval in the circumstances indicated herein would be unnecessary, unjustifiable, and unwarranted on the basis of the construction and application of the act, which we deem both reasonable and proper.

We conclude, therefore, that nothing contained in Chapter 333, 1959 Statutes of Nevada, indicates or requires such retrospective construction or application of its provisions to the specific bond issue here involved; that such retrospective consequences was never the legislative intent; and, that the proper and valid construction to be given said act is that with prospective effect only, and as regards bond elections held on or after July 1, 1959, the date when said law became effective.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-81 Public Utilities—Public Service Commission has jurisdiction of sale of all assets of certified electric company to nonprofit cooperative corporation, although no jurisdiction over operation of nonprofit cooperative—Commission has jurisdiction over nonprofit corporation which may serve public—Attorney General’s Opinion No. 919, May 16, 1950, modified. Attorney General’s Opinion No. 326, December 17, 1957, overruled.**

CARSON CITY, August 3, 1959

MR. J.G. ALLARD, *Commissioner, Public Service Commission, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. ALLARD: The Wells Power Company of Wells, Nevada, holds a certificate of public convenience and necessity from the Public Service Commission of Nevada, as a public utility. This utility contemplates the sale of all of its assets to either a nonprofit cooperative corporation or to a nonprofit corporation.

The Wells Rural Electric Company, a Nevada Corporation, as we understand it is a nonprofit corporation and one of the prospective buyers of the Wells Power Company. Article IV of the Articles of Incorporation of the Wells Rural Electric Company reads as follows:

That said corporation is organized to carry on the general business of the purchase, manufacture, transmission, distribution, and sale of electric current to the members of the corporation *and to the public in general*, for heating, lighting, and all other power purposes, and for the carrying on of all business incident or related thereto, and to acquire, build, construct, own, and maintain and operate all necessary and convenient land, buildings, structures, machinery, poles, wires and other things and devices, and to acquire, lease, hold, or occupy lands, and the use of such lands, or easements therein. (Italics supplied.)

QUESTIONS

1. Does the Public Service Commission have jurisdiction in matters of sale by a certified utility to a cooperative corporation or to a nonprofit corporation, and would the Commission be compelled to hold public hearings?
2. Is a nonprofit corporation a public utility under the provisions of the statute, and would this type of utility be compelled to obtain a certificate of public convenience and necessity before beginning operation?

CONCLUSION

The answer to both questions is “Yes.”

ANALYSIS

Nevada Revised Statutes 704.020, subsection 2(b) reads as follows:

2. “Public utility” shall also embrace:
  - (b) Any plant or equipment, or any part of a plant or equipment, within the state for the production, delivery or furnishing *for or to other persons*, firms, associations, or corporations, private or municipal, heat, light, power in any form or by any agency, water for business, manufacturing,

agricultural or household use, or sewerage service, whether within the limits of municipalities, towns or villages, or elsewhere.

The commission is hereby invested with full power of supervision, regulation and control of all such utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village, unless otherwise provided by law. (Italics supplied.)

NRS 704.390 reads as follows:

It shall be unlawful for any public utility to discontinue, modify or restrict service to any city, town, municipality, community or territory theretofore serviced by it, except upon 20 days' notice filed with the commission, specifying in detail the character and nature of the discontinuance or restriction of the service intended, and upon order of the commission, made after hearing, permitting such discontinuance, modification or restriction of service.

NRS 704.410 reads as follows:

A certificate of public convenience issued to a public utility may be transferred to a purchaser of all the assets of the utility. The purchaser shall first furnish such evidence of its corporate character and of its franchise or permits as may be required by the commission, and the commission shall have the power, after hearing, to approve or refuse approval of the transfer, but shall not otherwise alter, amend or abridge the certificate.

In view of the specific provisions of NRS 704.410 governing the sale of the assets of the public utility, we do not believe NRS 704.390, dealing with the discontinuance of service by a public utility, is applicable in this case.

Attorney General's Opinion No. 436, dated March 26, 1947, held that the Public Service Commission of Nevada had no jurisdiction over a rural electric nonprofit corporation since the same is not a public utility. We agree with this opinion, but are of the view that NRS 704.410 must be followed before the Wells Power Company may sell its assets to a nonprofit cooperative corporation, or to the Wells Rural Electric Company, a nonprofit corporation.

The Wells Rural Electric Company, by the terms of its own Articles of Incorporation, may serve the general public in addition to its own members. Because of such potential service, we believe the said company to be a public utility and, therefore, if the Wells Rural Electric Company is the purchaser, the Public Service Commission will have continuing jurisdiction and the company must be certified despite its nonprofit character.

Should a nonprofit cooperative corporation be the purchaser, the Public Service Commission will have no jurisdiction after the sale. It should be noted that NRS 704.410 provides "The purchaser shall first furnish such evidence of its corporate character and of its franchise or permits *as may be required by the commission \* \* \**" (Italics supplied.)

We do not here pass upon the question of whether the Wells Rural Electric Company, should it be the purchaser of the assets of the Wells Power Company, would be subject in its operation to the jurisdiction of the Commission if its Articles were amended to provide for service to its members only.

Attorney General's Opinions No. 919 of May 16, 1950, and No. 326 of December 17, 1957, held that the Public Service Commission had no jurisdiction over the sale of public utility property from one utility to another.

What is now NRS 704.410, quoted supra, was added to 6137 Nevada Compiled Laws 1929, as amended in 1955 by Chapter 250, pages 407-411. Opinion No. 919 of May 16,

1950, was correct when written, but now must be modified to conform with NRS 704.410. Opinion No. 326 of December 17, 1957, is in error and is expressly overruled.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-82 Department of Agriculture—Division of Plant Industry.  
Gasoline-blending dispensing device proposed to be sold and used in Nevada  
would be violative of existing law as regards labeling and sale of mixed gasoline  
or other petroleum product.**

CARSON CITY, August 5, 1959

MR. LEE M. BURGE, *Director, Division of Plant Industry, Department of Agriculture,  
State of Nevada, Post Office Box 1209, Reno, Nevada*

STATEMENT OF FACTS

DEAR MR. BURGE: By letter, dated July 16, 1959, you request our opinion concerning compliance with existing law of a gasoline dispensing device manufactured and marketed by Wayne Pump Company, Salisbury, Maryland, referred to, or called the Blend-O-Matic Pump (Model 511 D Blendomatic Gasoline Dispenser).

Your letter indicates that your department is fully satisfied that the device involved meets all the specifications and tolerances required for gasoline pumps in the Federal Tolerance and Specifications Code.

Essentially, as stated in your letter and in the descriptive literature submitted by the manufacturer, the device is nothing more than two separate gasoline tanks equipped with two meters and two separate pumps which will deliver either regular or high octane gasoline. The two pumps are mounted in a single housing, and consist of two each of the following: pumping unit, motor, air separator, check and relief valve, meter, flow indicator and sump or reservoir. Each meter discharge line goes through a section of a dual control valve having a common shaft and so designed that when one section of the valve opens, the opposite section closes. The discharge from one section of the valve passes through a one-inch hose and the discharge from the other section passes through a one-inch hose which is inside the one-inch hose. The smaller hose projects into the nozzle, so that the mixing of the contents of the two tanks to which the same is connected takes place at the point of delivery. The pump delivers free from blending or mixing either of the two-tank base products; it also delivers the two base products in any of the seven predetermined blend ratios, keeping proportions constant, and measuring each base product separately within the required tolerances from slow to full flow.

The price of each blend is set into a computing mechanism, which automatically records the total price. It is so designed that in the event of a broken suction or vapor lock, the pump will automatically stop. Blends can be changed by simple operation of lever and knob controls. Once a blend is selected and the motor started, the blend cannot be changed until the motor is shut off.

The device is designed to meet the alleged need and demand for gasoline or fuels of desired octane rating, to satisfy claimed varying requirements on the basis of differences in models of cars, new and old cars, variances in engines, number of miles driven, or particular type of driver, thus making for greater customer satisfaction and increasing business potential and return.

It further appears from certifications and testimonials submitted by the manufacturer that a number of states have tested and approved the device, and that the same is now in

use in said states. We are also informed that the manufacturers have a number of customers in Nevada who are desirous of purchasing and installing these gasoline-dispensing "Blend-O-Matic" pumps, or devices.

Your letter properly invites our specific consideration to the provisions of NRS 590.060, and their application to said gasoline-dispensing device.

#### QUESTION

Is the sale and use of Model 511 D Blendomatic Gasoline Dispenser in the State of Nevada invalid and prohibited under presently existent applicable law?

#### CONCLUSION

Affirmative: Yes.

#### ANALYSIS

We are of the opinion that the device, as described, would comply with existing statutory provisions as regards accuracy from a Weights and Measures standpoint, and to such extent this is apparently your view also.

There is, however, very serious doubt that the said device enables a prospective and intending user to so label said blending pump in such manner as to comply with the requirements of existing law. This doubt, expressly noted in your letter, is, specifically, the basis of your inquiry.

NRS 590.060, insofar as pertinent herein, provides as follows:

1. It is unlawful for any person, or any officer, agent or employee thereof, to mix or adulterate any gasoline \* \* \* and to sell, attempt to sell, offer for sale or assist in the sale of any of the products resulting from the mixture or adulteration, and to represent such product as the gasoline \* \* \* of a brand or trade name in general use by any other marketer or producer of gasoline \* \* \*.

2. Whenever the description of any petroleum product is displayed on any tank \* \* \* or other delivery device used for sale to the public, the kind, character and name of the petroleum product dispensed therefrom must correspond to the representations thereon.

3. It is unlawful for any person, or any officer, agent or employee thereof, to deliver into any tank, receptacle or other container any gasoline \* \* \* other than the gasoline \* \* \* intended to be stored in such tank, receptacle or container and distributed therefrom, as indicated by the name of the producer, manufacturer or distributor or the trade name of the product displayed on the container itself, or on the pump or other distributing device used in connection therewith \* \* \*.

There are many other provisions in NRS 590 which are also pertinent herein, but the foregoing quoted excerpt is representative, and clearly shows that, as the device is represented to function and as above described, any intending user of such a gasoline dispensing device could *not* effect labeling, to show the varying ratios of blending of gasoline purchased by different customers. While the predetermined blending ratio sought to be purchased by any given customer would, and could, be shown appropriately by a built-in indicator, a feature of the device, the product actually dispensed on a continuing basis to all the customers, will not, effectively and specifically, be labeled so as to accurately identify the product offered for sale, sold, and actually dispensed, to intending purchasers. Moreover, the mixing, or blending, effected by the device, results

in a sale of a product, actually differing from that marketed under a trade name, and marketed by the original producer.

For all of the foregoing reasons, compliance with presently existing statutory provisions applicable to labeling cannot be made by said Blendomatic Gasoline Dispensing Device.

We find support for our view in the similar conclusion reached, as regards this same question, by the Bureau of Weights and Measures, Department of Agriculture, State of California, whose laws are almost identical to ours, and which department also held that such pumping device would be violative of, and is prohibited by, that state's (California) labeling requirements. (See their Ltr., dated July 8, 1959 to Mr. R. Rebuffo, District Agriculture Coordinator, Nevada State Department of Agriculture.)

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-83 Public Service Commission—A one-way radio paging service to be operated in the Reno-Sparks area, may properly be classified as a “public utility.”**

CARSON CITY, August 6, 1959

HONORABLE J.G. ALLARD, *Acting Chairman, Public Service Commission, State of Nevada, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. ALLARD: A business of Reno, Nevada, held in sole ownership by an individual, is listed under the provisions of the fictitious name statute (NRS 602.010 et seq.) with the County Clerk of Washoe County, as “Washoe Telephone Answering Service.” There is also another telephone answering service in the Reno area, under the name of “Telephone Answering Service of Reno.” We are informed that the two business are competitive and are engaged in the type of business as indicated by their names. The Washoe Telephone Answering Service has made application to the Public Service Commission of Nevada for a certificate of public convenience and necessity to furnish one-way, radio paging service in the Reno-Sparks area. The service applied for is a public communications service for hire from the base station to miniature pocket receivers in the possession of the subscribers, or to mobile receivers installed in vehicles of subscribers. The applicant justifies the granting of a certificate because of the need among professional and business people—lawyers, doctors, real estate and insurance men, repair services, etc.—for a means of notification when they are needed, although they are not available by telephone.

We understand that the service would be limited to the Reno-Sparks area, and that although the effective range of the station might extend across the state line into California, the Federal Communications Commission is not concerned with this aspect by reason of the fact, as a practical matter, that the subscribers for the service would be residents of that area.

If licensed, the applicant would operate as a common carrier, under advice directed to the Nevada commission by the Federal Communications Commission of July 10, 1959, which advice in part reads as follows:

This applicant holds the reference station license to operate a one-way signaling facility in the Domestic Public Land Mobile Radio Service, governed by Part 21 of our rules, which rules require that station KOH270 be operated as a common carrier facility and, as such, is obligated to furnish service, in accordance with legally applicable tariffs, to all persons who make a reasonable request therefor.

#### QUESTION

May such a service as above outlined, be classified as a public utility?

#### CONCLUSION

We are of the opinion that the one-way radio paging service, alone, may be classified as a public utility, that a certificate of public convenience and necessity may issue to the individual owner, doing business under the name Washoe Telephone Answering Service, as to this service, not to include the telephone answering service.

#### ANALYSIS

We observe at the outset that the F.C.C. officials apparently believed that the certificate could issue to the applicant to operate the service as a common carrier and subject to all of the burdens of being so classified as a public utility, common carrier.

We first concern ourselves with the question of whether or not the business contemplated—one-way radio paging service—is of a public character. In short, is it impressed with a public interest? We quote from 73 C.J.S. p. 991, under the title “Public Utilities,” as follows:

Accordingly, whether the operator of a given business or enterprise is a public utility depends upon whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily depending upon the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

Applying the above test, we are of the opinion that the service and facilities that are offered by the applicant may be classified as “impressed with a public interest.”

We understand that the “Telephone Answering Service of Reno” does not offer or contemplate to offer a service of the kind here under consideration, namely, one-way radio paging service. Our next concern then is whether or not it is within the power of the commission to classify the applicant, and this service, as a public utility, and to issue the certificate to the applicant, doing business under the fictitious name, and as to this one service, despite the fact that the applicant will continue in the telephone answering service, which would not be classified as a public utility. In other words, may the certificate issue for the radio paging service, to the applicant, doing business under the fictitious name, despite the fact that such would not be the sole business in which the applicant would be engaged? In brief, may the certificate be so limited?

NRS 704.370 provides the following:

The commission shall have the power, after hearing, to issue or refuse such certificate of public convenience, or to issue it for the construction only of the contemplated line, plant or systems, or extension thereof, *and may attach thereto such terms and conditions* as, in its judgment, the public convenience and necessity may require. (Italics supplied.)

We are therefore of the opinion that terms and conditions may be attached in the certificate if issued, and that the fact that it could not issue as to telephone answering service, will not prevent it from issuing as to the radio paging service.

Finally, does the fact that this radio paging service is owned by an individual, rather than a corporation, preclude and prevent it from being classified as a public utility, and thus prevent the issuance of the certificate of public convenience and necessity? We are of the opinion that it does not, for as defined in NRS 704.020, the term "public utility" embraces private or sole ownership. In part this section provides as follows:

1. As used in this chapter, "public utility" shall mean and embrace:
  - (d) Radio or broadcasting instrumentalities and airship common carriers.
3. The provisions of this chapter and the term "public utility" shall apply to:
  - (a) The transportation of passengers and property and the transmission or receipt of messages, intelligence or entertainment, between points within the state.

NRS 704.020 1.(a) mentions a number of legal entities, including "individuals," indicating that a business may be classified as a public utility, even though individually owned.

For the reasons heretofore given, and no other objections occurring to us, which would cast any doubt upon the authority to issue the certificate, we are clearly of the opinion that the certificate should issue, to the individual applicant, doing business as aforesaid, and for the limited purpose, and within the limited scope heretofore mentioned.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-84 University of Nevada—Registrar's Office. Effect of employment in military and civil service of United States upon residence, as required for admission to University of Nevada, construed. Burden of proof as to such residence found to be insufficient, on the basis of facts submitted.**

CARSON CITY, August 10, 1959

MR. C.E. BYRD, *Registrar, University of Nevada, Reno, Nevada*

STATEMENT OF FACTS

DEAR MR. BYRD: You have requested our opinion and advice as regards residence requirements for admission to the University of Nevada, specific reference being made to the nature and extend of proof thereof, as affected by employment in the military or civil service of the United States.

On the basis of the documents submitted to us, it appears that an applicant for admission to the University has, himself, never resided in Nevada. Applicant therefore

seeks to qualify, and secure the benefit of authorized allowance in tuition charges, as provided by law to bona fide residents of the State of Nevada (NRS 396.540), on the basis of his father's claimed residence in this state.

Applicant's father submits the following statements in the foregoing connection: That he established residence in Reno, Nevada, in 1927, remaining in Nevada until 1935, at which time he entered upon United States military service; that he declared and maintained Nevada as his legal residence, paying poll taxes, voting therein, and refraining from establishment of residence elsewhere, until his retirement from said military service on October 1, 1956, because of physical disability. Further, that he was immediately employed in the civil service of the United States, which employment presently requires maintenance of offices, and performance of duties, both in the State of Michigan and in Washington, D.C., with presumed residence in both such localities, at least for an indefinite future period, since he is subject to transfer anywhere in the United States at any time. Finally, it is claimed that legal residence has not been established, either in Michigan, or anywhere else.

Information secured from other sources indicates no registration in Nevada for voting purposes, since 1953, on the part of applicant's father.

#### QUESTIONS

1. What constitutes "bona fide" residence for purposes of admission to the University of Nevada, as contained in NRS 396.540?
2. How does absence from the state because of employment in the military or civil service of the United States affect "bona fide" residence, as prescribed for admission to the University of Reno?
3. Has applicant submitted sufficient and satisfactory evidence of "bona fide residence," as prescribed by NRS 396.540, to entitle him to admission to the University of Nevada, as a resident of this state?

#### CONCLUSIONS

Question No. 1: The actual establishment or taking up of a place of abode by a person, with intention of there remaining permanently or for an indefinite time, then and there not expressly determined, is deemed to constitute "bona fide residence." (A.G.O. 858, January 27, 1950; A.G.O. 321, October 23, 1928; A.G.O. 9 to University of Nevada, February 18, 1959.) Presumptively, at least six months residence, prior to matriculation, is required. (See NRS 396.540, subsection 1(b).)

Question No. 2: "No person shall be deemed to have gained or lost a residence:

1. By reason of his presence or absence while employed in the military, naval or civil service of the United States or of the State of Nevada \* \* \*" (NRS 292.080: While this statutory provision is specifically applicable to the right of suffrage, it is, undoubtedly, equally valid for other purposes.)

Question No. 3: No.

#### ANALYSIS

It is believed that the conclusions and references hereinbefore set forth suffice as regards our opinion and advice in questions Nos. 1 and 2. Some amplification would appear to be necessary, however, as regards the conclusion stated for question No. 3.

Preliminarily, it should be noted that "residence" is variously defined by law for different purposes. Thus:

NRS 292.080 Legal residence; right of suffrage. The legal residence of a person with reference to his right of suffrage is that place where he shall

have been actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed by him. Should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence shall not be considered in determining the fact of such residence. (See also NRS 10.101 Legal residence; NRS 281.050 Legal residence: Eligibility to office.)

NRS 292.090 (as here pertinent) has been quoted above in our conclusion, as regards the effect of employment in the military or civil service of the United States or of the State of Nevada on such right of suffrage.

As defined in connection with Property Taxes, "resident" or "bona fide resident" means any person who has established a residence in the State of Nevada, and has actually resided in this state for at least 6 months. (NRS 361.015, 360.040.)

For Poll Tax purposes, any person shall be deemed to be a resident of this state who shall reside in this state or who shall be employed therein upon any public or private works for a period exceeding 10 days. (NRS 363.010.)

We are of the opinion that "bona fide residence," as prescribed for admission to the University of Nevada, requires at least six months residence prior to matriculation. (See NRS 396.540, subsection 1(b).)

We also believe that it is proper and necessary to evaluate the facts, as herein submitted and above stated, in the light of the *intention* of applicant's father, as regards his, the father's residence, and the effect of his employment in the military and civil service of the United States in connection with same. (Italics supplied.)

In this regard, there are certain general legal presumptions which become relevant. One such presumption is:

If a person having a fixed and permanent home in this state break up such home and remove to another state, territory or foreign country, the intent to abandon his residence in this state shall be presumed, and the burden shall be upon him to prove the contrary. (NRS 292.120, subsection 1.)

Applied to the factual situation here presented, we next consider specifically, whether such burden has been satisfactorily sustained. While employment in the military and civil service of the United States on the part of applicant's father would, as we have already noted, operate so as to effect no gain or loss of residence, the long period of time involved (1935-1959), lack of more definite information as to the period of time that intervened between retirement from military service and employment in the civil service of the United States, and the further absence of any evidence that applicant's father affirmatively took any action indicating an intention to preserve legal residence in Nevada, substantially indicate an intention to abandon such Nevada residence. In this connection, the alleged established failure on his part to register for voting purposes since at least 1953 must be deemed significant and determinative, in the absence of other proof to the contrary.

In our considered opinion, therefore, the burden imposed by the legal presumption to prove that there was no intention on the part of applicant's father to abandon his Nevada residence, has not been sufficiently or satisfactorily sustained on the basis of the facts presented herein.

Consequently, since, admittedly, applicant himself cannot establish Nevada residence, and proof of such residence through his father is also insufficient, we conclude that any admission of applicant to the University of Nevada, as a resident of this state, would be unwarranted and unauthorized.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-85 National Guard—Nevada Army. It is within the power of the Nevada Army National Guard to contract with the United States National Guard Bureau, for the joint utilization of Nevada Army National Guard armories located in Nevada.**

CARSON CITY, August 21, 1959

JACK LA GRANGE, JR., *Brig. Gen., ANG, The Adjutant General's Office, Carson City, Nevada*

STATEMENT OF FACTS

DEAR GENERAL LA GRANGE: Under date of July 28, 1959, the Departments of the Army and the Air Force, National Guard Bureau, Washington 25, D.C., have directed a communication to all Adjutants General to all states, Hawaii, Puerto Rico and the District of Columbia, upon the subject "Joint Utilization of Army National Guard Facilities." The communication discusses the recognized objections to joint utilization and the federal law encouraging such utilization, as hereinafter more particularly set out, and asks that an official opinion from the chief legal officer of the state be obtained as to whether or not there are legal impediments to an agreement in writing between the United States and the state, providing for and regulating the joint use of such facilities. You have delivered this letter to us for our study, together with a form circular from Honorable C.W. Wilson, Secretary of Defense, dated March 13, 1956, numbered 1225.2, upon the subject matter "Policies Governing the Contribution of Federal Funds to the States Under the National Defense Facilities Act of 1950, as Amended."

QUESTION

Under Nevada law is there any valid objection to the joint utilization of the Nevada Army National Guard Facilities, by the Army National Guard and a branch or branches of the Armed Forces of the United States?

CONCLUSION

We have come to the conclusion that there is no valid objection to such joint utilization of the Nevada Army National Guard Facilities.

ANALYSIS

In the circular from the Department of Defense, heretofore mentioned, the law is cited and it is pointed out, that under federal law sums may be advanced by the United States to the states to expand, rehabilitate or convert facilities owned by the states for such joint utilization. This will be more fully discussed presently.

In the letter of July 28, 1959, heretofore mentioned, it is stated that in the past the states have advanced some or all of the following reasons in favor of unilateral construction or occupancy:

(a) Existing facilities, fully state provided or constructed, are incapable of expansion buildingwise and/or the site is restrictive in size, precluding expansion for additional reserve utilization.

(b) State appropriations are restricted for "State Department uses only" and cannot be used where other than state agencies benefit.

(c) No permissive legislation exists for the State Adjutant General (or other state official) entering into a joint utilization agreement.

(d) Restrictive clause in site transfer to the State by donor, limiting use "for National Guard purposes" which would preclude a joint utilization agreement.

(e) Statutes require ownership of land by the State (or subdivision thereof) as a requisite to expenditure of state (or subdivision thereof) funds for construction thereon. This differs from federal provision of a longterm lease-hold interest as well as ownership permitting expenditure of federal funds for construction.

(f) State does not consider joint utilization practicable.

The foregoing reasons, then, having been advanced by different states, territories or district, in favor of unilateral construction or occupancy, of such facilities, under the laws and factual situations of the many respective states, or other political entities, we shall consider separately the several reasons as applied to this state, to determine if any have force as a valid objection here.

U.S.C.A. Title 10, Sections 1 to 3000, contains Ch. 133, entitled "Facilities for Reserve Components," Sections 2231 to 2238. Briefly these sections provide for the acquisition or rehabilitation for joint use of facilities by the reserve components of the Armed Forces looking to the greatest of efficiency and economy, and provide for advancing of sums by the United States to the states for such purposes, through the office of the Secretary of Defense, who is given discretion and latitude as to the placing of such sums and authorizing of such expenditures. Although it is true that the Army National Guard is a state agency in normal times, it is also true that it is potentially an agency of the United States, for, it will be remembered that it may be called into federal service in the event of emergency. NRS 412.050. (A.G. Opinion No. 357, June 21, 1954.)

We now consider the objections in the order heretofore set out and as formerly designated.

(a) It may be that in certain of the states of large population and very restricted area one or very few armories have been provided, and that the space problem for expansion is or would be a very real one. We are informed that there are a number of armories in Nevada, and without laboring the point, space for expansion, at least as to some of these facilities, could not be considered to be a serious problem. We are not short as to space for expansion, at least as to some of these armories.

(b) Here we consider legal impediments. Are there constitutional or statutory provisions to the effect that appropriations by the legislature are restricted for "State Department uses only?" We have searched the constitution and have found no such provision or limitation. The constitution has two references to appropriations. Neither has a bearing here. See Art. I, Sec. 11, and Art. IV, Sec. 19. Respecting legislation so providing, we have found no such provision, in fact, there are many acts which violate such a concept. Such an objection appears not valid under the constitution and laws of this state.

(c) Under this objection, sometimes advanced, we are concerned with the question of whether or not there is authority by statutory enactment or reasonable implication for the state Adjutant General or other state official to enter into such a joint utilization agreement.

Under the provisions of NRS 412.035, the Governor is designated the Commander in Chief of the Nevada National Guard. NRS 412.155 provides the following:

The adjutant general shall perform such duties as are prescribed in this chapter and such other duties consistent with the regulations and customs of the United States Army and the United States Navy as may be prescribed by the commander in chief. All the duties of the adjutant general shall be performed under the direction of the commander in chief.

NRS 412.850, in part, provides as follows:

1. The adjutant general shall have control of: (a) All armories and arsenals built by the state or which may come into the possession of the state.  
(b) \* \* \*.
2. Under direction of the governor, the adjutant general shall make and enforce regulations for the government and control of such armories, arsenals and buildings.

Under the foregoing authorities we entertain no doubt but that there is statutory authority for the adjutant general under the direction of the governor to make regulations respecting armories, including the joint utilization thereof, and may contract to this end with the United States.

Under Chapter 277 NRS entitled "Cooperative Agreements," such authority is clearly given, for the formation of such a contract as here contemplated, between agencies of government. Under NRS 277.050, such contracts between the United States and agencies of state government are contemplated and authorized.

(d) Here we consider whether or not there are restrictive clauses in the conveyances to the State of Nevada, either as a donation or by purchase of such site. As inferred the State does not have merely one site and one armory, but is in possession of a number of them. There are, therefore, a number of sites by a number of conveyances, and without checking out the title as to each, we believe it to be a virtual impossibility that there might be in existence such a restrictive clause as to all of such building plots or sites. We, therefore, conclude that subdivision (d), above, would not preclude such an agreement between agents of the state and national governments.

(e) Here we are concerned with the question of whether or not there is a requisite to the expenditure of state funds for construction upon lands that those lands be held by the State in fee. Under federal law it is said that a long-term leasehold interest by the government will permit the expenditure of federal funds upon such construction.

This point which perhaps is formidable under the laws of some of the states, we feel, has no weight here, for insofar as new construction is concerned, lands in fee are available, and although this appears to be more than the requirement under federal laws and regulations, the federal officials could never object to such fact of the acquisition in fee for the sites or armories to be constructed for joint use.

(f) Here we are concerned with whether or not joint utilization of armories are practicable. This is a policy matter and in no respect a legal matter. In such matters of policy, the adjutant general under the direction of the governor will determine as to specific armories, whether or not joint utilization is practicable. Such determination will precede the entry into a contract for joint utilization. But such determination has no effect upon the question of power and authority to enter into such contract. The power exists and having so determined the interest and authority of this department ends.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-86 Nevada School of Industry—1. District Courts, properly exercising jurisdiction over juveniles under existing law, retain same until juvenile attains 21 years of age. Valid orders entered in Juvenile proceedings by such courts must be complied with until same are vacated, modified, or are otherwise rendered ineffective through operation of law. Executive or legislative encroachment on judicial powers and jurisdiction held violative of constitutional prohibition. 2. Existing law prohibits use of school funds in connection with commitment and placement of juveniles by courts other than under actual and complete jurisdiction and control of School of Industry, except as expressly provided by law.**

CARSON CITY, August 25, 1959

MR. OLIVER D. FORSTERER, *Superintendent, Nevada School of Industry, Box 469, Elko Nevada*

STATEMENT OF FACTS

—A—

DEAR MR. FORSTERER: In the year 1954, a District Court of the State of Nevada entered an order of commitment of a boy, presumably retarded, to the Nevada School of Industry, said court order, however, additionally providing and directing that said boy be placed in the Seeman School, a private institution for seriously retarded children, located in El Monte, California, the cost and expense of such placement to be paid by the Nevada School of Industry. This boy is now over 19 years of age, and is still at the Seeman School. Payments for the boy's maintenance at said institution from the date of commitment have been, and are currently being, made by the Nevada School of Industry.

Section 22 of Chapter 421, Nevada Statutes of 1959, an Act amending Chapter 210 NRS, which governs the Nevada School of Industry, provides:

Inmates shall be discharged from the school upon reaching the age of 18 years.

The Comptroller's Office has directed your attention to NRS 62.230, relating to "Compensation for care of children; charge upon county or parent," as apparently applicable in the circumstances. This section corresponds to NRS 210.180, as regards the matter before us.

Finally, we are given to understand that in the absence of sufficient facts concerning the present condition or well-being of the boy in question, said District Court feels justified in refusing your request for discharge of the boy from the Seeman School.

—B—

The Chief Probation Officer of Clark County, Nevada, has indicated to you that it is desired to have three (3) boys committed to the Nevada School of Industry, but instead of sending them to the school, it is apparently also desired to have them placed in private agencies or institutions, two of the said boys at the Nevada Youth Ranch, Fallon, Nevada, and the third boy in a foster home in Las Vegas, Nevada. The costs or charges involved in said desired placements would be \$75 per month per boy at the Nevada Youth Ranch, and \$50 per month for the boy in the foster home.

## QUESTIONS

1. May the Nevada School of Industry legally pay for the care and maintenance of a person over 19 years of age placed in a private institution located outside the State of Nevada pursuant to a court order committing said person to the Nevada School of Industry, but additionally directing the placement in the private institution, the cost thereof, nevertheless, to be the obligation of, and paid by, the Nevada School of Industry?

2. Has the Nevada School of Industry the legal power and authority to make payment for the cost entailed in the care and maintenance of juveniles, who would be committed to the school by district court order, which would additionally direct their actual placement, care and maintenance with a private agency, or in a foster home?

## CONCLUSIONS

To question No. 1: Yes.

To question No. 2: No.

## ANALYSIS

### *Question No. 1.*

As indicated by the district judge who made the order of commitment in the factual situation hereinbefore outlined, there appears to be a definite and direct conflict between legislative or executive policy and judicial action, in said case. Such conflict involves a substantial constitutional question, inasmuch as the resolution and answer thereto must be predicated upon, and justified by, reference to the legal doctrine of Distribution of Powers and Exercise of Judicial Powers. (Art. III, § 1, and Art. VI, Nev. Const.)

Art. III, § 1, Nevada Constitution, provides as follows:

The powers of the government of the State of Nevada shall be divided into three separate departments—the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Article VI, Nevada Constitution, generally, relates to the vesting of the judicial power of the State in the Supreme Court, District Courts, and Justices of the Peace, and its exercise by said courts or other courts created by the Legislature.

NRS Chapter 62 (Juvenile Court Act), and specifically NRS 62.040, expressly vests *exclusive* original jurisdiction over juvenile matters in the District Courts of the State.

Moreover, NRS 62.070, “Retention of jurisdiction by court,” expressly provides as follows:

When jurisdiction shall have been obtained by the court in the case of any child, *the court shall retain jurisdiction of the child until it reaches the age of 21 years.* (Italics supplied.)

From the foregoing applicable provisions of the Constitution, as well as existing statutory law, we conclude, therefore, that if Chapter 421, § 22 is so construed as to operate to divest a district court of its constitutionally vested powers and authority, said provision would be invalid on constitutional grounds. The district court legally has and retains jurisdiction in the case until the child there involved reaches the age of *21 years*, unless or until said court’s order of commitment is vacated or otherwise modified or changed by the court.

Until either of these events occur, there must be compliance with said court order. In more specific language, the Nevada School of Industry must make payments as directed in said court order.

In view of the indicated mental condition of the boy at the time of the commitment order, it would seem that he should, more appropriately, have been placed at the Nevada State Hospital, which institution, if lacking in facilities, could have made the out-of-state placement.

Chapter 421, § 13, subsection 3, 1959 Statutes of Nevada (approved April 6, 1959), as regards "sexual psychopaths, defectives or psychopathic delinquents," *presently authorizes* a court, upon written request of the school's superintendent, to enter an order committing a child to an appropriate institution outside the State of Nevada *approved by the Advisory Board of the School*. In any such case, the "committing court may order the expense of such support and treatment be paid in whole or in part by the parents, guardian or other person liable for the support and maintenance of such a person in accordance with the provisions of NRS 210.180. *In the absence of such an order*, the expense of such support and treatment shall be paid by the school." (Italics supplied.)

By way of practical suggestion, we advise the following:

1. That sufficient relevant information be secured concerning the present condition of the boy from the authorities of the Seeman School, and, if warranted, based upon said information, that petition be made to said district court for vacating of the order of commitment, and discharge of said boy from the Seeman School to the custody of his family; *or*

2. That petition be made to said district court for an order vacating, modifying, or otherwise amending the previous commitment order so as to require the parents or legal guardian of said boy to make payment to the Seeman School of future charges for his care and maintenance.

3. If the mental condition of the boy is presently such that continued hospitalization is needed, petition might be made to the district court for an order amending the previous order so as to commit the boy at this time to the Nevada State Hospital.

*Question No. 2.*

Apart from the exceptions above noted in Chapter 421, § 13, subsection 3, 1959 Statutes of Nevada ("sexual psychopaths, defectives, or psychopathic delinquents"), neither Chapter 210 of the Nevada Revised Statutes, nor any other provisions of applicable law, would appear to authorize court commitment of juveniles under the Juvenile Act (NRS Chapter 62) to the Nevada School of Industry, with actual placement, and care and maintenance elsewhere.

Use of funds appropriated for, and to, the Nevada School of Industry, are primarily intended for, and restricted, as regards their application, to such purposes as relate to proper discharge of the School's responsibilities to inmates actually and physically under the School's direct jurisdiction and control. Any other application and use of such moneys must be based upon *express* sanction of law, and the exceptions above noted are the only ones that we find in presently existing statutory provisions.

A district court undoubtedly has the power to commit a juvenile for placement with an *authorized* public or private agency, other than the Nevada School of Industry, or even in a foster home, *providing*, however, that *the private agency is one that has been approved by the State Welfare Department of Nevada*, or, if said private agency is located in another state, approved by the "analogous department of that state." (See NRS 62.200 subsection 1(b).) However, apart from the exceptions expressly noted in Chapter 421, § 13, subsection 3, 1959 Statutes of Nevada, when a juvenile is not actually and physically placed under the direct jurisdiction and control of the Nevada School of Industry, the provisions of NRS 62.230, 210.180 should govern as to the manner in which the costs incident to such placement of a juvenile shall be secured and paid.

The present status of the Nevada Youth Ranch, as regards its approval by the State Welfare Department for placement of juveniles under district court commitment orders should be determined.

As regards the placement of the third boy in a foster home, assistance in the selection of a proper foster home may be available from the State Welfare Department also. The district court, of course, is empowered and authorized to enter an order vesting custody of a child in the State Welfare Department, in conjunction with which agency the Probation Officer of Clark County could exercise joint jurisdiction and control in said particular case.

In our considered opinion, the facts as submitted to us and as governed by present law would not authorize either the indicated placement of the three boys, or payment therefor by the Nevada School of Industry.

We trust that the foregoing furnishes some clarification on the questions you have submitted to us, and that our answers thereto may prove of some assistance.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-87 Banks and Banking—Savings and Loan Associations—  
Insurance of accounts of savings and loan association by Federal Savings and  
Loan Insurance Corporation—Failure of savings and loan association to  
authorize eligibility examination for federal insurance of its accounts by Federal  
Home Loan Bank constitutes grounds for institution of revocation of license  
proceedings.**

CARSON CITY, August 26, 1959

MR. GRANT L. ROBISON, *Superintendent of Banks, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. ROBISON: Nevada Revised Statutes 673.321 reads as follows:

1. Building and loan associations or savings and loan associations presently licensed and operating under the laws of the State of Nevada shall, on or before January 1, 1959, apply to the Federal Savings and Loan Insurance Corporation for insurance on accounts carried with such building and loan associations and savings and loan associations, but should such insurance be denied for any reason the association will diligently attempt to remedy the causes for such denial, and within a period not to exceed 6 months from the date of such denial, again make application for insurance of accounts to the Federal Savings and Loan Insurance Corporation.
2. The denial or refusal to grant such insurance shall not forfeit any rights that an association may now have, or may hereafter acquire, under the laws of this state.
3. Failure to make such application in the time required shall constitute grounds for revocation of such association's license as provided in this chapter.

A savings and loan association operating in Nevada since 1952 notified the State Banking Department, by letter, that it had applied on December 30, 1958, to the Federal

Savings and Loan Insurance Corporation for the insurance of its accounts. You have been informed by a vice president of the Federal Home Loan Bank of San Francisco that the said savings and loan association has failed to authorize examiners of the Federal Home Loan Bank to conduct an eligibility examination, such examination being a condition precedent to the determination of the eligibility of the said savings and loan association for the insurance of its account.

#### QUESTIONS

1. In view of the failure of the said savings and loan association to make possible an eligibility examination, has the said savings and loan association in fact applied to the Federal Savings and Loan Insurance Corporation for insurance of its accounts on or before January 1, 1959, within the meaning of NRS 673.321?
2. If the answer to question No. 1 is in the negative, is the license of the said savings and loan association subject to revocation as provided in sec. 3 of NRS 673.321?

#### CONCLUSIONS

1. The said savings and loan association has not in fact applied to the Federal Savings and Loan Insurance Corporation for the insurance of its accounts within the meaning of NRS 673.321.
2. The failure of the said savings and loan association to apply to the Federal Savings and Loan Insurance Corporation for insurance of its accounts constitutes grounds for revocation of the association's license as provided in sec. 3 of NRS 673.321.

#### ANALYSIS

In our view, it was the intention of the Legislature in requiring savings and loan associations, whose accounts are not federally insured, to apply for such insurance before January 1, 1959, to impose upon such savings and loan associations the duty of fully complying with all conditions of the Federal Savings and Loan Insurance Corporation, or its agents and employees, reasonably required to determine the eligibility of such savings and loan association for the insurance of its accounts.

If the said savings and loan association has not made possible the eligibility examination, revocation of license proceedings might be instituted as provided in Chapter 673 NRS.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-88 Public Utilities—Public Service Commission—Nonprofit cooperative corporation subject to county franchise requirements of NRS 709.050-709.170, but not subject to jurisdiction of Public Service Commission.**

CARSON CITY, August 28, 1959

HONORABLE RALPH L. DENTON, *District Attorney, Esmeralda County, Goldfield, Nevada*

#### STATEMENT OF FACTS

DEAR MR. DENTON: The White Mountain Power Cooperative, Inc., a nonprofit cooperative corporation, has made application to Esmeralda County Commissioners,

under the provisions of Nevada Revised Statutes 709.050-709.170, for a franchise in Fish Lake Valley, Esmeralda County, Nevada.

NRS 709.160 reads as follows:

Nothing contained in NRS 709.050 to 709.170, inclusive, shall be so construed as to deprive the public service commission of Nevada of full power to regulate and control, as prescribed by law, the service, practices, regulations and charges, subject to the maximum charges fixed by the board of county commissioners upon granting the franchise, and subject also to the provisions of NRS 709.110, of all public utilities receiving franchises as provided in NRS 709.050 to 709.170, inclusive.

#### QUESTION

Has the White Mountain Power Cooperative, Inc., a nonprofit cooperative corporation, by the filing of its application for a franchise with the County Commissioners of Esmeralda County, under the provisions of NRS 709.050-709.170, made itself subject to the jurisdiction of the Public Service Commission of Nevada?

#### CONCLUSION

The Articles of Incorporation of the White Mountain Power Cooperative, Inc., reflect that it is a nonprofit cooperative corporation authorized to generate, manufacture, purchase, acquire and accumulate, electric energy for its members only, and to transmit, distribute, furnish, sell and dispose, of such electric energy to its members only. Therefore, the said corporation is not subject to the jurisdiction of the Public Service Commission.

#### ANALYSIS

Attorney General's Opinion No. 436, of March 26, 1947, held that a nonprofit cooperative corporation was not a public utility and hence the Public Service Commission of Nevada had no jurisdiction over its operation. With this opinion, we concur.

NRS 709.160 does not, in our opinion, enlarge upon the jurisdiction of the Public Service Commission. This section applies only when the Public Service Commission would otherwise have jurisdiction.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-89 Printing, State Department of. Purchasing, State Department of. Economic Development, State Department of.—Where State Printer is not equipped to do work required by Department of Economic Development, he shall so inform director, who may then order in a commercial plant. Department of Purchasing has no jurisdiction.**

CARSON CITY, September 8, 1959

HONORABLE JACK MCCARTHY, *State Printer, Carson City, Nevada*

STATEMENT OF FACTS

Dear Mr. McCarthy: The Department of Economic Development has tentatively placed an order for the printing of 250,000 copies of a 32-page booklet in accordance with the powers of the director of the department. See Chapter 322, Stats. 1955, sec. 12, subdivision 10. NRS 231.120, subdivision 10. The cost of this booklet will be between \$20,000 and \$35,000. The State Printing Office is not equipped to do this work in a satisfactory manner, particularly in the quantity involved.

#### QUESTION

Does the State Printer have the authority to place this order directly with a qualified printing firm without consultation with or approval of the State Purchasing Department?

#### CONCLUSION

We are of the opinion that the State Purchasing Department is not involved in this problem and need not be consulted. The State Printer, however, does not have the authority, in our opinion, to place the order with a commercial printer. He may, under these circumstances, inform the Department of Economic Development of the inability of his department to properly take care of an order of this size, and as a consequence, shall authorize that department to have the work done in a commercial printing establishment.

#### ANALYSIS

In arriving at the conclusion hereinabove expressed, we are first concerned with the question of what authority the State Department of Purchasing has, in a case such as this, if any. The present statute (NRS 344.160) is an amendment of 1951. See: Chapter 140, Stats. 1951, sec. 9. The State Purchasing Act (NRS Chapter 333) was also an Act of 1951. See Chapter 333, Stats. 1951. An earlier statute, respecting the State Printing Office had authorized the board of printing control to inform a state officer, or department, of the inability of the State Printing Office to properly fill an order, and to authorize that the order be let to a commercial printing establishment. See sec. 9, Chapter 204, Stats. 1923. In this respect the statute of 1951 amended the statute of 1923, only in that the consent that the work go to a commercial plant was authorized to be given by the Superintendent of State Printing. An examination of the State Purchasing Act, as originally enacted, or as modified by amendment, does not reveal or indicate a legislative intent to invest the Director of State Purchasing with any authority respecting the placing of an order for printing. Both matters (state printing and purchasing) were considered by the same legislative body, and it therefore may be reasonably inferred that since one provision is specific (manner of letting a printing order) and the other is general (purchasing of supplies for state offices and departments) it was the intent of the Legislature that state printing be authorized in the manner that was provided, without any authority in such matters being conferred upon the Purchasing Department. We so construe the statutes.

Having determined that the Department of State Purchasing has no jurisdiction or authority in the premises, we are now concerned with respective power and authority of the two state officers, viz, the Director of the Department of Economic Development and the Superintendent of State Printing.

The Department of Economic Development was created by Chapter 322, Stats. 1955. Under sec. 12 thereof, subdivision 10, the department is authorized and directed to "prepare and publish pamphlets and other descriptive material designed to carry out and effectuate the purposes of this act." (NRS 231.120)

Respecting the powers of the Superintendent of State Printing, NRS 344.040, subdivision 1, provides the following:

1. The superintendent of state printing shall have the entire charge and superintendence of the state printing and all matters pertaining to his office.

NRS 344.160, subdivision 1, provides the following:

1. Should any state officer, commissioner, trustee or superintendent consider that the requirements of his office, department or institution demand stationery, blanks, forms or work of any character which cannot be performed in the state printing office, and if it appear that, through lack of necessary machinery or appliances, the work cannot be done satisfactorily in the state printing office, *the superintendent of state printing shall authorize the state officer, commissioner, trustee or superintendent to have the work performed in a commercial printing establishment*, the cost of the same to be paid out of the contingent fund provided for the expense of state officers or out of the fund provided for the support of the commission or institution requiring the work, as the case may be. (Italics supplied.)

Under the provisions of NRS 344.040, subdivision 1, that have been quoted hereinabove, the Superintendent of State Printing shall have the entire charge of the work of his plant and of state printing. This provision is general.

Under the provisions of NRS 344.160, subdivision 1, quoted hereinabove, when for any of the reasons given, it shall appear to the Superintendent of State Printing that the contemplated work cannot be done in a satisfactory manner in the state printing plant, the Superintendent shall authorize that the work be done in a commercial establishment. This provision is specific. It designates what the Superintendent shall do and does not authorize him to place the order. The specific provision controls.

In the above case then, the power and authority of the Superintendent of State Printing is clear. He is empowered and directed to notify the Director of the Department of Economic Development (we believe in writing), that for the reasons stated herein, he is not able in the state printing plant to do a satisfactory job of the brochure, and that therefore the Director of the Department of Economic Development is authorized to have the work performed and done in a commercial printing establishment.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-90 Education, State Department of—Members of the State Board of Education may receive travel and subsistence allowance only in “attending meetings of the board.” NRS 385.050 construed.**

CARSON CITY, September 8, 1959

MR. DWIGHT F. DILTS, *Assistant Superintendent of Public Instruction, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. DILTS: NRS 385.050 provides the following:

1. The members of the state board of education shall receive no compensation for their services.

2. Members shall be allowed their traveling and subsistence expenses incurred *in attending meetings of the board* at the rate authorized by law. Claims for expenses shall be approved by the superintendent of public instruction and the state board of examiners, and shall be allowed and paid from funds provided by direct legislative appropriation from the general fund as other claims against the state are allowed and paid. (Italics supplied.)

#### QUESTION

May members of the State Board of Education receive travel and subsistence allowances in attending meetings other than meetings of the State Board of Education, which are deemed by the Board to be helpful in the discharge of their lawful duties?

#### CONCLUSION

We conclude in the negative.

#### ANALYSIS

NRS 385.040 makes provision for the regular and called meetings of the State Board of Education. NRS 385.050 then provides that although members of the State Board of Education shall receive no compensation for their services, there is an exception in that they may receive traveling and subsistence allowances in "attending meetings of the board." The right to receive travel and subsistence allowance is thus restricted and circumscribed. It being an exception to the principle that they serve gratis, must be strictly construed.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-91 Television Districts—Additional costs incurred by county assessor's office in collecting the assessment against the owners of television receivers within a television district formed under Chapter 317 NRS must be borne by the county and cannot be charged against the television district.**

CARSON CITY, September 9, 1959

HONORABLE ROSCOE H. WILKES, *District Attorney, Lincoln County, Pioche, Nevada*

#### STATEMENT OF FACTS

DEAR MR. WILKES: Pursuant to the provisions of Chapter 317, Nevada Revised Statutes, two television districts were established in Lincoln County, Nevada.

The Board of County Commissioners of Lincoln County made an assessment against each television receiver in the district in an amount estimated by the commissioners to be sufficient to finance the affairs of the district for fiscal year 1959-1960.

After the budget of the County Assessor was approved, and the Assessor commenced to collect the assessments against the owners of television receivers, it was discovered that the time and cost in making said collections were more than anticipated. The County Assessor proposed to solve the problem of the extra cost by billing the trustees of the district approximately \$60 to \$70 a month, and then increasing a deputy's salary this amount to compensate for overtime worked by that deputy in collecting the assessments. Numerous objections were raised with respect to the procedure outlined above. The Assessor thereupon submitted a request for an additional deputy, the payment of whom would require an emergency loan and budget revision.

#### QUESTIONS

1. May the County Assessor bill a television district for the additional costs incurred by the Assessor's Office in collecting assessments provided in Chapter 317 NRS?
2. May the trustees of a television district established pursuant to the provisions of Chapter 317 NRS expend the district's fund to pay for the additional accounting, billing and other bookkeeping costs incurred by the County Assessor in collecting the assessments against the television receivers located within the district?

#### CONCLUSIONS

1. A County Assessor cannot legally charge a television district established under the provisions of Chapter 317 NRS for additional costs incurred by his office in collecting the assessments provided in Chapter 317 NRS.
2. The trustees of a television district organized pursuant to the provisions of Chapter 317 NRS are not authorized by law to expend the district's funds to compensate an employee of the County Assessor's Office who performs the necessary billing and bookkeeping work entailed in collecting the assessments provided in said Chapter 317 NRS.

#### ANALYSIS

We have relied on two grounds to support our conclusion. The first of these concerns our interpretation of Chapter 317 NRS with reference to the manner of collecting the assessments provided in that chapter. The second concerns a discussion of the purposes for which the funds of a television district may be expended. Each of these grounds will be discussed in the order stated.

NRS 317.060 provides that the assessment against each television receiver shall be collected by the County Assessor in the same manner as taxes on unsecured personal property.

Taxes on unsecured personal property are collected by the Assessor immediately after the unsecured personal property has been assessed (NRS 361.505). Neither that statute nor any other statute, to our knowledge, permits a County Assessor to pass on to the taxpayer the cost incurred by the Assessor in making such collections. Such costs are a normal cost of governmental operation and must be borne and budgeted for in the same manner as other county expenses. The fact that Chapter 317 NRS provides for collecting assessments rather than taxes does not carry with it the inference the district must bear the cost of collection. If the Legislature had intended that the district should bear the cost of collection, we think it would have so provided.

Turning to the second ground upon which we rely, let us assume that County Assessor bills the district for the costs incurred in making the collection of those assessments. As we interpret Chapter 317 NRS, including the 1959 amendment thereto (Chapter 384), there is no legal authority for the trustees to expend the district's funds for that purpose.

Under NRS 317.060 the trustees annually certify to the County Commissioners the amount of money necessary to maintain the property of the district, and to pay the interest or principal on bonds issued for the purpose of raising sums needed for capital improvements. We interpret that language to limit the assessments to be made to that amount of money needed to maintain the district's property in the sense of physical maintenance and improvement. Therefore, the trustees could not certify to the County Commissioners that a certain amount of money is required by the district to pay the County Assessor for costs incurred by that office in making such collections. Such amounts would not be for the maintenance and operation of the district's property.

We concede that inequities could result from placing the burden of collecting the assessment on the county and not permitting the county to pass this additional cost to the district. If such inequities result, the answer lies in amending the statute.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-92 Nevada Olympic Games Commission may use Surplus of \$37,000 of the Sum of \$400,000 Appropriated to Assist in Financing Olympic Games at Squaw Valley, California, to Improve Facilities at Reno Ski Bowl on Slide Mountain to be Alternate Downhill Racing Site.**

CARSON CITY, September 9, 1959

MR. E.J. QUESTA, *Chairman, Nevada Olympic Games Commission, 206 North Virginia Street, Reno, Nevada*

STATEMENT OF FACTS

DEAR MR. QUESTA: Chapter 392, 1957 Statutes, created the Nevada Olympic Games Commission and appropriated \$200,000 to aid, support and give all possible assistance in the promotion, organization and staging of the 1960 Winter Olympic Games at Squaw Valley, California, in cooperation with the International Olympic Committee and California Olympic Commission.

The preamble to this Act stated that the Olympics would produce innumerable benefits to Nevada and that Nevada should pay a proportion of the costs of financing the Olympics.

By Chapter 426, 1959 Statutes, an additional \$200,000 was appropriated to the Nevada Olympic Games Commission for the same purposes.

You inform us that the Nevada Olympic Games Commission has expended a total sum of \$363,000 for the construction of the Nevada Olympic Center at Squaw Valley, California, and that there is on hand an unexpended balance of \$37,000.

You further inform us that the Reno Ski Bowl, located at Slide Mountain, Nevada, has been designated as the alternate downhill race site for the 1960 Winter Olympic Games. You are advised that there is an extremely good chance, because of weather and other conditions, that the alternate site will be used. The Organizing Committee, VIII Olympic Winter Games, a California nonprofit corporation established through the International Olympic Committee, has requested that everything possible be done at Reno Ski bowl to prepare the area for the possible great influx of contestants and spectators in the event that this downhill site is used. The Organizing Committee and California Olympic Commission, with their own funds, are now undertaking approximately \$40,000 in

minimum work at Reno Ski Bowl to prepare the hill for the event. None of their funds will be used for spectator facilities.

Your commission desires to spend the remaining \$37,000 on spectator facilities, sanitary improvements, limited housing for working personnel, Olympic Flag staffs, an appropriate plaque, necessary painting and decorating of present improvements at Slide Mountain and miscellaneous furnishings.

#### QUESTION

May the Nevada Olympic Games Commission spend the remaining \$37,000 at the Reno Ski Bowl location on Slide Mountain, Nevada, for the purposes described?

#### CONCLUSION

The Nevada Olympic Games Commission has authority to employ \$37,000 for the purposes described at the Reno Ski Bowl at Slide Mountain, Nevada.

#### ANALYSIS

In our opinion it was clearly the intention of the Legislature, both in the 1957 and in the 1959 Acts, that the Commission use the \$400,000 to aid, support and give all possible assistance to the promotion, organization and staging of the 1960 Winter Olympic Games at Squaw Valley, California.

Since it is your judgment and the judgment of the International Olympic Committee, the California Olympic Commission and the Organizing Committee, that the Reno Ski Bowl should be employed as an alternate downhill race site, we believe that the sum of \$37,000 may be expended for the purposes described. This, we think, is proper since the Reno Ski Bowl at Slide Mountain may very well become an integral part of the 1960 Olympic Games facilities. We believe the Legislature would look favorably upon this proposed project since there will be permanent improvements, the benefits of which will accrue to the people of our State.

We do not pass upon the constitutionality of the two appropriation Acts, Chapter 392, 1957 Statutes, and Chapter 426, 1959 Statutes.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-93 Physician—County and Health Officer—Hospitals—County. Statutory contractual term of appointment of County Physician and Health Officer may not be terminated by appointment of successor, even with additional burdens and responsibilities, in the absence of a legal reason for termination.**

CARSON CITY, September 9, 1959

HONORABLE A.D. DEMETRAS, *District Attorney, White Pine County, Ely, Nevada*

#### STATEMENT OF FACTS

DEAR MR. DEMETRAS: There is presently a physician in the employ of the county of White Pine who has been designated as County Physician and Health Officer. Under the provisions of NRS 439.290, the appointment of such an officer is by the Board of County

Commissioners. Under the provisions of NRS 450.180 the Board of Hospital Trustees of White Pine County proposes to appoint another physician. Presumably the consent and approval of the Board of County Commissioners would be obtained and the physician appointed by the hospital trustees would not only take over the duties at the hospital by virtue of his appointment by the hospital trustees, but would also be authorized to take over the duties of County Physician and Health Officer by order of the governing board of the county.

#### QUESTION

May the two boards, that is, County Commissioners and Hospital Trustees, acting conjunctively and cooperatively in the manner above recited, legally dismiss from service the incumbent County Physician and Health Officer?

#### CONCLUSION

We conclude that the County Physician and Health Officer of White Pine County may not be dismissed from service at this time in this manner.

#### ANALYSIS

In arriving at the conclusion above expressed, we assume that the incumbent County Physician and Health Officer will not voluntarily leave the office that he holds. We assume also that there is no reason sufficient in law for the Board of County Commissioners to terminate the contract and service of the County Physician and Health Officer.

Under the provisions of NRS 450.180 the Board of Hospital Trustees is authorized to employ a physician and to remove him at will. There is no provision that upon such employment or appointment the contract shall be for a designated period of time.

Under the provisions of NRS 439.290 the Board of County Commissioners is authorized to appoint a County Health Officer on or before January 1 following each general election, for a term of two years or until his successor is appointed and qualified.

The general election was conducted in Nevada in November 1958, and pursuant to the provisions of NRS 439.290, the incumbent County Physician and Health Officer was appointed by the Board of County Commissioners on or before January 1, 1959, for a term of two years. The provisions of the statute as regards the term of office of such appointee are mandatory, and it therefore is not important to determine whether or not the resolution of the Board of County Commissioners, upon making the appointment, recited that it was for a term of two years. For the appointment of the County Physician and Health Officer, made on or before January 1, 1959, was for a term of two years, even if it did not so recite.

Although we find no provisions in the statute to preclude one physician from holding both posts, in a proper case, it would not be possible for the two boards acting in conjunction to appoint such a physician when the appointment would constitute a breach of contract by reason of the mandatory provisions of the statute, on the part of the Board of County Commissioners. At the time that the contract of the County Physician and Health Officer expires and such officer comes up again for reappointment, an appointment of another physician, by both boards, as here contemplated, could legally be made.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-94 County Commissioners—County Commissioners  
authorized to conduct a bond election that the proceeds of such bond issue may  
be used to acquire a firehouse, may not use the proceeds otherwise.**

CARSON CITY, September 10, 1959

STATEMENT OF FACTS

DEAR MR. MOORE: The forty-ninth session of the Nevada Legislature (1959) enacted Chapter 72, which is a statute authorizing a bond election to be held in Storey County and if the vote is favorable to authorize the issuance of \$100,000 in negotiable general obligation bonds, the proceeds therefrom to be used by the board of county commissioners in constructing a firehouse and improvements incidental thereto. Section 1 of said act provides, in part, the following:

The board of county commissioners of Storey County, State of Nevada, is hereby authorized and empowered, in addition to the powers elsewhere conferred upon the board, to establish, construct, otherwise acquire, reconstruct, improve, extend or better, a firehouse, *and improvements incidental thereto*, to equip and furnish the same, to acquire a suitable site or grounds therefor, and to issue general obligation bonds therefor in not to exceed the aggregate principal amount of \$100,000. (Italics supplied.)

QUESTION

Assuming that the bond issue is authorized by an affirmative vote of the electorate of the county, as otherwise provided in the statute, would the board of county commissioners under the provisions of the statute be authorized to use a part of the proceeds from the sale of the bonds in making improvements of the water mains in Virginia City?

CONCLUSION

We are of the opinion that the statute must be strictly construed and is not broad enough to empower the board of county commissioners to use a part of the proceeds of the bond issue to make improvements in the water main in Virginia City.

ANALYSIS

Boards of county commissioners have only such powers as are conferred upon them by law, and powers reasonably inferred from the powers expressed. See *State v. McBride*, 31 Nev. 57; and *First National Bank of San Francisco v. Nye County*, 38 Nev. 123, 145 P. 932. The question arises, how far by this statute has the Legislature extended and increased the powers of the Board of County Commissioners of Storey County?

The Legislature has authorized the board to conduct a bond election, in order that the proceeds of the bond issue if authorized may be used by the board in constructing or otherwise acquiring a firehouse, and improvements incidental thereto. Presumably in a bond election, if conducted, the provisions of the statute will be called to the attention of the electorate. Those, in such a case, who vote for the bonds, will have in mind that the proceeds are to be used in strict compliance with the provisions of the statute. No discretion has been conferred upon the board to use such part, or any part, of the proceeds of the bond issue, as the board may elect, to improve the city water mains. Who can say

that if this had been written into the bill, that Assembly Bill 246 would have passed the legislative body? Suppose that the electorate of Storey County is hereafter informed as to the provisions of Chapter 72, Statutes 1959, and relying upon those provisions votes in a bond election as authorized in the statute in favor of the issuance and sale of bonds. Who can say that the vote would have been in favor of the issuance and sale of the bonds if the statute had provided for the use of the money in repairing or replacing of water mains in Virginia City? Or that their results would have been the same if the electorate had been informed of the plan of the commissioners to liberally construe the statute and use the money in part for the repair or replacement of water mains in Virginia City?

In brief, we conclude that this proposed use of the proceeds of the contemplated bond issue is not authorized, and that the board of county commissioners are not empowered to so expend any of the moneys so obtained. Water mains are not “improvements incidental” to a firehouse.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-95 Industrial Commission, Nevada. Constitutional Law—  
The Nevada Industrial Commission is an agency or instrumentality of the State  
government within the meaning of Section 8 of Article IV of the Constitution.**

CARSON CITY, September 28, 1959

HONORABLE GRANT SAWYER, *Governor of Nevada, Carson City, Nevada*

STATEMENT OF FACTS

DEAR GOVERNOR SAWYER: A present Assembly member of the Nevada State Legislature was first elected in 1956, and again in 1958. Having been sworn into office in January 1957, he remained in office during his first term until he succeeded himself by taking the oath of office for the second term on January 19, 1959. During the legislative session beginning in January 1957, the Legislature increased the salaries of members of the Nevada Industrial Commission. See Chapter 295, Statutes 1957, p. 447.

QUESTION

Is this individual now eligible for appointment to membership upon the Nevada Industrial Commission?

CONCLUSION

By reason of a constitutional limitation and provision, the question must be answered in the negative.

ANALYSIS

Section 1 of Article III of the Constitution of the State of Nevada provides the following:

The powers of government of the State of Nevada shall be divided into three separate departments—the legislative, the executive and the judicial;

and no person charged with the exercise of powers belonging to one of these departments shall exercise any functions appertaining to either of the others, except in cases herein expressly directed or permitted.

This gentleman is now a member of the legislative department of government. The Nevada Industrial Commission is a branch of the executive department of government. However, if there were no other impediment to the appointment, he could resign the one office and thus separate himself from the legislative department, after which he could accept an appointment to the executive department of government. See Attorney General Opinion No. 379, of April 30, 1958.

Section 8 of Article IV of the Constitution provides:

No senator or member of the assembly shall, during the term for which he shall have been elected, *nor for one year thereafter*, be appointed to any civil office of profit under this state which shall have been created, or the emoluments of which shall have been increased, during such term, except such office as may be filled by election by the people. (Italics supplied.)

Inasmuch as the Assemblyman was a member of the Legislature, by virtue of his election of November 1956, until he succeeded himself on January 19, 1959, and inasmuch as the Legislature of 1957 did increase the emoluments of the members of the Nevada Industrial Commission, the Assemblyman would not be eligible for appointment to the Commission, if no exception exists, until one year from January 19, 1959.

When we speak of an exception, we have in mind that it might be urged that the Nevada Industrial Commission is not an agency of the State, within the meaning of the prohibition contained in Section 8 of Article IV of the Constitution, inasmuch as it is not supported by ad valorem or other general taxation. The Nevada Industrial Commission is, however, an agency of the State Government for purposes of (1) obtaining immunity from ad valorem taxation upon its real property, as State owned, (2) control of the State Government in the appointment by its Governor of the Commissioners, (3) creation by the legislative body, and (4) regulation by the Legislature in a number of respects, including salary of the Commission members. See Attorney General Opinion No. 86 of July 20, 1955. All of this would indicate that the Nevada Industrial Commission is an agency of State Government within the meaning of the prohibition contained in Section 8 of Article IV of the Constitution.

We are not unmindful of that provision contained in Section 2 of Article IX of the Constitution, appertaining to the funds of the Nevada Industrial Commission, and providing that such funds are and shall always be trust funds, protecting workmen from the hazards of industrial accidents and occupational diseases. Such provision, however, does not alter the conclusion tentatively reached that the Nevada Industrial Commission is an agency of State Government within the meaning of the prohibition contained in Section 8 of Article IV.

We are, therefore, of the opinion that Section 8 of Article IV appertains to the Nevada Industrial Commission, as an agency or instrumentality of the State Government, and that the Assemblyman, under the state of facts now existing, would be precluded from being appointed to the Commission prior to the date January 20, 1960.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-96 State Board of Veterinary Medical Examiners—Fee for license to practice veterinary profession in State. Present applicable statutes interpreted and held to prohibit any deviation by State Board from amount of license fee as legislatively fixed and prescribed.**

CARSON CITY, September 28, 1959

W.F. FISHER, D.V.M., *Director, Division of Animal Industry, Department of Agriculture, State of Nevada, 118 W. Second Street, Reno, Nevada*

STATEMENT OF FACTS

DEAR DR. FISHER: The State Board of Veterinary Medical Examiners has by rule and regulation established a fee of \$25 to be paid by any person making written application to the Board for a license to practice veterinary medicine, surgery or dentistry in the State of Nevada.

QUESTION

May the State Board of Veterinary Medical Examiners, by rule and regulation, effect any increase or decrease in the fee to be charged and paid in connection with an application for, and issuance of a license to practice the veterinary profession in the State of Nevada under existing law?

CONCLUSION

No.

ANALYSIS

The State Board of Veterinary Medical Examiners possesses only such powers as the Legislature has expressly conferred upon it, and such other powers as can reasonably be deemed to be necessary to carry out the aims, purposes, and objectives, expressly authorized by the Legislature.

NRS 638.100, subsection 3, relating to application for, and issuance of licenses to practice the veterinary profession in the State of Nevada, expressly provides as follows:

3. The application shall be accompanied by a fee of \$10.

NRS 638.070, relating to the powers of said State Board of Veterinary Medical Examiners, insofar as here pertinent, provides as follows:

1. The board may adopt such rules and regulations as it deems necessary to carry out the provisions of this chapter *and not in conflict therewith.* (Italics supplied.)

Resort or reference to specific rules of statutory construction is manifestly unnecessary in the present matter, since there is no apparent ambiguity or indefiniteness in the applicable provisions of the law, and the Legislature has so clearly established the limitation that shall govern any adoption by the Board of rules and regulations to carry out its functions and responsibilities.

It is our considered opinion, therefore, that the indicated increase in the application and license fee effected, or sought to be effected, through adoption of rule and regulation by the State Board of Veterinary Medical Examiners, is clearly and directly in conflict

with the denominated, prescribed license fee, as expressly fixed by the Legislature, and is, or would be, both improper and invalid.

It is our further considered opinion that, in the absence of amendatory legislative action, the State Board of Veterinary Medical Examiners is without legal authority to charge and exact payment of any fee for a license to practice the veterinary profession in the State of Nevada, which would be less than, or in excess of, the \$10 legislatively specified and prescribed therefor.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-97 Public Schools—School Property. Real property belonging to county school district may be disposed of under provisions of NRS 393.220—393.320. Earlier statutes in conflict repealed.**

CARSON CITY, September 29, 1959

HONORABLE GEORGE FOLEY, *District Attorney, County of Clark, Las Vegas, Nevada*

Attention: MR. M. GENE MATTEUCCI, *Deputy*

STATEMENT OF FACTS

DEAR MR. FOLEY: The Clark County School District is the owner in fee of a number of parcels of real property located within the district. Title in the said district to part of this property was derived by virtue of a dedication for school purposes pursuant to the provisions of NRS 116.020. (Stats. 1905, Ch. 126, p. 223; A. 1909, p. 111; A. 1921, p. 34; A. 1929, p. 339.) Part or all of said land was acquired by the district prior to March 2, 1956, the effective date of the present comprehensive school code.

Prior to March 2, 1956, land held by a school district which, in the judgment of the board was unsuitable, undesirable or impractical for any school uses or purposes, was authorized to be disposed of under the provisions of NRS 116.070. This statute is derived from the several statutes heretofore quoted.

NRS 393.220—393.320 (derived from the school code effective on March 2, 1956, as aforesaid) makes provision for the manner of sale by trustees of school real property, when in the best interests of the school district such property should be sold.

The procedure outlined to be followed under NRS 393.220—393.320 is somewhat more exacting and difficult to pursue than the procedure outlined in NRS 116.070.

QUESTION

Did Nevada Revised Statutes, Sections 393.220 to 393.320, inclusive, repeal, by necessary repugnance thereto, the provisions of NRS 116.070?

CONCLUSION

We are of the opinion that the enactment of the school code did effect a repealer of NRS 116.070 and that the procedure now required to be followed by the board is outlined in NRS 393.220—393.320, inclusive.

ANALYSIS

Sections NRS 116.020-116.070, derived from the early statutes as enumerated, had for the major purpose the manner of regulation of subdivisions. The amendment of 1909 made mandatory a dedication of one block for public school purposes, in subdivisions of forty acres or more. The act of 1929, p. 339, from which NRS 116.070 is derived, authorized school boards to dispose of land so acquired, in the manner therein provided, when not required for school purposes.

In the absence of a later statute, the provisions of NRS 116.070 are clear and explicit, and in every respect sufficient to determine the procedure to be followed. As previously stated, however, the provisions of NRS 393.220—393.320 are more demanding, more detailed and explicit. As for example, under NRS 393.220, subsection 2, provision is made that the school board shall not violate the conditions of a gift or devise. The statutes are in conflict and are not capable of being harmonized, they are incapable of coexistence.

It is a cardinal principle of statutory construction that when two statutes exist, either of which, if standing alone, would control a situation and determine the procedure to be followed, one of which is general and the other specific, the specific statute will control, particularly if such statute is of later enactment. This is determinative of the matter. Those provisions that are lifted from the school code of 1956 (NRS 393.220-393.320) are controlling and have repealed NRS 116.070, by inference, being repugnant thereto. It is provided in said school code, being Chapter 32, Section 473, subdivision 3, Statutes 1956, that "All other acts and parts of acts in conflict with this act are hereby repealed."

For the reasons heretofore given, we are of the opinion that Sections NRS 393.220-393.320 contain the provisions determinative of the procedure to be followed:

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-98 Nevada School of Industry—Indians, on or off Indian Reservations, held presently amenable and subject to criminal and civil law of the State, and, in proper cases, when adjudged delinquents, may be committed to the school. School formerly had implied, and presently has express, legislative authority and jurisdiction to exercise parole power over inmates.**

CARSON CITY, October 1, 1959

MR. OLIVER D. FORSTERER, *Superintendent, Nevada School of Industry, P.O. Box 469, Elko, Nevada*

STATEMENT OF FACTS

DEAR MR. FORSTERER: There are presently several Indian boys at the Nevada School of Industry, pursuant to commitment orders made by the courts, some of whom may be connected with Indian reservations. There may be instances of Indian boys on parole from the Nevada School of Industry.

Based upon the expressed views of some district court judges, some question has arisen concerning the legality of court orders committing Indian boys to the Nevada School of Industry, especially in those cases where such boys may be connected with Indian reservations. Moreover, some district court judges have additionally questioned any jurisdiction whatsoever either on the part of the courts or of the Nevada School of

Industry over Indian boys, when the offenses, resulting in their commitment, occurred within the confines of Indian territory or Indian reservations.

#### QUESTIONS

1. Has the State of Nevada jurisdiction over crimes, and punishments applicable thereto, when crimes are committed by Indians, whether on or off an Indian reservation, within the State?
2. May courts make orders of commitment of Indian boys from Indian reservations to the Nevada School of Industry?
3. Has the Nevada School of Industry legal authority and jurisdiction to grant parole to inmates of the school, including Indian boys, whether or not connected with Indian reservations?

#### CONCLUSIONS

To question No. 1: Yes.  
To question No. 2: Yes.  
To question No. 3: Yes

#### ANALYSIS

Prior to 1953, criminal jurisdiction, *insofar as tribal and reservation Indians were concerned*, was generally deemed to be vested exclusively in the Federal Courts. Since that year, pursuant to congressional action, state jurisdiction over public offenses committed by Indians within a state, whether in Indian territory, or on or off Indian reservations, has become the rule rather than the exception. This development is due to the established and continuing policy of the Federal Government to withdraw from its "guardianship" functions, responsibilities, and exclusive concern for, and jurisdiction over Indians, and to bring about their gradual integration in all respects with the rest of the population. This process is not yet complete. (See Attorney General Opinion 13, February 13, 1959.)

Insofar as the present matter is concerned, the following would appear conclusively to resolve any uncertainty as to the present law in the State of Nevada respecting the specific questions above stated:

The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof. (Sec. 7, Chapter 505, Public Law 280, 83rd Congress, approved August 15, 1953, 67 Stat. 588.)

The State of Nevada, under and pursuant to the above enabling federal law, legislatively gave implementation thereto in 1953 by enactment of a statute making Indians, on or off Indian reservations, amenable to the criminal law of the State (NRS 194.030), and in 1955 further extended state jurisdiction over public offenses committed by or against Indians in areas of Indian country (NRS 194.040). In the latter year the State further assumed and confirmed its jurisdiction over actions and proceedings where Indians are parties, both in the area of public offenses and civil causes of action (NRS 41.430).

In our opinion, therefore, there is ample authority for an affirmative answer to both questions Nos. 1 and 2 above stated, at least from the effective dates of the implementary

state legislation of the above-cited federal statute. We have found no exemption of Indians, as such, whether on or off Indian reservations, from application of the provisions of the Juvenile Court Act (NRS Chapter 62), which governs and generally regulates the commitment of juveniles, including Indian boys, to the Nevada School of Industry.

Our review of the provisions of NRS Chapter 210, relating to the Nevada School of Industry, indicates that prior to April 6, 1959, the school did not possess any *express* parole power. However, it may reasonably be inferred and presumed on the basis of the necessity therefor in order to effect legislative intent and the attainment of legislatively specified purposes and objectives, namely, education and employment of school inmates. Any denial of such legislative intendment of parole power would nullify and render ineffectual and meaningless express provisions of law. (See: NRS 210.040(2), 210.070, and 210.090.)

Sections 17 and 18, Chapter 421, 1959 Statutes of Nevada, approved April 6, 1959, now expressly vest such parole power and authority in the Superintendent, Nevada School of Industry, insofar as inmates thereof are concerned.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-99 Planning and Zoning—Housing Authority subject to zoning laws and ordinances. After municipality contracts with Housing Authority to rezone, when reasonable and necessary, and after municipality approves sites selected by Housing Authority as compatible with Master Plan and existing uses, municipality must ministerially rezone.**

CARSON CITY, October 5, 1959

MR. CALVIN M. CORY, *City Attorney, Las Vegas, Nevada*

STATEMENT OF FACTS

DEAR MR. CORY: 1. The Housing Authority of the City of Las Vegas, Nevada, hereinafter called the "Authority," was created by Chapter 253, 1947 Statutes, now found in Nevada Revised Statutes, Sections 315.140-315.790.

2. The Authority was authorized to exercise its powers as a municipal corporation by resolution of the City of Las Vegas, dated June 6, 1947, in the manner required by NRS 315.320 and 315.330.

3. On March 5, 1958, the City adopted a resolution finding that there existed within the City a need for low-rent housing units and approved the Authority's application to the United States Public Housing Administration for 75 units of such housing.

4. On March 6, 1958, the City entered into a Cooperation Agreement with the Authority. The agreement required the Authority to endeavor to secure the approval of the Public Housing Administration for federal participation in the costs of approximately 200 units of low-rent housing in the City of Las Vegas.

Paragraph 5(c) of the Cooperation Agreement reads as follows:

Insofar as the Municipality may lawfully do so \* \* \* (ii) make such changes in any zoning of the site and surrounding territory of such Project as are reasonable and necessary for the development and protection of such Project and the surrounding territory;

5. The City rezoned two sites for such housing selected by the Authority, upon which sites were constructed 75 units of the 200 units mentioned in the Cooperation Agreement.

6. On the 16th day of December, 1958, the Mayor, on behalf of the Board of City Commissioners, advised the Authority by letter that the proposed route of Interstate Highway No. 15 through the City would dislocate many families, a substantial number of whom would be eligible for low-rent housing and requested the Authority to take the necessary steps "to secure as many additional low-rent housing units as will be needed."

7. On the 4th of March, 1959, the City adopted a resolution finding that there existed within the City a need for additional low-rent housing units and approved the Authority's application to the Public Housing Administration for 100 units.

8. With the approval of the Public Housing Administration, the Authority selected and obtained options to purchase two sites hereinafter referred to as sites A and B.

9. Thereafter the Mayor of the City, after authorization by the Board of City Commissioners, advised the Authority, by letter dated the 23rd of April, 1959, that the use of sites A and B by the Authority would be compatible with the Master Land Use Plan of the City, not then adopted, and was consistent with the use of land immediately adjacent to the said sites.

10. The owner of site A, the Authority not having exercised its option to purchase, petitioned the Planning Commission of the City to rezone site A. The petition was denied by the Planning Commission, and on appeal, by the Board of City Commissioners.

#### QUESTION

Should the Authority purchase sites A and B and petition in the manner required by law for the rezoning of the same, may the petition be denied?

#### CONCLUSION

A petition by the Authority, as the owner of sites A and B, must be granted and the said sites rezoned.

#### ANALYSIS

The United States Housing Authorities Act of 1937 is constitutional. *City of Cleveland v. United States*, 323 U.S. 329, 65 Sup. Ct. 280, 89 L.Ed. 274.

The Housing Authorities Law of 1947, Chapter 253, 1947 Statutes, Nevada Revised Statutes 315.140-315.790, is constitutional. *McLaughlin v. Housing Authority for the City of Las Vegas*, 68 Nev. 84, 227 P.2d 206.

You have cited the case of *Hallemeier v. St. Clair County Authority*, No. 18335, City Court, City of East St. Louis, Illinois, an unreported case in the trial court decided in 1952. In this case the Court held that the City was bound under its cooperation agreement to rezone upon request, expressly pointing out that in the absence of such contractual obligation the City had the discretionary power of denying a rezoning application, and that such denial, in view of the evidence, "would not be arbitrary or unreasonable."

There was language in the cooperation agreement nearly identical with paragraph 5(c) of the Cooperation Agreement referred to herein.

We are referred to the case of *State ex rel. Great Falls Housing Authority v. the City of Great Falls*, a decision of the Supreme Court of Montana in 1940, found at 100 P.2d 915. After the creation of the Housing Authority by the City a Cooperation Agreement was entered into between them. The agreement provided that the City Council would comply with the requests for the vacating of streets and alleys, zoning and rezoning of land incorporated in the Great Falls project, when requested to do so.

The Housing Authority requested a subsequently elected City Council to vacate certain streets and alleys and requested that eight blocks purchased by the Housing Authority be zoned and rezoned. The City Council refused to grant either request. The Court, at page 920, had this to say:

*The official machinery of the municipality was merely employed to determine the necessity for the creation of the Authority and that having been done as the free act of the city council, it had no further discretionary function to perform in the premises.*

\* \* \*

The refusal of the city council \* \* \* to comply with the requests of the Authority to vacate the streets and rezone the location was a useless act. The acts of the city council of a contractual nature cannot be repudiated by any subsequent council, whether the membership of the council be the same or not. When the council authorized the creation of the Great Falls Authority it assumed all the obligations involved essential to a perfected project.

\* \* \*

*\* \* \* when the city council regularly authorized the creation of the Great Falls Housing Authority, any act or thing the council was thereafter required to do in order to bring the Housing project to completion was purely a ministerial act imposed upon the city council, a state agency of the state government. (Italics supplied.)*

You have also cited the cases of Helena Housing Authority v. City Council of the City of Helena, 242 P.2d 250, 125 Mont. 592, 1952; Housing Authority of the City of Los Angeles v. City, 243 P.2d 515, 1952, 256 P.2d 4, 1953; and Drake v. City of Los Angeles, 243 P.2d 525, 1952.

The Helena Housing Authority case and the first Los Angeles Housing Authority case hold that the city council could not rescind cooperation agreements previously approved. The second Los Angeles case and the Drake case are not in point.

In addition to the cases called to our attention, we have found the following:

A city cannot bargain away, surrender, or abdicate the exercise of its police power. The enactment of the Housing Authorities Law in no way diminishes a city's police power vested in the municipality by the Legislature. (McQuillin, Municipal Corporations, 3rd Ed., Vol. 8, p. 17 et seq.)

Krause v. Peoria Housing Authority, 19 N.E. 2d 193, 203, 370 Ill. 356:

We have no Federal restriction upon the city of Peoria. While it, of course, has no authority to bargain away its governmental powers to the national government, it may, as here, voluntarily contract with an agency of the national government within the authority granted it by the State. The agreement of the city commits it only to the performance of governmental functions clearly within its power.

McNulty v. Owens, Mayor, 199 S.E. 425, 431, 188 S.C. 377:

\* \* \* The contract does not constitute an attempt by the City to bind itself in its exercise of governmental functions. *It is merely an agreement to cooperate in the use of those functions and as such is valid.* (Italics supplied.)

Williamson v. Housing Authority of Augusta, 199 S.E. 43, 50:

\* \* \* Manifestly the city could not bargain away the discretion which it should exercise within the police power for the general welfare; and therefore the contract can mean nothing more than an assurance, unnecessary perhaps, that the city will do what it should do \* \* \*.

(To the same effect, see Rutherford v. City of Great Falls, 86 P.2d 658, 661; Marvin v. Housing Authority of Jacksonville, 183 So. 145, 156.)

Mumpower v. Housing Authority, 11 S.E.2d 732, 176 Va. 426, 1940, cited in 172 A.L.R. 975, wherein it was said that provisions in an agreement between a city and a housing authority whereby the city agreed to vacate and close any streets or roads which the housing authority found reasonably necessary in the development of a housing project would be invalid, since it would place beyond the control of the local legislative representatives of the people the determination of matters directly and vitally affecting the public safety.

The Hallemyer and the Great Falls cases would seem to lay down the rule that, after the execution of the Cooperation Agreement, the City must ministerially rezone at the request of the Housing Authority. There is language in the Great Falls case which seems to go so far as to say that from and after the creation of the Authority the City can act only ministerially.

We have cited a number of cases holding that a City cannot bargain away, surrender or abdicate, the exercise of its governmental functions or police powers.

We do not find it necessary to attempt to resolve these apparently conflicting cases, or to determine, in this case, whether after the execution of the Cooperation Agreement the City had the power to determine in the exercise of its discretion, and not ministerially, whether the zoning changes proposed by the Authority were in fact reasonable and necessary.

It is our opinion that after the Authority proposed sites A and B approved by the Public Housing Administration and the City authorized the Mayor to advise the Authority by letter dated April 23, 1959, that sites A and B would be compatible with the proposed Master Plan and consistent with the use of land immediately adjacent to the sites, the City had, in our judgment, determined that the use of the said sites was both reasonable and necessary for the development and protection of the project and the surrounding territory.

We believe, therefore, that, in any event, by this exercise of its discretion the City irrevocably bound itself to rezone sites A and B when requested by the Authority after the Authority acquired title to the two said sites.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-100 Banks, Superintendent of—Insurance, State Department of—Neither Chapter 413 nor Chapter 417, Statutes 1959, repealed or amended Chapter 208, Statutes 1959. Amendment to Chapter 208 is indicated.**

CARSON CITY, October 5, 1959

HONORABLE PAUL A. HAMMEL, *Insurance Commissioner, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. HAMMEL: Chapter 208, Statutes of Nevada 1959, p. 226, was approved on March 20, 1959. This act, amendatory to Title 56 of NRS, is known as "Nevada Installment Loan and Finance Act." It regulates the lending of money or credit by licensed institutions, under the Act, to amounts of \$2,500. Briefly and in essence, the Act is one to regulate and license the loan business for those lending institutions that can qualify and that elect to come under its provisions, for Chapter 674 NRS (Nevada Small Loan Act) has not been repealed. It being a finance act, it is properly, for the most part, administered by the Superintendent of Banks. In Section 31 thereof, subsection 1 provides that the licensee may require the borrower to insure tangible personal property when offered as security for the loan. In Section 31, subsection 2, it is provided that the licensee may insure the life of one obligor in an amount sufficient to cover the unpaid balance of loan. This is to afford additional security in the discharge of the fiscal obligation. In part this subsection provides:

The premium charged therefor shall be in such amount as the superintendent may determine after a hearing thereon and shall be subject to modification after a hearing called at the request of the superintendent and upon notice to all licensees or upon a hearing held before the superintendent upon written application therefor by not less than three licensees and upon notice to all licensees.

Section 3, subsection 1(g), provides as follows:

"Superintendent" means the superintendent of banks.

Chapter 413, Statutes of Nevada 1959, p. 634, was approved on April 6, 1959. This act, amendatory to Chapter 690 NRS, is known as "The Model Act for the Regulation of Credit Life Insurance." It has for its purpose the regulation of life insurance which is provided as additional security to a creditor in credit transactions. In this respect it is more comprehensive than Chapter 208, for insurance purchased under Chapter 413 could protect any creditor, including creditors under the Nevada Installment Loan and Finance Act, and other creditors of other transactions not in their nature loans or financing. This statute being one of insurance, the administration thereof is for the most part delegated to the Insurance Commissioner. Under Section 9 of the Act, the Commissioner has the power and duty, among other things, to conduct hearings respecting rates. In part this section reads as follows:

Sec. 9. 1. All policies, certificates of insurance, statements of insurance, applications for insurance, binders, endorsements and riders shall be filed with the commissioner.

2. The commissioner shall, within 30 days after the filing of all policies, certificates of insurance, statements of insurance, applications for insurance, binders, endorsements and riders, in addition to other requirements of law, disapprove any such form if the table of premium rates charged or to be charged appears by reasonable assumptions to be excessive in relation to benefits or if it contains provisions which are unjust, inequitable, misleading, deceptive or encourage misrepresentation of such policy.

3. If the commissioner notifies the insurer that the form does not comply with the requirements of this section, it is unlawful thereafter for such insurer to issue or use such form. In such notice, the commissioner shall specify the reason for his disapproval and state that a hearing will be granted within 20 days after request in writing by the insurer. No such policy, certificate of insurance, statement of insurance, nor any application,

binder, endorsement or rider, shall be issued or used until the expiration of 30 days after it has been so filed, unless the commissioner gives his prior written approval thereto.

Chapter 417, Statutes of Nevada 1959, p. 643, was approved on April 6, 1959. This Act, amendatory to Chapter 692 NRS, is known as "The Model Act for the Regulation of Credit Accident and Health Insurance." This Act is very similar in its provisions to Chapter 413, heretofore mentioned, except that the type of insurance here involved is health and accident, whereas under Chapter 413 the type of insurance is life. This chapter has for its purpose the regulation of health and accident insurance when provided as additional security to a creditor in credit transactions. This type of insurance may, under the provisions of the chapter, be used in all credit transactions. The administration of the Act under the provisions of this chapter is delegated to the Insurance Commissioner. Under Section 9 hereof, hearings are to be conducted by the Commissioner, as in Chapter 413, upon a number of matters, including the matter of reasonable rates.

If hearings were conducted as provided in Chapter 208 upon rates of insurance premiums by the Superintendent of Banks, insofar as insurance is provided to protect creditors under the Nevada Installment Loan and Finance Act, and, if hearings were conducted by the Insurance Commissioner as provided in Chapter 413 (and Chapter 417) upon rates of insurance premiums, insofar as insurance is provided to protect any type of creditor, great confusion would result, not to mention the fact that work would be demanded of the Superintendent of Banks which he would be not qualified or equipped to perform.

#### QUESTION

Insofar as the authority to conduct hearings upon insurance rates is concerned, upon insurance to be effected for the protection of creditors under Chapter 208, have Chapters 413 and 417, or either of them, amended, or repealed, the provision wherein the Superintendent of Banks is authorized to conduct the hearings, in such a manner as to confer the authority upon the Insurance Commissioner?

#### CONCLUSION

We think the question must be answered in the negative, for if this office should construe Chapter 208 in such a manner as substitute the one officer for the other therein, it would constitute legislation on our part. However, under Chapter 413, the credit that is envisioned is all inclusive credit, not merely credit in loans of money, and since the authority of the Commissioner under this chapter is unquestioned, the difficulty may be obviated by hearings being conformed to Chapter 413, and no hearings upon the matter being conducted under Chapter 208. At the legislative session of 1960, Chapter 208 should be amended.

#### ANALYSIS

Senate Bill No. 303, which has become Chapter 208, appears to have been sponsored by the Committee on Banks, Banking and Corporations. Senate Bill No. 119, which became Chapter 413, appears to have been requested by the Insurance Commissioner. Senate Bill No. 127, which has become Chapter 417, appears to have been requested by the Insurance Commissioner. It therefore appears that the bills were not sponsored by the same people (except the last two mentioned) and that therefore Chapter 208 is not in harmony with Chapters 413 and 417. Apparently the interrelationship was not understood.

The Legislature could hardly have known which ones of the three bills would become law, and therefore the interrelationship of one to the other bill was not fully reflected upon until after approval. Although the credit envisioned in Chapter 413 is broad and does include all credit contemplated in Chapter 208, there are many provisions in Chapter 208 in addition to the provisions of insurance to further secure credit.

Clearly, a difficult and dangerous situation is presented. For, if rates of insurance are fixed by two different officers upon policies to insure debtors to further secure credit, the one type of credit overlapping the other, friction may result and confusion is certain. Although the Superintendent of Banks in being authorized to fix insurance rates, upon policies appertaining to the credit authorized in Chapter 208, appears to be entrusted to a function foreign to his usual duties, yet we do not know that he would want to relinquish the responsibility. Even if the two officers were in accord, the one to relinquish a statutory duty and the other to assume it, they would lack the power to make it effective.

Chapter 417 is the chapter on accident and health insurance to further secure credit, and although Chapter 208 does not contemplate this type of insurance to partially secure the credit incidental to loans of money, it would apparently be available to secure money loaned as to secure any of the other innumerable types and kinds of credit.

We are not able to say that the Legislature intended to substitute the Commissioner of Insurance for the Superintendent of Banks, as to the authority to conduct the rate hearings upon insurance under the provisions of Chapter 208 when it enacted Chapters 413 and 417. For this department to declare such an intent would, we think, be legislative, and beyond our power.

However, the two officers can work together in harmony in the performance of their duties, we think, in the interval from this date to the next legislative session by pursuing the following courses respectively:

The Superintendent of Banks would perform all duties and functions imposed upon him under the provisions of Chapter 208, except he would not conduct hearings on rates of insurance as empowered under Section 31, subsection 2. If requested to conduct such hearings, he would refer to this opinion and would advise that hearings conducted by the Insurance Commissioner under the provisions of chapter 413, and applicable to Chapter 208, fully meet the need.

The Insurance Commissioner would perform all of the functions and duties imposed upon him under the provisions of Chapters 413 and 417. If requested to conduct hearings on rates of insurance as empowered by Section 31, subsection 2, in which the Superintendent of Banks has been authorized, he would refer to this opinion and would advise that he is not authorized under Chapter 208, and that rate fixing under Chapter 413 has application to Chapter 208.

At the proper time, this ambiguity and lack of certainty would be called to the attention of the Legislature with request for amendment.

Respectfully submitted,  
ROGER D. FOLEY, Attorney General  
By: D.W. Priest, Chief Deputy Attorney General

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**OPINION NO. 1959-101 Insurance, State Department of—Premiums from “surplus line” insurance are taxable. “Surplus line” statutes—NRS 686.270-686.380, construed.**

CARSON CITY, October 7, 1959

HONORABLE PAUL A. HAMMEL, *Insurance Commissioner, Carson City, Nevada*

## STATEMENT OF FACTS

DEAR MR. HAMMEL: American Motorists Insurance Company is an insurance corporation foreign to the State of Nevada and not qualified to do business in Nevada.

National Hairdressers and Cosmetologists Association, Inc., is a national association of beauty operators, which has recommended the aforementioned insurance company to the individual cosmetology member shops as a potential insurer of the risks incidental to their business.

It appears that during the year 1957 the Insurance Commissioner of the State of Nevada tacitly agreed with the said company that the risk incidental to the beauty shop business in Nevada be classified as "surplus line," and that the said company be permitted to write such insurance by mail solicitation and be not required to appoint any broker or agent domiciled in Nevada. Accordingly, it appears, the said company appointed the Insurance Commissioner its agent for the service of process, under the provisions of NRS 683.050 (Section 27, Chapter 189, Statutes of Nevada 1941), and under this arrangement has continued to operate and enjoy this business originating in Nevada, to date, without the payment of a tax upon the gross premiums so received, as provided in NRS 686.010. Now the Insurance Commissioner doubts that this procedure is authorized as a matter of law and asks that we review the matter officially.

## QUESTIONS

Question No. 1: May "surplus line" insurance be sold through the mails in Nevada; and without the necessity of the appointment of a surplus line broker?

Question No. 2: Under the law is the appointment of the Insurance Commissioner authorized, as the resident agent for service of process, of company not licensed to do business in Nevada?

Question No. 3: If the answer to question No. 2 is in the negative, what does the law require as to the appointment of an agent for the service of process?

Question No. 4: Is a company that is permitted to write insurance under the classification of "surplus line" required, through its "surplus line" broker, to pay the tax of two (2%) percent from the gross premiums received as provided in NRS 686.010?

## CONCLUSIONS

Question No. 1—No.

Question No. 2—No.

Question No. 3—Under the provisions of NRS 686.330 the service of process shall be made upon the surplus line broker.

Question No. 4—Yes. With the exception of the exemptions that are enumerated under the provisions of NRS 686.380, there are no "free rides," and all insurance written under a surplus line broker must pay its two (2%) percent tax computed upon gross premiums charged.

## ANALYSIS

We have no quarrel with the classification by the Department of Insurance of this type of risk as "surplus line," if, as we presume to be the case, it possesses the characteristics of such classification.

As "surplus line" it falls under the provisions set out in NRS 686.270-686.380, and the rights and duties are clearly spelled out in these sections. NRS 686.270 and 686.280 provide the following:

### *Surplus Line Brokers*

686.270 1. No person, firm or corporation in Nevada shall, in any manner, represent any company not authorized to do business in this state in the solicitation or writing of insurance in this state except as provided in NRS 686.270 to 686.380, inclusive.

2. NRS 686.270 to 686.380, inclusive, shall not apply to an adjuster or attorney at law representing such unauthorized company in his professional capacity.

686.280 1. The commissioner, upon the annual payment of a license fee of \$10, and the furnishing of a bond as provided in this section, may license as a surplus line broker any resident agent or broker in this state, permitting the surplus line broker to place or effect insurance upon risks located in this state with insurance companies not licensed to do business in this state.

2. No such surplus line broker shall place, procure or effect insurance upon any risk located in this state in a company not licensed to do business in this state until a license has first been procured from the commissioner, as provided in this section, and a bond furnished to the State of Nevada in the penal sum of \$2,500, with authorized corporate sureties approved by the commissioner, conditioned that he will conduct such business in accordance with the provisions of NRS 686.270 to 686.380, inclusive, and will pay to the state treasurer, through the office of the commissioner, the taxes provided by NRS 686.270 to 686.380, inclusive.

Insurance companies generally (excepting insurance supplied through a lodge system), must pay to the commissioner a tax upon the gross premiums collected upon Nevada risks. In this respect NRS 686.010 provides the following:

686.010 1. Every insurance company or association of whatever description, except fraternal or labor insurance companies, or societies operating through the means of a lodge system or systems, insuring only their own members and their families, including insurance on descendants of members, doing an insurance business in this state, shall annually pay to the commissioner a tax of 2 percent upon the total premium income, including membership fees, from all classes of business covering property or risks located in this state during the next preceding calendar year, less return premiums and premiums received for reinsurance on such property or risks.

2. The amounts of annual licenses paid by such companies or associations upon each class of business licensed annually shall be deducted from such tax on premiums if such tax exceeds in amount the licenses so paid.

In the case of a foreign or alien company that desires to be licensed in Nevada, it must make application to the commissioner under NRS 683.020, must meet the financial conditions set out in NRS 683.040, and must pay the two (2%) percent tax on gross premium receipts as set out in NRS 686.010. In other words, if a foreign corporation applies for and is licensed to do an insurance business in Nevada, it pays its own 2 percent tax. If it is not required to be licensed its surplus line broker pays the tax as outlined in NRS 686.280, subdivision 2, hereinabove quoted.

It follows that "surplus line" insurance may not be sold in Nevada, by a company not licensed to do business herein, without the appointment of a surplus line broker.

We now consider question No. 2, stated above. The appointment of the Insurance Commissioner for service of process is provided in those cases in which a foreign or alien company qualifies to be licensed to do business in Nevada. The appointment of the Commissioner is regulated by the provisions of NRS 683.050. This section sets out a part of the proceedings preliminary and requisite to being licensed. However, under NRS 686.270-686.380, appertaining to the regulation of surplus line brokers and companies authorized to do a surplus line business, it is provided that such alien companies need not be licensed to do a business in Nevada. As we have previously shown, the control by the Insurance Department is, as to such companies, upon the broker, and the broker being definitely regulated, circumscribed and controlled there is not need to require the company doing exclusively a surplus line business to be licensed. Under the provisions of NRS 686.340 the surplus line broker must pay the tax. Under the provisions of NRS 686.330 the service of process must be upon the surplus line broker.

To summarize, as to those companies that do exclusively a surplus line business upon Nevada risks, there is no requirement that they be licensed, and being not licensed there is no authority for the appointment of the Insurance Commissioner as agent to receive service of process, and being unable to do a surplus line business upon Nevada risks, except through an agent or broker, licensed as a surplus line broker, service of process is made, not by virtue of appointment, but by virtue of law (NRS 686.330) upon such broker.

We now consider question No. 3, stated above. As we have heretofore shown, the law does not require the company doing exclusively a surplus line business upon Nevada risks to appoint an agent for the service of process, but it does require that all surplus line business come from a duly licensed surplus line broker. Having required that all business must come from a duly licensed surplus line broker, it presumed that litigation growing out of a Nevada risk, of a Nevada insured, will be traceable to a surplus line broker domiciled in Nevada, and such broker is by law authorized and empowered to receive the service of process respecting any such policy.

We now consider question No. 4, stated above. As we have previously shown, a resident agent or broker may apply for and be licensed as a "surplus line broker" upon meeting the exacting requirements of NRS 686.280. Among other things, provided in this section is the requirement of bond to require the surplus line broker to pay the tax provided in NRS 686.270-686.380. Under NRS 686.310 it is provided that the surplus line broker shall file with the Commissioner annually a statement of all business done under his "surplus line" license. In subdivision 2 thereof it is provided that the tax shall be computed only upon exposures located in this State. Under the provisions of NRS 686.340, the penalties are provided as against any surplus line broker who fails to file the annual statement and pay the requisite tax thereon. Under NRS 686.380, the exemptions to the provisions of NRS 686.270-686.380 are set out. These exemptions (exclusions) do not include the surplus line risk here under consideration. It follows that the insurance upon the risks incidental to the operation of Nevada beauty shops is taxable, payable through the "surplus line" broker, and that the company in question has no authority to insure a Nevada risk except through a duly licensed surplus line broker, and that the Commissioner should enter a suitable order (orders) consistent with this opinion to bring the operation of the insurance company within the law and to pay its tax upon premiums heretofore received, and to be precluded from further operations, or issuing further policies, until it does comply.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-102 Personnel, State Department of—Terms “deputy” and “chief assistant” under NRS 284.140, subsection 3, construed.**

CARSON CITY, October 12, 1959

MR. IRVIN GARTNER, *Personnel Director, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. GARTNER: The Public Service Commission proposes to hire two individuals for the position classified as Field Inspector. The duties and responsibilities of each individual will be the same, and are set forth in detail in Bulletin No. 165 of the Personnel Department, which reads as follows:

Makes field inspections of motor vehicle carrier firms in the enforcement of the Motor Carrier Act as it applies to the Public Service Commission. Conducts skilled investigations to determine if motor carrier firms are operating in accordance with the laws, rules and regulations as established by the Public Service Commission. Does related work as required.

The Chairman of the Commission has requested that one position be in the classified service and the other in the unclassified. The basis for such a request is the Chairman's interpretation of the statute whereby one deputy and one chief assistant in each department, agency or institution may be in the unclassified service (NRS 284.140, subsection 3).

QUESTION

What, if any, are the limitations or restrictions on the elective officer or head of a department, agency or institution, in placing an employee in the unclassified service under the authority of NRS 284.140, subsection 3?

CONCLUSION

Under NRS 284.140 the elective officer or head of a state department, agency or institution may place not more than two employees of that department, agency or institution, in the unclassified service of the State if:

1. The person making such placements is the elective officer or head of a “department, agency or institution” designated as such by our Constitution or Legislature, and
2. Those employees qualify as a deputy and chief assistant respectively.

ANALYSIS

The unclassified service of the State of Nevada is comprised of positions expressly enumerated in the 11 subsections of NRS 284.140.

The classified service of the State of Nevada is comprised of all positions in the public service which are not included in the unclassified service and which provide services for any office, department, board, commission, bureau, agency or institution, of the State Government (NRS 284.150).

It is apparent from reading the foregoing sections of the Nevada Revised Statutes that all state employees and officers are in the classified service unless they fall within one of

the enumerated subsections of NRS 284.140. The enumeration of these exceptions must be strictly construed to include no more within its provisions than the Legislature clearly intended.

In the present case for the Chairman of the Public Service Commission to place in the unclassified service one of the two field inspectors proposed to be employed, it is first necessary to show that the Chairman is the head of a department, agency or institution, as those terms are used in subsection 3 of NRS 284.140, and, secondly, that the person employed is actually a deputy or chief assistant.

We do not wish to place undue emphasis on the choice of terms employed by the Legislature in distinguishing the classified and unclassified service of our state employment system. However, it cannot pass unnoticed that in designating the classified service the Legislature had in mind, under NRS 284.150, seven distinct divisions of our State Government, namely, office, department, board, commission, bureau, agency and institution.

Whereas, under subsection 3 of NRS 284.140, the subsection under which the Chairman proposes to place one of the field inspectors in the unclassified service, the Legislature refers to the elective officer or head of only three of the seven divisions enumerated in NRS 284.150, namely, department, agency and institution. This is significant in that it evidences the fact that the Legislature had in mind more divisions than the three enumerated, but saw fit to employ only those three in subsection 3 of NRS 284.140.

It would be difficult and, we think, unnecessary to attempt to define and distinguish each of the seven divisions enumerated in NRS 284.150. If the Legislature or Constitution has not, in creating divisions of our State Government, designated that division as a "department," "agency," or "institution," then the elective officer or the head of the division so created may not avail himself of subsection 3 of NRS 284.140 and appoint a deputy and chief assistant in the unclassified service.

Since the Public Service Commission, by its very name, is a commission and, therefore, not within one of the divisions enumerated in subsection 3 of NRS 284.140, the Chairman is without authority to designate one of the two field inspectors for the Public Service Commission as being in the unclassified service.

While the foregoing discussion disposes of the problem raised, nevertheless, we think it appropriate to express a further opinion on what constitutes a "deputy" or "chief assistant" under NRS 284.140, subsection 3.

As we have said above, the right to appoint a deputy or chief assistant in the unclassified service under the authority of subsection 3 of NRS 284.140 is available only to the elected officer or head of a "department, agency or institution," designated as such by either the Constitution or the Legislature. The character of the position determines whether or not the position is that of a deputy or chief assistant. The head of the department, agency or institution, cannot designate an individual as a deputy or chief assistant in the unclassified service if, in fact, the position held by that employee is not within the meaning of deputy or chief assistant as those terms are commonly defined.

A deputy has by law the whole power of his principal. He may do in his own name any act the principal may do and the principal is bound thereby. A simple but complete definition of the term "deputy" is found in Volume 18 of Corpus Juris at page 784, wherein it is said that a deputy is "one appointed as the substitute of another and empowered to act for him and in his name or on his behalf."

In the instant case, we are of the opinion the Chairman of the Public Service Commission is without authority to appoint a deputy. If he did have such a power of appointment, it would permit the Chairman to delegate to an individual the power to act for the Commission. Such power the Chairman cannot delegate. Therefore, in addition to the reasons stated in the first part of this opinion, we must conclude that a field inspector for the Public Service Commission cannot be designated as a deputy for two reasons. Firstly, the Chairman of the Public Service Commission is without power to appoint a

deputy, and, secondly, even if such power did exist, the duties of the position of field inspector as set forth in Bulletin 165 fall short of the definition of the term “deputy.”

We now turn to what constitutes a “chief assistant” under the referenced statute. An assistant is defined in the case of *State ex rel. Dunn v. Ayers*, 112 Mont. 120, 113 P.2d 785, as an employee whose duties are to help his superior to whom he must look for authority to act. By the Legislature designating the position as a “chief assistant” we must reason it had in mind a position of greater responsibility than a mere assistant. There may be numerous assistants, but there can be but one chief assistant. Again we have studied the duties of field inspector and must reason that even if we could overcome the initial obstacle, namely, a commission is not a “department, agency or institution,” we must conclude that the duties of a field inspector for the Public Service Commission are too confining and of insufficient responsibility to be considered a chief assistant.

The character of employment will not be determined solely by the title that may be assigned to it. The legal classification of employment will be determined by the powers, functions and duties appertaining to the incumbent. For the employer to entitle an appointee a “deputy” or “chief assistant” if the powers, functions and duties are not harmonious with the title, will be of no legal effect. For the law looks at substance and not form.

For the reasons expressed the Chairman of the Public Service Commission cannot designate a field inspector for the Commission as a “deputy” or “chief assistant” and place that individual in the unclassified service under NRS 284.140, subsection 3.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-103 Penitentiary, Nevada State—Hospital, Nevada State—School of Industry, Nevada State—Applicable statutes relative to placement, confinement, and medical care and treatment of mentally-ill inmates and patients considered dangerous to the public safety and for whom the State hospital lacks adequate security facilities, construed. Under certain conditions, out-of-State placement of mentally-ill public offenders is authorized under the Western Interstate Corrections Compact, Chapter 466, 1959 Statutes of Nevada, page 829 et seq.**

CARSON CITY, October 13, 1959

MR. JACK FOGLIANI, *Warden, Nevada State Penitentiary, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. FOGLIANI: We have received a copy of a communication sent by an attorney to the Superintendent of the Nevada State Hospital, relating to a convict who, allegedly, had been transferred to the State Hospital, escaped therefrom, was captured, refused readmittance to the Hospital, and is presently again in the Prison, in a mentally-ill condition and in solitary confinement because of his dangerous propensities and menace to the safety of others. It is also claimed that such convict is not receiving proper medical care and treatment.

It has been indicated that there are additional convicts at the Prison who are also in need of mental care and treatment, but who, because of their dangerous propensities and the lack of adequate security facilities at the State Hospital, have been denied admission

thereto, and must be kept segregated and in solitary confinement at the Prison, where no proper medical care can be, or is, provided.

There are at least three other related situations which fall within the scope of the problem stated, which we believe may properly be considered. These are:

1. Mentally-ill inmates of the Nevada School of Industry of dangerous propensities considered uncontrollable within the available security facilities of the State Hospital.

2. Persons committed to the Hospital by court orders who cannot be tried, adjudged to punishment, or punished for a public offense because of insanity, and who, at the time of, or subsequent to such commitment, manifest dangerous propensities considered uncontrollable within the available security facilities at the Hospital.

3. Mentally-ill person committed to the Hospital, who, either at the time of commitment or subsequent thereto, manifests dangerous propensities considered uncontrollable within the available security facilities at the Hospital. In this case, the mentally-ill person is neither a convict, an inmate of the School of Industry, nor a person accused of a crime, but simply a patient.

#### QUESTIONS

I. (A): Is the Nevada State Hospital required to admit or to retain a convict of the State Prison, who is mentally-ill and has shown, or may have, dangerous propensities, if, in the opinion of the Hospital's Superintendent, adequate security facilities are not available for such convict in the Hospital?

(B): In the event that the answer to the foregoing question is in the negative, may the Warden of the State Prison enter into a contractual arrangement with a suitable institution without the State, for detention, and medical care and treatment of convicts who are mentally-ill with dangerous propensities?

II. May the Superintendent of the School of Industry enter into contractual arrangements for out-of-State placement of dangerous, mentally-ill inmates when security facilities available at the State Hospital are considered inadequate?

III. May the State Hospital transfer a court-committed person who cannot be tried, adjudged to punishment, or punished for a public offense because of insanity, and who, at the time of commitment, or subsequent thereto, manifests dangerous propensities considered uncontrollable within the available security facilities at the Hospital, either to:

(A): the State Prison?

(B): a suitable out-of-State corresponding institution?

IV. May a mentally-ill person (neither a convict, nor an inmate of the School of Industry, nor accused of or adjudged to punishment for a public offense) who is a patient at the State Hospital, and who manifests dangerous propensities considered uncontrollable within the available security facilities at the Hospital, be transferred to:

(A): the State Prison?

(B): a suitable corresponding out-of-State institution?

#### CONCLUSIONS

To question No. I. (A): No.

(B): Yes.

To question No. II: As herein qualified, Yes.

To question No. III. (A): As herein qualified, Yes.

(B): Yes.

To question No. IV (A): On a temporary basis, Yes.

(B): Yes.

#### ANALYSIS

*(Convicted Mentally-ill Inmates of State Prison)*

NRS 433.320, insofar as here pertinent, provides as follows:

1. Whenever a convict, while undergoing imprisonment in the Nevada state prison, shall become mentally ill, *and be so adjudged by a court as in other cases of mental illness*, the warden shall deliver such convict to the superintendent of the hospital for detention and treatment. (Italics supplied.)
2. The superintendent of the hospital shall receive such mentally-ill convict and safely keep him, and, if the superintendent determines such convict to be cured or relieved of such mental illness before the expiration of his sentence to prison, the superintendent shall deliver him at the hospital to the warden thereof or his representative, who shall retain such convict therein for the unexpired term of his sentence, unless the convict shall be released by order of the state board of pardons commissioners or the state board of parole commissioners.

NRS 433.310 provides as follows:

1. Whenever a person *legally adjudged to be mentally ill* is deemed by the court or the superintendent to be a menace to public safety, *and the court is satisfied* that such facilities at the hospital are inadequate to keep such mentally ill person safely confined, *the court may*, upon application of the superintendent, *commit such person to the Nevada state prison*. The person shall be confined in the Nevada state prison until the further order of the committing court either transferring him to the hospital or declaring him to be no longer mentally ill. (Italics supplied.)
2. No person shall be ordered committed to the Nevada state prison under the terms of this chapter *unless the consent of the board of state prison commissioners has been first obtained*. (Italics supplied.)
3. All the provisions of law, so far as the same are applicable, relating to the confinement of mentally ill persons in the hospital shall apply to confinement of mentally ill persons in the Nevada state prison.

It should be noted that NRS 433.310 is general in import and application, so that it encompasses convicted inmates of the State Prison; court-committed persons who cannot be tried, adjudged to punishment, or punished for a public offense because of insanity; inmates of the School of Industry; and legally adjudicated and court-committed insane patients of the Hospital.

NRS 433.320 clearly indicates that the Superintendent of the Nevada State Hospital is not required to admit a convict to its facilities unless such convict has been adjudged by the court to be mentally ill, as in other cases of mental illness. Upon such court adjudication of mental illness, NRS 433.310 would be applicable. However, if a convict's mental illness was characterized by, or caused dangerous propensities of a kind or degree to constitute a menace to public safety, and (1) the consent of the Board of State Prison Commissioners has been first obtained, and (2) *the court is satisfied that hospital facilities are inadequate to keep such mentally-ill convict safely confined*, the court has no alternative but to recommit such convict back to the Nevada State Prison, as above indicated.

Since we are here concerned with convicted inmates of the State Prison who are mentally-ill, and they are primarily the responsibility of said institution, rather than the Hospital, the legislative intent of the above statutory provisions would appear to prohibit not only the court but also the Hospital Superintendent from making any other disposition

of a mentally-ill convict considered a menace to public safety, when *the court was satisfied that available Hospital security facilities were inadequate.*

In our opinion, therefore, question I(A) must be answered in the negative.

Chapter 466, 1959 Statutes of Nevada (amending Title 16 of NRS) enacted the Western Interstate Corrections Compact, applicable to adjudged and sentenced public offenders. The Compact empowers the Warden of the Nevada State Prison to enter into such contracts on behalf of the State as may be appropriate to implement participation in the Compact. The Compact authorizes and provides for placement of convict inmates in institutions of this State, in corresponding suitable institutions located in any other member state of the Compact, having adequate and available facilities for confinement, treatment and rehabilitation of adjudged public offenders. (Article II(d) and (e); and Article X, Section 7, which, however, provide: "No such contract shall be of any force or effect until approved by the state board of examiners.")

Since the Warden is authorized and empowered to enter into proper and suitable contractual arrangements for confinement, treatment and rehabilitation of adjudged and sentenced public offenders, both mentally-ill and possessed of dangerous propensities, there would appear to be no reason for the Board of State Prison Commissioners to refuse its consent (indicated in NRS 433.310 to be a condition precedent) to recommitment of such a convict to the State Prison.

The provisions of any contract with a member state of the Compact for confinement, treatment and rehabilitation of mentally-ill and adjudged and sentenced public offenders, or convict inmates, from institutions within the State, are outlined in Article III of said Compact. (Chapter 466, 1959 Statutes of Nevada, 829, 830.)

An affirmative conclusion to question I(B) is, therefore, justified on the authority and power contained in said Western Interstate Corrections Compact.

## II

### *(Mentally-ill Inmates of School of Industry)*

Insofar as inmates of the Nevada School of Industry are concerned, present law provides that upon request of the School's Superintendent, a person committed to the School shall be accepted by the State Hospital for observation, diagnosis and treatment, for a period not to exceed 90 days. It is further provided that if, after observation, the Hospital's Superintendent and Medical Director finds such person to be feeble-minded or mentally-ill, such person may be returned to the committing court for discharge from the School and commitment to the State Hospital in accordance with law. In the cases of sexual psychopaths, defectives, or psychopathic delinquents, such persons shall be returned to the School, and upon written request of the School's Superintendent, the committing court may order any such person to be committed to an appropriate institution outside the State of Nevada approved by the School's board for treatment. The committing court may order the expense of such support and treatment to be paid in whole, or in part, by the parents, guardian or other person liable for the support and maintenance of such person, and in the absence of such support and maintenance order, the cost thereof shall be paid by the School. (Chapter 421, 1959 Statutes of Nevada, Section 13, at page 679.)

The Western Interstate Corrections Compact, *supra*, would appear to authorize and empower the Superintendent of the Nevada School of Industry to enter into contractual arrangements with any member state of the Compact for confinement, treatment and rehabilitation of School inmates, in a corresponding suitable institution having adequate available security and medical facilities for mentally-ill School inmates of dangerous propensities, denied admission to the State Hospital because considered uncontrollable within the available security facilities therein.

### III

*(Court-committed Alleged Public Offenders Who Cannot be Tried, Adjudged to Punishment, or Punished, Because of Insanity.)*

NRS 178.400 provides as follows:

An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense while he is insane.

NRS 433.240, subsection 2, provides that the district court having jurisdiction in such cases may order the temporary commitment of such persons believed to be mentally-ill for examination and report, such commitment to continue until completion of the examination and report of the hospital.

NRS 433.550, subparagraph 5, provides that the Hospital Superintendent shall not discharge *any* patient known to have exhibited physical violence toward persons or property immediately prior to commitment *and who was committed subject to further court order*, without first giving notice in writing, not less than 10 days prior to discharge, to the court or judge who ordered the commitment.

And NRS 433.310, subparagraph 2, already quoted above, prohibits commitment of any person to the Nevada State Prison “\* \* \* unless the consent of the board of state prison commissioners has first been obtained.”

Apart from cases of homicide, which is, generally, a nonbailable public offense authorizing detention in any circumstances (NRS 178.020, 178.025) a temporarily-court-committed person charged with a public offense, and of dangerous propensities constituting a menace to public safety, may not be transferred for confinement in the State Prison without (1) the prior consent to such transfer by the Board of State Prison Commissioners, *and* (2) the approving order of the committing court.

Since presumptively innocent until adjudged guilty of the public offense charged and actually sentenced pursuant to such a judgment, immediate arrangements for suitable and safe confinement and treatment in a facility other than a prison are properly indicated for this class of cases. The *only* justification for confinement in the State Prison of such persons, even for such *temporary* period as may be necessary to make other arrangements, is the concern for public safety. *The court must be satisfied that the Hospital's security facilities are, in fact, inadequate for safe confinement of such persons.* And before the court makes any decision in the matter of transferring and confining such persons in the State Prison, the consent of the Board of State Prison Commissioners must first be obtained. In these cases, the State Prison Commission may properly condition its consent to such transfer and confinement in the Prison to such period only as may reasonably be necessary to effect other and more suitable placement for confinement and medical treatment of such dangerous, mentally-ill persons.

If the State Hospital's security facilities are satisfactorily shown to the committing court to be, in fact, inadequate, the court is authorized to approve transfer and confinement of such mentally-ill persons in a suitable corresponding hospital having adequate security facilities, in another state. Such court order should, necessarily, provide for retention of jurisdiction over the person of the alleged public offender to stand trial or have sentence imposed, if, and when, restored to sanity, in accordance with law. General implied authority and power of the Superintendent, Nevada State Hospital, to make such out-of-State placement of dangerous, mentally-ill persons may be found in NRS 433.020, 433.120, 433.180, and 433.530-433.540.

(A.G.O. 670, Sept. 9, 1948; A.G.O. 148, Feb. 21, 1952; A.G.O. 168, May 10, 1956; and A.G.O. 419, Oct. 20, 1958.)

## IV

### *(Court-adjudged Mentally-ill Patients)*

The last situation to be considered is that of Court-adjudged mentally-ill patients at the State Hospital, *neither convicted of, nor charged with, commission of a public offense*, manifesting dangerous propensities deemed a menace to public safety, where the Hospital's security facilities, *to the Court's satisfaction*, are, in fact, shown to be inadequate.

As previously noted, NRS 433.310 authorizes the Superintendent of the State Hospital to make application to the committing Court for transfer of such dangerous, mentally-ill patients to the State Prison for safe confinement. The prior consent of the Board of State Prison Commissioners to such confinement in the State Prison is a condition precedent to Court approval thereof.

Since these cases involve neither convicts nor persons charged with commission of a public offense, nor inmates of the School of Industry, their confinement in the State Prison can only be justified on the basis of the inadequacy of security facilities at the Hospital and concern for public safety. Prison confinement, therefore, should properly be temporary and for such period of time only as may reasonably be necessary to arrange for placement in a suitable *hospital*, even in another state, where both security and medical facilities are available for confinement and medical care and treatment.

Inasmuch as the State Prison is lacking in both medical facilities and personnel for proper care and treatment of mentally-ill persons, the Board of State Prison Commissioners should give consent to prison confinement of such persons on a conditional basis, only to permit completion of immediate arrangements for transfer to a suitable *hospital* possessed of both adequate security and medical facilities for safe confinement and medical care and treatment of mentally-ill patients, even though it involved out-of-state placement.

This category of cases is the responsibility primarily of the Superintendent of the State Hospital, and any necessary arrangements for suitable confinement and medical care and treatment of patients in a corresponding hospital should be made by him, under the generally implied authority and power already noted. Any such action by the Warden of the State Prison is unauthorized, since the Western Interstate Corrections Compact is expressly limited in its application to convicts or adjudged and sentenced "offenders." (Article I, Chapter 466. 1959 Statutes of Nevada, page 829.)

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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### **OPINION NO. 1959-104 Dairy Products and Substitutes—State Dairy Commission's authority to regulate credit controls within the dairy industry.**

CARSON CITY, October 12, 1959

MR. CLARENCE CASSADY, *Secretary of Nevada State Dairy Commission, Reno, Nevada*

#### STATEMENT OF FACTS

DEAR MR. CASSADY: There is at present, listed under the Unfair Trade Practices Section of the Stabilization and Marketing Plan of the Nevada State Dairy Commission, two

regulations upon which you have asked that the question of their legality be given an opinion by this office. The two regulations are listed as subsections (c) and (d) and are worded as follows:

(c) Within the boundaries of the Southern Nevada marketing area the granting of an extension or receiving of credit beyond the period of fifteen (15) days from the date of delivery of any milk, cream, or dairy by-product. Such period of credit extension for any delivery shall be computed from the first date of delivery not previously paid. The giving of any promissory note does not constitute payment within the meaning of this section.

(d) Within the boundaries of the Southern Nevada marketing area a distributor shall immediately place upon a cash basis any wholesale customer who has failed to pay for any delivery within fifteen (15) days after delivery, or is in default for fifteen (15) days in any other obligation to such distributor, and shall immediately notify the dairy commission, in writing, of the name of said wholesale customer whereupon the dairy commission will notify all other distributors to place the said wholesale customer on a cash basis.

#### QUESTION

The question of the legality of these two regulations raises four questions:

1. Is the statutory law upon which these regulations are based, legal and constitutional;
2. If the statutory law is legal, is there a legal basis within the statute giving the Dairy Commission authority to promulgate credit regulations generally;
3. Are the specific regulations in question in conformity with the statutory authority; and
4. Do the regulations amount to a secondary boycott and therefore are in contravention of certain Federal statutes.

#### CONCLUSION

1. The first question as to the legality of the statute has previously received attention from this office in Attorney General's Opinion No. 31, dated March 31, 1959, and conclusively answers the question as to the legislative authority to enact such statutes and therefore concludes that the statutory law on which these regulations are based is legal and constitutional.

2. The authority for promulgating credit regulations may be found first in NRS 584.565, wherein the Commission is given the authority to establish a stabilization and marketing plan necessary to accomplish the purposes of NRS 584.325 to 584.690, inclusive, and further, under NRS 584.585, it reads as follows:

*Additional duty and authority of commission: unfair trade practices.*  
Pursuant to the declaration and statement of facts, policy, and purposes set forth in NRS 584.325 to 584.690, inclusive, the commission is hereby vested with the additional administrative duty *and* authority to prescribe unfair trade practices and investigate marketing *and* pricing practices within marketing areas for later legislative recommendation.

We therefore feel there is sufficient authority within the statute for the Dairy Commission to regulate credit within the industry and make it a part of the stabilization and marketing plan, where they have found the use of credit to be an unfair trade practice.

3. The regulations as heretofore listed, provide for a period of 15-day credit in the Southern Nevada marketing area. Taken in conjunction with the regulations in other marketing areas within this State, we find 30-day credit is granted in the Eastern Nevada Marketing area, and 45-day credit may be extended in the Western Nevada marketing area. Section 21, Article 4, Constitution of the State of Nevada, provides as follows:

In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state.

It is self-evident that under the present rules, the distributors and retailers in the Western Nevada area and the Eastern Nevada area have much greater latitude in extending credit to customers than do the distributors and retailers in the Southern Nevada marketing area. We, therefore, conclude the regulations under question do not conform with Section 21, Article 4 of the Constitution of the State of Nevada which requires our laws to be uniform in operation.

4. The regulations above listed are not in contravention of Federal statutes prohibiting secondary boycott in that a secondary boycott is a form of conspiracy which is absent in the case where the distributors are acting in concert on application of credit in order to conform to a state law or regulation.

#### ANALYSIS

1. It is suffice to say that as to the first question raised in this Opinion, Attorney General's Opinion No. 31, dated March 31, 1959, gives a complete analysis of this question and cites numerous authorities which support the opinion that the Statutes enacted by the Nevada State Legislature in regard to the Dairy Commission are of legal effect and are constitutional.

2. The Nevada State Dairy Commission has been given authority by the Legislature under NRS 584.565 to establish a stabilization and marketing plan to further the free flow of fluid milk and milk by-products within the State of Nevada.

The stabilization and marketing plan presently in effect was established after investigations and public hearings as required by statute. As a part of the Stabilization and Marketing Plan, the Dairy Commission found that the unrestricted giving of credit did, in many cases, amount to an unfair trade practice by allowing some retailers to operate on the money of the distributor. Those distributors that could afford to give unlimited credit, of course could use this means of gaining business to the unfair advantage of those distributors that could not do so.

NRS 584.585, as previously cited in conclusion above, vests the Commission with the authority to prescribe unfair trade practices. This section further states that the Commission has the authority to investigate marketing and pricing practices within marketing areas for later legislative recommendation. The Commission is not limited to those unfair trade practices set up by statute nor limited to prescribing what are unfair trade practices for later legislative recommendation. The additional authority to prescribe unfair trade practices in their rules and regulations may be assumed from the wording of the statute:

*Additional duty and authority of commission: unfair trade practices.*  
Pursuant to the declaration and statement of facts, policy, and purposes set forth in NRS 584.325 to 584.690, inclusive, the commission is hereby vested with the additional administrative duty *and* authority to prescribe unfair trade practices and investigate marketing *and* pricing practices within marketing areas for later legislative recommendation.

As noted, the statute states these are to be *additional* duties of the Commission, and the use of the word “and” shows what are to be the additional duties. It further can be assumed that the Commission is not limited by statutory unfair trade practices. NRS 584.570 lists them to be *mandatory* provisions to be placed in every stabilization and marketing plan of the Dairy Commission, which indicates the Commission itself has the authority and duty to determine what are other unfair trade practices and so make them a part of any stabilization and marketing plan.

3. Since the regulations in question apply unequally to distributors and retailers within different sections of the State of Nevada for no apparent reason within the Stabilization and Marketing Plan, the legality of such regulations is questionable. The basis for such opinion is that Section 21, Article 4, Constitution of the State of Nevada, requires that all laws be of uniform operation throughout the State.

4. The question arising as to whether these rules amount to a secondary boycott and therefore are in contravention of certain Federal statutes, has been given serious consideration and investigation. The opinion insofar as a violation of any certain Federal Statute is concerned, is that these rules do not constitute a secondary boycott. A boycott is a form of conspiracy and the following opinions aptly cover the situation here:

In *Bedford Cut Stone Co. v. Journeymen S. C. Assn.*, 274 U.S. 37, the Supreme Court approves the following:

An act which lawfully might be done by one may when done by many acting in concert take on the form of a conspiracy and become a public wrong and may be prohibited if the result is hurtful to the public or to individuals against whom such concerted action is directed.

And again we find the following holding applicable to this situation: “An essential element of a boycott is intent to injure.” *Oxley Stove Co. v. Coopers International Union*, 72 Fed. 695.

It must appear that the means used are threatening and intended to overcome the will of others, and to compel them to do or to refrain from doing that which they would not otherwise do. *Meier v. Speer*, (Ark.), 132 S.W. 988.

It is therefore apparent under the above holdings and definitions that these rules do not and cannot be construed as a boycott or conspiracy in any form.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: VE NOY CHRISTOFFERSEN, *Special Deputy Attorney General  
for Nevada State Dairy Commission*

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**OPINION NO. 1959-105 Municipal Corporations—Mayor Pro Tem—Under NRS 266.185, subsection 1, election of councilman as Mayor pro tem authorizes such councilman to so serve during the term for which he has been elected to the council.**

CARSON CITY, October 19, 1959

HONORABLE WILLIAM P. COMPTON, *City Attorney, City of Henderson, 116 South Fourth Street, Las Vegas, Nevada*

## STATEMENT OF FACTS

DEAR MR. COMPTON: The city of Henderson is a city of the second class, incorporated under the provisions of Chapter 266, Nevada Revised Statutes (Incorporation by General Law) and, therefore, has for its charter sections NRS 266.005-266.795.

Upon organization of the new City Council, after the election of 1959, the Council elected one of its members as Mayor pro tem.

## QUESTION

Did the election conducted, as aforesaid, entitle the councilman to serve as Mayor pro tem, upon those occasions in which the Mayor is temporarily absent or temporarily disabled, during the entire term for which the councilman was elected?

## CONCLUSION

We are of the opinion that the question must be answered in the affirmative.

## ANALYSIS

Section 266.185, Nevada Revised Statutes, provides as follows:

1. During the temporary absence or disability of the mayor, the city council in cities of the second or third class shall elect one of its number to act as mayor pro tem. In cities of the first class the councilman at large shall act as mayor pro tem.
2. During the temporary absence or disability of the mayor, the mayor pro tem shall possess the powers and duties of the mayor.

Subsections 1 and 2 of NRS 266.245 provide as follows:

1. The city council shall prescribe by ordinance the time and place of holding its meetings, but at least one meeting shall be held each month.
2. Special meetings may be held on call of the mayor or a majority of the council, by giving 6 hours' written notice of such special meetings to each member of the council, served personally or left at his usual place of abode.

It is urged that the Legislature intended by the provisions of NRS 266.185, subdivision 1, that when a councilman is elected as Mayor pro tem, he is entitled by virtue of such election by the Council to serve as Mayor during the one Council session at which he has been elected.

To this contention, in your written opinion given to the Mayor pro tem, you have advanced the argument that if such were the meaning of NRS 266.185, subdivision 1, it would negative the obvious meaning of NRS 266.245, subdivision 2, wherein it is provided that a special meeting of the Council may be called by the Mayor. If such contention be correct, it would mean that during the temporary absence or disability of the Mayor, no matter how great the emergency, a special meeting of the City Council could not be called by the Mayor pro tem. The city, in such case, would be without a Mayor until by the cumbersome method of calling a meeting of the Council by a majority thereof, the Council would be called into a special meeting and at such meeting, for the meeting only, it is presumed the Council would elect one of its members as Mayor pro tem. How any councilman would have the authority to preside over the meeting when called, for the purpose of electing one of its members as Mayor pro tem, is not considered

or made clear. The argument that you have advanced in this respect, with which we agree, is unanswerable.

It could not be seriously contended, we feel, that "mayor pro tem," as used in the second sentence of subsection 1 of NRS 266.185, has a meaning differing from the meaning to be given to the term in the first sentence of that subsection. Under the second sentence the Mayor pro tem would clearly serve during his term as councilman. Yet it is urged that under the first sentence of the subsection a Mayor pro tem would serve the one meeting only.

In Volume 3, McQuillan on Municipal Corporations, Third Edition, Article 12.42, page 195, the author states the rule as follows:

\* \* \* it has been held that, when a member of the board of commissioners is elected mayor pro tempore, his term expires at the expiration of his term as commissioner. *Culbertson v. Moore*, 302 Ky. 768; 196 S.W. (2d) 308.

For the reasons given, we are of the opinion that for a city of the second class, operating under a charter of the general law, heretofore mentioned, it is the duty of the City Council, upon organization, to elect one of its members Mayor pro tem, who then becomes authorized to serve as Mayor during the temporary absences or disabilities of the Mayor, and that his authority to so serve terminates at the expiration of his term as councilman.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D. W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-106 Public Service Commission of Nevada has Jurisdiction over Intrastate Activities of an Interstate Air Transportation Carrier in the Field of Economic Regulation.**

CARSON CITY, October 19, 1959

MR. J.G. ALLARD, *Chairman, Public Service Commission of Nevada, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. ALLARD: 1. Bonanza Air Lines, Inc., is a Nevada Corporation with its principal office and place of business in Las Vegas, Nevada.

2. On the 12th day of July, 1946, Bonanza was awarded a permanent certificate of public convenience and necessity by the Public Service Commission of Nevada (hereinafter called PSCN) to transport by air passengers and cargo between Reno and Las Vegas, Nevada, serving no intermediate points.

3. On the 27th day of March, 1947, Bonanza was awarded a temporary certificate of public convenience and necessity by the PSCN, for passengers only, to serve the intermediate points of Hawthorne and Tonopah, Nevada.

4. On the 26th day of June, 1947, the temporary certificate described in paragraph 3 above was made permanent and Bonanza was further authorized to transport cargo in addition to passengers.

5. On the 22nd day of November, 1949, the U.S. Civil Aeronautics Board (hereinafter called CAB) awarded to Bonanza a temporary certificate of public

convenience and necessity to engage in the air transportation, for the period November 22, 1949, to the 31st of December, 1952, with respect to persons, property and mail, under the title Air Mail Route No. 105 as follows:

Between the terminal point Reno Nev., the intermediate points Carson City-Minden, Nev., Hawthorne, Nev., Tonopah, Nev., Death Valley, Calif., Las Vegas, Nev., Boulder City, Nev., Kingman, Ariz., and Prescott, Ariz., and the terminal point Phoenix, Ariz.

6. On the 21st of July, 1950, the PSCN awarded a permanent certificate of public convenience and necessity to Bonanza to serve additionally the intermediate point of Carson City-Minden, Nevada.

7. On the 25th day of January, 1955, the CAB issued a temporary certificate of public convenience and necessity to Bonanza to engage in air transportation with respect to persons, property and mail, between the terminal points Reno, Nevada, and Phoenix, Arizona, and the intermediate points of Hawthorne, Gabbs, Tonopah and Las Vegas, Nevada, Kingman and Prescott, Arizona.

8. This certificate of the 25th day of January, 1955, as described in paragraph 7 above, omitted service to Carson City-Minden. Bonanza thereafter ceased such service. The PSCN never authorized Bonanza to terminate its service to Carson City-Minden, but the PSCN took no action in regard to this abandonment of service.

9. On the 4th day of November, 1955, the CAB issued to Bonanza:

(1) A permanent certificate of public convenience and necessity to operate Air Mail Route No. 105 between Reno, Nevada, and Phoenix, Arizona, serving the intermediate points of Las Vegas, Nevada, and Prescott, Arizona.

(2) A temporary certificate, expiring on the 31st day of December, 1958, to serve Hawthorne and Tonopah, Nevada, and other intermediate points outside Nevada.

10. On the 5th day of December, 1958, by Exemption Order, Bonanza was authorized to continue to serve Hawthorne and Tonopah, Nevada, but was not required to do so.

11. On the 26th day of August, 1959, Bonanza notified the PSCN by letter from its general counsel that, effective on the 27th day of September, 1959, it would discontinue all transportation to Hawthorne, Nevada, and curtail its service to Tonopah, Nevada, without complying with Nevada law. Bonanza took the position that it was not subject to Chapter 704, Nevada Revised Statutes, regulating public utilities, being subject only to regulation by the CAB. In accordance with its stated intentions, Bonanza has discontinued service to Hawthorne, Nevada, and restricted its service to Tonopah, Nevada.

12. There is no contention on the part of Bonanza that it is not a public utility subject to regulation by the PSCN under Chapter 704 NRS, provided that the Nevada Commission has jurisdiction.

NRS 704.020 1(d) defines "airship common carriers" as a public utility.

NRS 704.390 reads as follows:

It shall be unlawful for any public utility to discontinue, modify or restrict service to any city, town, municipality, community or territory theretofore serviced by it, except upon 20 days' notice filed with the commission, specifying in detail the character and nature of the discontinuance or restriction of the service intended, and upon order of the commission, made after hearing, permitting such discontinuance, modification or restriction of service.

13. It is conceded by Bonanza's general counsel, and concurred in by this department, that insofar as this problem is concerned, the Civil Aeronautics Act of 1958,

adopted in August of 1958, is the same as the Civil Aeronautics Act of 1938 and, therefore, all references herein will be to the 1938 Act.

#### QUESTION

Does the Public Service Commission of Nevada have jurisdiction to compel Bonanza Air Lines, Inc., to comply with NRS 704.390 insofar as the abandonment of service to Hawthorne and the curtailment of service to Tonopah is concerned?

#### CONCLUSION

Bonanza Air Lines, Inc., is subject to the jurisdiction of the Public Service Commission of Nevada and has violated NRS 704.390 when it abandoned service to Hawthorne and curtailed service to Tonopah, Nevada, without the authority of the PSCN.

#### ANALYSIS

We are dealing here with a case where the exercise of state police power must be reconciled with the exercise by the United States of its power to regulate commerce among the several states (Article 1, Section 8, Constitution of the United States). The cases on this subject are legion. The rule is well established by the Supreme Court of the United States that where state police power conflicts with the proper exercise of the commerce power by the United States, the former must yield. It is also a well recognized rule that the state may exercise its police power in the field of commerce unless Congress has preempted the field. But, it is quite another thing to determine in a particular case involving particular Congressional legislation, and a particular Federal agency, the line of demarcation between Federal and state jurisdiction.

Where the activity in the commerce field is wholly interstate and has no intrastate aspects, or where the commerce is entirely intrastate, there is no problem of conflicting federal and state jurisdiction. But when the question, as here, involves the authority of the State to regulate the intrastate activities of a company engaged in interstate commerce, no broad general rule can be followed. The facts of each case, the federal and state law, both statutory and case law, must be carefully examined.

In *Bell Telephone Company of Nevada v. Public Service Commission of Nevada*, 70 Nevada 25, at page 43, the court said:

\* \* \* it has been universally recognized that, as the federal jurisdiction in rate matters is restricted to interstate commerce, so the jurisdiction of the various states is restricted to intrastate rates in their respective jurisdictions. Most of the telephone plant and equipment is used in both interstate and intrastate communications. \* \* \* Since the Minnesota Rate Cases, \* \* \* the accepted law has been that the properties serving such dual purpose must be separated, for rate making purposes in the respective jurisdictions, in accordance with proportionate use.

In *State of Nevada ex rel. The Texas Company v. Koontz, Secretary of State*, 69 Nevada 25, the court stated:

While a state may not prohibit a foreign corporation from engaging in interstate commerce within its boundaries, it does have inherent power to prohibit such a corporation from engaging in intrastate or local commerce within its boundaries. Accordingly, it may, in admitting such corporations to do local business, impose upon their admission such conditions as it may choose. Further, the fact that interstate commerce is already being carried

on within the state, does not carry with it any right to engage in intrastate commerce in connection therewith. That right remains for the state to grant.

This subject was generally treated in an opinion of the Attorney General. In Opinion No. 559, dated January 8, 1948, our predecessor, General Bible, stated that the Nevada Public Service Commission had no jurisdiction with respect to interstate communications by radio. The Attorney General stated that the Federal Communication Commission Act of Congress had occupied the entire field. But the opinion went on to state, regarding other activities in interstate and intrastate commerce, as follows:

It is true that an interstate telephone company is subject to regulation by the Federal Communications Commission. However, a telephone company is not in the same category as a radio broadcasting company using the air waves exclusively for communication. An examination of the Federal Communications Act discloses that Congress has not occupied the entire field with respect to regulation of telephone and telegraph companies but has specifically left the regulation thereof with respect to intrastate business and extension of lines wholly within a State to the regulation of the respective Public Service Commissions. See sections 221 and 214 of said Title 47, Federal Code Annotated. So that insofar as the power of your commission is concerned, it has the right to regulate such interstate companies with respect to their intrastate business within Nevada and require reports and such certificates as may be necessary concerning their intrastate business.

The same proposition surrounds the operation of interstate railroads within the State of Nevada as the Interstate Commerce Act contains no provision whereby Congress has entered the field to the exclusion of all State regulation and it may be further stated with respect to railroads and telephone and telegraph companies that in many instances the line of demarcation between the power of Federal commissions and State commissions is not clearly marked and when cases arise close to the line of demarcation, then the facts in each individual case will be necessary of close examination before any definite rule can be laid down thereon.

With respect to aviation, we beg to advise that Congress has enacted a very comprehensive Act concerning the carriage of passengers and property by air known as the Civil Aeronautics Act, enacted in 1938, the same being section 401 et seq., Title 49, Federal Code Annotated. An examination of this Act discloses that Congress has practically occupied the field with respect to aeronautics and we think such Act is so broad as to preclude control and regulation of air traffic in interstate commerce by any method whatsoever. This, however, does not preclude the Commission of this State from control and regulation of carriers by air engaged in intrastate traffic and we think that such regulation and control attaches to airway companies engaged in interstate traffic whenever they engage in purely intrastate traffic within Nevada. Therefore, it follows that as to intrastate traffic your commission has the power to require certificates of public convenience and such reports and filing of classifications as may be necessary under our law.

We have carefully examined the Civil Aeronautics Act of 1938, Title 49 U.S.C.A., Sec. 401 et seq., Chapter 704 NRS, all of the cases cited by counsel for Bonanza, and many other cases.

We have found the case of *People v. Western Air Lines, Inc.*, a 1954 decision of the California Supreme Court, found in 268 P.2d 723 (Appeal dismissed 75 Sup.Ct. 87, 348 U.S. 859, 99 L.Ed. 677). We believe this case is controlling and have resolved the

question presented to us by applying the rules of law and analysis of the California Court. The facts in this case were as follows:

Western Air Lines, among other interstate air carriers, challenged the jurisdiction of the Public Utilities Commission of California to regulate, in any respect, the business of federally certificated interstate air transportation companies and without the authorization of the State Commission, increased its passenger rates for air coach service between Los Angeles and San Francisco, California. Much of the decision deals with the question of the jurisdiction of the California Commission over air transportation. (We have no similar problem in Nevada. See NRS 704.020 1(d) referred to supra.) After finding that the California Commission did have jurisdiction in the field of air transportation, the court turns its attention to the question of the right of the State of California to regulate the intrastate activities of interstate air transportation companies certified by the CAB. Beginning at page 735, the court states:

It is further contended by the defendant that any regulation of air carriers by states is barred by the Civil Aeronautics Act of 1938, as amended, 52 Stats. 977, 49 U.S.C.A., sec. 401 et seq., and is against the national interest. This question was squarely raised in the hearings before the commission in the prior proceedings and was determined by the commission and by this court contrary to the contention. It formed one of the bases of the appeal to the Supreme Court of the United States. The jurisdictional statement on that appeal recited the issues there to be: "(1) Has the Civil Aeronautics Act of 1938, as amended, pre-empted the entire field of civil aviation to the exclusion of the right or power of any state or state agency to exercise jurisdiction or authority over commercial air transportation" and "(2) Is the Order of the Public Utilities Commission of the State of California, purporting to regulate the air coach tariff over an (intrastate) segment of a federally certificated interstate air route, a burden on interstate commerce and thus in violation of subsection 3 of Section 8, Article I of the Constitution of the United States? \* \* \* That appeal was dismissed by the Supreme Court "for the want of a substantial federal question." 342 U.S. 908, 72 S.Ct. 304, 96 L.Ed. 679. \* \* \*.

It appears beyond question that the power of Congress under the commerce clause extends to the regulation of "modes of interstate commerce unknown to the fathers," *In re Debs*, Petitioner, 158 U.S. 564, 591, 15 S.Ct. 900, 909, 39 L.Ed. 1092, and includes the regulation of the interstate operation of air carriers. The extent to which Congress has asserted such jurisdiction over civil aviation depends upon the terms of the legislation which it has adopted. This legislation is chiefly embodied in the Civil Aeronautics Act of 1938, as amended. *A review of that act indicates that two kinds of jurisdiction have been there asserted by Congress—one over safety factors, the other over economic factors.* We are not here concerned with the provisions of the act applicable to safety regulations except to note that the extent of federal jurisdiction over those factors, Secs. 601-610, 49 U.S.C.A. Secs. 551-560, seems to be based on the definition of "air commerce" contained in section 1(3), 49 U.S.C.A. Sec. 401(3). It is there provided: "'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

*The jurisdiction asserted by Congress in the local economic regulatory field is not covered.* Section 1(2), 49 U.S.C.A. Sec. 401(2), defines "air carrier" as one engaged in "air transportation." "Air transportation" is

defined in section 1(10), 49 U.S.C.A. Sec. 401(10), to mean “interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.” “Interstate air transportation” is defined by section 1(21), 49 U.S.C.A. Sec. 401(21), to mean “the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

“(a) a place in any State of the United States, or the District of Columbia, and a place in any other State \* \* \* or between places in the same State of the United States through the air space over any place outside thereof \* \* \*

“(b) a place in any State of the United States \* \* \* and any place in a Territory or possession of the United States \* \* \*

“(c) a place in the United States and any place outside thereof \* \* \*.”  
(Italics supplied.)

Sections 601-610, 49 U.S.C.A. Secs. 551-560, state the jurisdiction asserted over safety factors of air carrier regulation; sections 401-416, 49 U.S.C.A. Secs. 481-496, over economic factors. Rates and tariffs are controlled by the latter sections. *Under those provisions and the definitions contained in section 1, 49 U.S.C.A. Sec. 401, it seems clear that Congress has not sought to extend the economic regulation of the board to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates.* (Italics supplied.)

Defendent urges that section 401(2), 49 U.S.C.A. Sec. 481(2), is of special significance on the question of the jurisdiction of the board over intrastate rates because it authorizes the issuance of certificates of public convenience and necessity for the transportation of mail and all other classes of traffic for which authorization is sought between such points as “from Brownsville, Texas \* \* \* to San Antonio, Texas.” Obviously that section pertains to the necessity of federal certification. *No question is here presented or determined as to the effect of this provision upon state certification; and the requirement of federal certification does not necessarily preclude state control of intrastate rates.* The same observation applies to the provisions of section 403, 49 U.S.C.A. Sec. 483, requiring air carriers to file tariffs with the board, of section 404, 49 U.S.C.A. Sec. 484, requiring the observance of reasonable rates and charges, and of section 406, 49 U.S.C.A. Sec. 486, empowering the board to fix the compensation to be paid to air carriers for the transportation of mail. \* \* \* (Italics supplied.)

*There is no language indicating that Congress intended to preempt the field of economic regulatory control of air transportation so as to include the transportation of passengers solely between points within a state and not involving the use of the airspace outside of the state. We are not concerned on this appeal with the question whether Congress could properly assert such power. There appear to have been no decisions of the United States Supreme Court defining the limits of such regulatory control.* (Italics supplied.)

Attention has been called to numerous recommendations and bills presented to Congress, prior to and since the enactment of the Civil Aeronautics Act of 1938 seeking to extend federal economic regulation to include intrastate operations of air carriers, and also to the fact that none of these has been enacted into law. This would seem to strengthen the conclusion that Congress has not assumed control over carriers to the exclusion of state control as to their intrastate rates.

Any doubts on the subject should be resolved in favor of state power for the principal reason, as stated, that the regulation of intrastate fares of

common carriers traditionally has been subject to state regulation. It is true, as defendant points out, that Congress did not use language in the Civil Aeronautics Act of 1938, such as that employed in different legislation asserting its control over other kinds of common carriers in which it was expressly stated that such regulations shall not be construed to interfere with the exclusive exercise by each state of the power to regulate intrastate commerce. See Section 1(2), Interstate Commerce Act, 49 U.S.C.A. Sec. 1 (railroads); Sec. 202(b), Part II, Interstate Commerce Act, 49 U.S.C.A. Sec. 302 (motor carriers); Sec. 303(j), Part III, Interstate Commerce Act, 49 U.S.C.A. Sec. 903 (water carriers). The failure to use such language in the Civil Aeronautics Act does not necessarily imply that federal regulation of air transportation was intended to exclude all state control. Railroads and motor carriers began as short-haul carriers. In their operations wholly within a state they have been traditionally subject to state regulation. In the early days of aviation the operating costs and necessarily the fares of the pioneering airlines were very high and as a consequence they could compete with surface carriers only on long hauls. Consequently air transportation in this country has been predominately interstate and as such subject to federal control.

\* \* \*

Since 1939 the carriers authorized to transport passengers by air between the mainland of California and Santa Catalina Island have been subject to detailed regulatory control by the federal board. Tariffs for those operations were filed with that board but had never been filed with or required by the state commission. Santa Catalina Island lies about 30 miles westward of the mainland and is a part of California. In September and December, 1951, the commission requested United Air Lines to file tariffs with it, asserting that the Catalina operations were not within the coverage of the Civil Aeronautics Act but were intrastate and subject to state regulation. No formal order was issued by the commission. In June, 1952, United Air Lines and Catalina Air Transport, a corporation, joined in a complaint filed in the United States District Court for the Southern District of California, 109 F. Supp. 13, praying for declaratory and injunctive relief, alleging that the California commission was threatening to bring penalty and reparation proceedings against them. The board intervened for the purpose of asserting its exclusive jurisdiction. A three judge court ordered an injunction, upholding the exclusive jurisdiction of the board. That judgment was reversed by the Supreme Court (74 S.Ct. 151, Nov. 30, 1953) on technical grounds, citing *Public Service Commission of State of Utah v. Wycoff*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291. However in the brief on appeal filed on behalf of the board it was stated there "is no issue here presented of whether Civil Aeronautics Act would pre-empt the field of economic regulation of the Catalina operations if those operations involved only flights over California territory, as, for example, do flights between Los Angeles and San Francisco. *United Air Lines (Inc.) v. Public Utilities Commission of California* 342 U.S. 908 (72 S.Ct. 304, 96 L.Ed. 679), where this Court dismissed an appeal from a rate order of the California Commission for want of a substantial federal question, involved air transportation between Los Angeles and San Francisco only, and is in apposite here." Brief for Appellee Civil Aeronautics Board, p. 13.

The argument that the interests of the United States require national uniformity in the regulation of air transportation through the total exclusion

of state control is addressed to a matter of public policy which requires no consideration here.

We have examined the authorities cited, and relied upon, by counsel for Bonanza, to wit, *Blalock v. Brown* (Georgia 1949), 51 S.E. 2d 610; *In re Veterans Air Express Co.*, U.S.D.C. N.J. 1948, 76 F.Supp. 684; *Rosenhan v. U.S.*, U.S.C.A. 10th 1942, 131 F.2d 932; *Allegheny Airlines v. Cedarhurst*, U.S.D.C. N.Y. 1955, 132 F.Supp. 871; Vol. 6, Revised, *American Jurisprudence*, 1958 Cumulative Supplement, page 4, notes on Section 13. We have read many other cases. See 69 A.L.R. 322; 83 A.L.R. 336; 99 A.L.R. 177; 9 A.L.R.2d 485. It is true that the majority of these authorities hold that the State Commission has no jurisdiction over intrastate activities of an interstate carrier because Congress has preempted the field. These cases may be distinguished in that they deal with the other kind of jurisdiction exercised by Congress through the Civil Aeronautics Act, jurisdiction over safety factors rather than over economic factors. We have not found a single case in the field of economic regulation of air carriers supporting Bonanza's position.

From the statement of facts set forth in this opinion, it is shown that Bonanza was originally an intrastate carrier only. The PSCN exercised full jurisdiction over Bonanza and that company submitted to such jurisdiction and apparently complied with Nevada law.

Bonanza applied for and was awarded by the PSCN a permanent certificate of public convenience and necessity to serve Hawthorne and Tonopah on the 26th day of June, 1947. Bonanza was then engaged in intrastate commerce only. Bonanza did not come under the jurisdiction of the CAB until the 22nd of November, 1949, when it was authorized to engage in interstate commerce by virtue of its acquisition of Transcontinental & Western Air, Inc.'s Phoenix to Las Vegas route.

There can be no doubt that up until the time Bonanza became an interstate carrier the PSCN had full and complete jurisdiction. When Bonanza, in 1949, extended its service from Las Vegas to Phoenix and other Arizona points, was the PSCN ipso facto ousted of any and all jurisdiction to regulate Bonanza's Nevada interstate operations? We think not. Bonanza obtained the right to serve Hawthorne and Tonopah in the air transportation of cargo and passengers, and became obligated to so serve, by an award of a certificate of public convenience and necessity by the PSCN. In our opinion the case of *People v. Western Air Lines* is authority for the proposition that the PSCN has had, and does now, have jurisdiction. Bonanza had no right to suspend its service to Hawthorne and restrict service to Tonopah unless authorized as provided in NRS 704.390.

Bonanza informed the PSCN that it had decided to abandon service to Hawthorne and restrict service to Tonopah although it had permission, temporary though it may be, from the CAB to continue to serve these Nevada points as before. The decision was Bonanza's. It was not compelled by the CAB to so act.

But even if the CAB's temporary certificate of public convenience and necessity to serve Hawthorne and Tonopah, which expired the 31st of December, 1958, had not been the subject of an exemption order extending Bonanza's right to serve these points (which exemption, we presume, is still in effect), we feel that there is no conflict between the Federal commerce power and the state police power. Congress has not preempted the field of economic regulatory control over the intrastate activities of an interstate federally certificated air transportation carrier. There can be no question but that the regulatory powers, both state and federal, with which we are dealing in this case concern themselves with economic factors and not with safety factors. Bonanza's counsel concedes this when he refers in his letter to the certification of Bonanza by the CAB to serve, among other points, Hawthorne and Tonopah under the provisions of Title 4 of the Civil Aeronautics Act of 1938. This Title 4 is entitled "Air Carrier Economic Regulations."

We, therefore, conclude that the Public Service Commission of Nevada can compel Bonanza to reinstate service as before to Hawthorne and Tonopah. In the event the CAB

completely withdraws Bonanza's authority to serve these two points, such an order would simply mean that Bonanza could not give mail service to Tonopah and Hawthorne. As we see it, the CAB's jurisdiction to include the intermediate intrastate points of Hawthorne and Tonopah in its certificate of public convenience and necessity exists only because it has the authority to control the intrastate activities of Bonanza insofar as that carrier's eligibility to contract with the Postmaster of the United States for the carrying of the mail. Assuming the PSCN should compel Bonanza to serve Hawthorne and Tonopah as before September 27, 1959, and assuming the CAB's withdrawal of Bonanza's authority to serve Hawthorne and Tonopah, both of these orders—the CAB's to cease mail service and the PSCN's to give passenger and cargo service—could be in effect simultaneously and would not be inconsistent.

Although, as stated, it is our opinion that there is no conflict between the exercise of the United States commerce power and state police power under the facts before us, we, nonetheless, wish to emphasize that should there be a conflict, the Federal power would govern. But the possibility that there may be conflicts under other factual situations cannot be considered where there is, in fact, no conflict.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*

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**OPINION NO. 1959-107 Colorado River Commission—"Basic contractors"  
entitled to Davis Dam power allotment.**

CARSON CITY, October 26, 1959

MR. A.J. SHAVER, *Chief Engineer, Colorado River Commission, State Building, Las Vegas, Nevada*

STATEMENT OF FACTS

DEAR MR. SHAVER: The State of Nevada, through its Colorado River Commission, has contracts, to furnish electrical energy, with Southern Nevada Power Co., Lincoln County Power District, and Overton Power District, hereinafter called "Southern Nevada contractors," and the said Commission has additional contracts with several industrial firms at or near Henderson, Nevada, hereinafter called "Basic contractors."

The source of the said power is Hoover and Davis Dams in Clark County, Nevada. The State has contracts with the United States to obtain such power.

The Southern Nevada contractors' contracts refer only to Hoover energy, while the Basic group contracts refer to Hoover and Davis as follows:

Paragraph 6(b) of the contract between Basic contractors and the Commission reads as follows:

The following rates and charges to be paid by the Company for electric energy are based on pooled power obtained from Hoover Power Plant and Davis Power Plant. Said rates will in no event exceed the average rate based on pooling a maximum of 236,000,000 kilowatt-hours obtained yearly from Davis Power Plant, and 386,000,000 kilowatt-hours obtained yearly from Hoover Power Plant subject to exhibits attached hereto and Article 18 hereof.

The Southern Nevada contractors have contracts for 355,000,000 kilowatt-hours of firm energy while the Basic group have contracts for 622,000,000 kilowatt-hours. Total—977,000,000 kilowatt-hours.

By former agreement the Basic group gets 52.09 percent of the Hoover power and the Southern Nevada contractors 47.91 percent.

The estimated available power for the operating year 1959-1960 is 85 percent of firm, which is 619,000,000 kilowatt-hours. This would allow the Southern Nevada contractors 296,969,000 kilowatt-hours and the Basic group 322,879,000 kilowatt-hours of Hoover.

In the contract between the State of Nevada and the United States for Davis Dam energy, the said contract refers to the Basic contractors and the Basic Magnesium project in several places and makes no reference to any other contract.

The Hoover contracts provide for an annual decrement to be deducted from contract.

The Davis Dam estimated available power for 1959-1960 operating year is 220,400,000 kilowatt-hours.

In addition, there may be additional Davis available which is released from other out-of-state contractors.

#### QUESTIONS

1. Which of the contractors is entitled to the Davis allotment of 220,400,000 kilowatt-hours?
2. Which of the contractors is entitled to the additional Davis power over and above the regular allotment?

#### CONCLUSIONS

Basic contractors are entitled to both the regular Davis allotment and the additional Davis power.

#### ANALYSIS

The Southern Nevada contractors have no contracts for Davis energy. They are limited to their agreed share of Hoover, namely, 47.91 percent or 296,969,000 kilowatt-hours. As pointed out in the Statement of Facts above, there is no reference made in the contract between the State of Nevada and the United States for Davis Dam power to any contractors other than the Basic contractors.

The Basic group have combined contracts for 622,000,000 kilowatt-hours of Hoover and Davis combined. They are entitled to their share of Hoover, 52.09 percent or 322,879,000 kilowatt-hours plus the entire output of Davis which is 220,400,000 kilowatt-hours. Thus, the combined total of Hoover and Davis gives them 543,279,000 kilowatt-hours. They are still short 78,721,000 kilowatt-hours, subject to adjustment for Hoover decrement. Until they receive that amount, they are entitled to all of Davis energy.

Basic contractors are also entitled to the additional Davis power.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

By: JOHN W. BONNER, *Special Deputy Attorney General for Colorado River Commission*

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**OPINION NO. 1959-108 Architecture, State Board of—Architects, when duly licensed, ordinarily, are not “contractors” or “builders,” and are, therefore,**

**expressly exempted from provisions of Contractors' Law, including requirement of contractor's license in connection with issuance of building permits. Requirement of owners' written authorizations for issuance of building permits to architects, contractors, or other persons held not unreasonable, an unwarranted delegation of authority, or violative of any other constitutional provisions.**

CARSON CITY, October 28, 1959

MR. ALOYSIUS McDONALD, *Secretary-Treasurer, State Board of Architecture of Nevada, 1420 South Fifth Street, Las Vegas, Nevada*

Attention: MR. ELMO C. BRUNER, *Member*

#### STATEMENT OF FACTS

DEAR MR. McDONALD: We are advised that in some instances building inspectors in Clark County, Nevada, have denied certain architects and their clients, or property owners, building permits, when requested by architects on the owner's behalf.

The denial of such building permits, we are given to understand, has been based upon the representation that an architect would have to be a holder of a contractor's license under the Contractor's Law before such a building permit could be issued.

On submission of the matter to the office of the District Attorney of Clark County, Nevada, it is indicated that the District Attorney's office gave advice that it would be permissible for the building inspector to issue the building permit only if the architect had prior written authorization from the owner for the architect to act as owner's agent, said authorization to be filed with the building inspector. It further is indicated that the building inspector has required contractors, seeking building permits on behalf of owners, to secure and submit such written authorizations from owners in order to obtain a building permit.

#### QUESTIONS

1. Are architects, duly licensed in the State of Nevada, required to have a contractor's license in order to secure a building permit on an owner's behalf?
2. May building inspectors require architects and/or contractors to submit written authorization constituting an architect or contractor an agent of an owner, in order to procure the issuance of a building permit?

#### CONCLUSIONS

To question No. 1: No.  
To question No. 2: Yes

#### ANALYSIS

NRS 624.020 defines "contractor" as synonymous with the term "builder," and exempts from the law governing contractors, a licensed architect or licensed engineer. The effect of such statutory provision is that, although a licensed architect may be a contractor, he is not a builder and is, therefore, exempt from application of the Contractors' Law. (See Attorney General's Opinion No. 781, July 22, 1949.)

As a general rule, it may be said that as far as the preparation of plans is concerned, an architect acts as an independent contractor, but that as regards the performance of his supervisory functions with respect to a building under construction, he ordinarily acts as

agent and representative for whom the work is being done. However, an architect may also occupy the position of an independent contractor where he undertakes to execute the entire work with sole control thereof, and of the employment and management of those engaged in such work. The actual status of an architect, therefore, is one of fact, to be determined by the circumstances in each particular case. (See: 3 Am.Jur. 1000, Attorney General's Opinion No. 781, July 22, 1949.) Before an architect shall be deemed a "contractor" or "builder," as defined and subject to the provisions of Chapter 624 of NRS, a clear preponderance of evidence is required. (19 A.L.R. 1181 et seq., Section 4.)

In the absence of a preponderance of evidence showing that an architect is, in fact, engaged in the business of a "contractor" or "builder," or performing such functions in excess of services authorized as a duly licensed architect, *or agent, acting for and on behalf of an owner*, issuance of a building permit cannot be denied a licensed architect on an owner's behalf, merely because the architect does *not* have a contractor's license.

In connection with our analysis of the second question involved herein, some preliminary observations are justified. Thus:

It is doubtless within the power of the legislature and of a municipality under its delegated general police power or powers expressly granted to enact building regulations to require persons proposing to erect buildings within the limits of municipalities to apply to some board or public officer for permission to do so, *provided such board or officer is not vested with arbitrary authority and is not authorized to withhold permission for some reason which cannot be sustained without the impairment of constitutional rights. The conditions upon compliance with which such permits may be obtained must, however, be reasonable ones.* The action of the officer or board, from whom a permit must be obtained, in refusing a permit, is subject to judicial review. *In order to be valid, the ordinance must not result in an unwarranted delegation of authority to officials of the municipality, nor attempt to confer upon them an unlimited discretion as to the granting, refusing, or revocation of permits \* \* \*.* (Italics supplied; 9 Am.Jur. 202 et seq., Section 7.)

Although information is lacking as to whether the building code or regulations here involved have been adopted by, or are embodied in, ordinance, either county or municipality, we presume that such is the case for purposes of our opinion. Information is also lacking as to whether the building inspector's requirement that an architect or contractor submit written authorization from an owner for issuance of a building permit is specifically and expressly provided by ordinance, or effective building code or regulations. If there is such specific and express requirement, the question would then be whether or not such requirement was a reasonable one. In our view, even in the absence of specific and express requirement therefor in ordinance, building code, or regulations, the question to be resolved is precisely and substantially the same.

We have reviewed the provisions of general law relevant to the question under consideration, contained in Chapter 278 of Nevada Revised Statutes, and particularly NRS 278.570, 278.580, and 278.610. NRS 278.610, specifically, provides as follows:

1. From and after the establishment of the position of building inspector and the filling of the same as provided in NRS 278.570, it shall be unlawful to erect, construct, reconstruct, alter or change the use of any building or other structure within the territory covered by the building code or zoning regulations without obtaining a building permit from the building inspector.

2. The building inspector shall not issue any permit unless the plans of and for the proposed erection, construction, reconstruction, alteration or use fully conform to all building code and zoning regulations in effect.

It is to be noted that the foregoing provisions of general law do not specifically or expressly require written authorization from an owner for the issuance of a building permit. However, such omission does not necessarily mean that insistence upon the submission of written authorization from the owner is an unreasonable requirement on the part of a building inspector. Building permits relate to performance of authorized specified work on particular property, necessarily involving possible property rights, in which an owner certainly must be presumed to have some interest and concern. Insofar as owners of property are concerned, therefore, the requirement of written authorization from them for the issuance of building permits covering work affecting their property, or property rights, cannot be deemed an unreasonable requirement, since such authorizations constitute a record of the fact that they are aware of contemplated construction work with respect to their property.

Moreover, such written authorizations from owners constitute *ostensible* authority, general or limited in nature, in an architect, contractor, or agent of an owner, which could prove of substantial importance in respect of any rights created by an architect, contractor, or agent *with third parties* (e.g., contractors, subcontractors, laborers, or materialmen) *which might affect property owners*. Both owners and such third parties can only be afforded greater protection by requirement of such written authorizations for issuance of building permits, since they would operate to reduce misrepresentation, and actions or transactions contrary to actual authorization and power conferred by owners of property on persons claiming to be acting in a representative capacity in their behalf.

With respect to architects, contractors, or other persons, requesting a building permit on behalf of owners, we find nothing unreasonable in a building inspector's requirement of an owner's written authorization. Such rights as exist for the issuance of a building permit pertain primarily to owners of property, rather than architects, contractors or agents. If the requirement of written authorizations from *owners* is not unreasonable or burdensome, then architects, contractors, or professed agents or representatives of the owners, are in no position to contend that they are unreasonably prejudiced by such requirement.

Finally, the requirement for written authorizations from owners for issuance of building permits can certainly be justified as an *administrative* measure designed to regulate and secure issuance of permits only when proper and authorized by property owners, the persons most directly concerned therewith, apart from the public authority or official charged with administration of the law applicable to the construction or building work specified in building permits issued.

In view of the foregoing, it is our opinion that the requirement of written authorizations from owners for issuance of building permits may be inferred as reasonably intended or implied in existing law; that such requirement by a building inspector cannot be deemed unreasonable, arbitrary, or violative of any constitutional rights; and that such requirement is not an unwarranted delegation of authority to the building inspector as an official of county or municipality, where such political subdivision has been granted, or possesses, general police power or powers to enact building regulations.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-109 Las Vegas, City of—Urban Renewal or Community Redevelopment Agencies—As amended and presently effective, applicable law held to authorize purchase of personal property, such as mobile trailer houses, in connection with clearance of real property and execution of a renewal or redevelopment project.**

CARSON CITY, October 30, 1959

CALVIN M. CORY, ESQ., *City Attorney, Las Vegas, Nevada*

Attention: SIDNEY R. WHITMORE, ESQ., *Deputy City Attorney*

STATEMENT OF FACTS

DEAR MR. CORY: It is indicated that there are a substantial number of substandard mobile trailer houses in the Urban Renewal Area of the city of Las Vegas, Nevada, which cannot be transferred to other trailer courts or locations, or otherwise disposed of, because of their substandard condition.

This state of affairs and condition has created a substantial problem, hindering the orderly development and planning of an Urban Renewal or Community Redevelopment Project for the area within the city of Las Vegas in promotion of the public welfare and interest.

QUESTION

Is the purchase and disposition of substandard mobile trailer houses by an Urban Renewal Administration or Community Redevelopment Agency authorized under the Urban Renewal Law of the State of Nevada, as set forth in Chapter 279 of Nevada Revised Statutes, and amended by Chapter 418, 1959 Statutes of Nevada?

CONCLUSION

Yes.

ANALYSIS

As submitted to us for opinion, the question stated was whether or not such substandard trailer houses could be purchased by the Urban Renewal Administration as “real property” in connection with the clearance of a “blighted area” as defined in Chapter 279 of NRS, and the execution of an “urban renewal project” in accordance with said law.

The question presumably arose from the definition of “real property” contained in NRS 279.180, and the fact that, ordinarily, trailers would be deemed *personal* property and, therefore, not included within the definition of “real property,” as provided by law prior to enactment of Chapter 418, 1959 Statutes of Nevada. If *personal* rather than *real* property, such substandard trailers would not be subject to condemnation through exercise of the power of eminent domain, or be otherwise purchaseable by the Urban Renewal Administration so as to make possible the execution of an urban renewal project.

Our review of applicable law prior to the enactment of Chapter 418, 1959 Statutes of Nevada, reasonably confirms the conclusion that presumptively, at least, purchase of substandard trailers would not have been authorized as “real property,” unless permanently attached to the land. (73 C.J.S., Property, p. 179 et seq., Sections 10, 11; Attorney General’s Opinion No. 96, August 19, 1955.)

In view of the extensive amendment of Chapter 279 of NRS through enactment of Chapter 418, 1959 Statutes of Nevada, it is unnecessary to dwell upon the problem as regulated or governed by law prior to such amendment. In our view, the problem has been wholly resolved by the presently effective amendment thereto, as contained in Chapter 418, 1959 Statutes of Nevada.

We invite consideration to the broadened definition of "Real property," contained in Section 16, Chapter 418, 1959 Statutes of Nevada, as follows:

"Real property" means:

1. Land, including land under water and waterfront property.
2. Buildings, structures, *fixtures* and improvements on land.
3. *Any property appurtenant to or used in connection with land.*
4. Every estate, interest, privilege, easement, franchise and right in land, including rights-of-way, terms for years and liens, charges or incumbrances by way of judgment, mortgage or otherwise and the indebtedness secured by such liens. (Italics supplied.)

Section 48 of Chapter 418, 1959 Statutes of Nevada, insofar as here pertinent, provides as follows:

Within the redevelopment area or for purposes of redevelopment an agency may:

1. *Purchase*, lease, obtain option upon, acquire by gift, grant, bequest, devise or otherwise, *any real or personal property, any interest in property* and any improvements thereon.
2. Acquire real property by eminent domain.
3. Clear buildings, *structures* or other improvements from any real property acquired.
4. *Sell*, lease, exchange, subdivide, transfer, assign, pledge, encumber by mortgage, deed of trust or otherwise, or otherwise dispose of any real or *personal property* or any interest in property.

\* \* \*

6. Rent maintain, manage, operate, repair and *clear such real property.* (Italics supplied.)

The foregoing provisions of the Community Redevelopment Law (Sec. 4, Chapter 418, 1959 Statutes of Nevada), in our opinion, should suffice to show that a proper agency has the authority to acquire through purchase such *personal property as trailers* in the clearing of real property for a "redevelopment project" in connection with the elimination of a "blighted area" in a community.

The Legislature, through such enactment, has substantially broadened the scope and powers of agencies concerned with renewal or redevelopment of communities within the State, and sufficiently provided for the resolution of the specific problem herein considered.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-110 Children's Home, Nevada State—Payments received from Social Security and similar agencies for benefit of a child committed in State Children's Home must be applied in reduction or reimbursement of State or county costs for the care, support and maintenance of such child in said home; only the surplus over such costs may be accumulated to the child's credit. (See A.G.O. 244, March 8, 1957; A.G.O. 263, May 17, 1957.)**

CARSON CITY, November 3, 1959

MR. RICHARD W. LITTLE, *Superintendent, Nevada State Children's Home, Carson City, Nevada*

#### STATEMENT OF FACTS

DEAR MR. LITTLE: It is indicated that Social Security, United States Employees' Compensation, and Veterans' Compensation check payments to children at the Children's Home are presently being deposited in the General Fund and being applied to reduction of the amount to be paid by the counties charged with the obligation for payment of the cost of maintenance of recipients of such funds at the Children's Home.

It is suggested that such funds should properly be deposited to the children's own personal accounts to be available to them when they leave the Children's Home, rather than applied, as indicated, in reduction of budgeted required payments by the counties for maintenance of children at the home.

#### QUESTION

Are counties entitled to application of the proceeds of check payments to the order of children at the Children's Home, received from Social Security Administration, United States Employees' Compensation and Veterans' Administration, in reduction of the maintenance costs of children at the home to the counties?

#### CONCLUSION

Yes.

#### ANALYSIS

The obligation for the cost of maintenance of any child at the Nevada State Children's Home rests upon the parents of any such child, in the first instance, and upon the county where the child was committed, in the second instance. (NRS 423.210; 62.230.)

Thus NRS 423.210, insofar as here pertinent, provides as follows:

2. The order of commitment shall require the parent or parents of the child to pay to the superintendent \$50 monthly for the care and support of each child committed; but when it shall appear to the district court that the parent or parents are unable to pay \$50 per month the order shall require the payment of such lesser amount as may be found to be reasonable, and the county where the child was committed shall then pay to the superintendent the difference between the amount so ordered paid and the sum of \$50, or, if the parents be found unable to pay anything, the county where the child was committed shall be liable for the whole amount of the support of the child.

There appears to be no express statutory provision covering the specific question involved herein. NRS 423.190, relating to "Orphan's estate; Appointment of guardian," merely provides for the appearance of the superintendent in any court or proceeding to represent the orphan, or to have a guardian appointed, for the protection and care of any property possessed by, or accruing to, an orphan at the home. NRS 423.230, relating to "Employment of children," does provide that the superintendent may arrange for the employment of children under certain specified conditions, and the payment of wages therefor, either to the child directly, or to the superintendent in trust for said child. To this extent, at least, the Legislature has expressly provided that such payments are the exclusive property of the child, and not available in reduction of the costs of maintenance of such a child in the home.

In the absence of express statute in the premises, therefore, general law and principles must be deemed to be properly applicable.

Children committed to the home, or any similar institution, must be considered as wards of the State insofar as their custody, control, care, education and maintenance is concerned. The State's legal position is, therefore, analogous to that of a guardian. Under general law applicable to guardian and ward, a guardian is undoubtedly authorized to use any property of the ward to satisfy or offset expenses incurred for the ward's education and support. The same principle, in our opinion, is similarly applicable where the State occupies the position and performs the duties of a guardian.

Money accruing to children, when derived from Social Security, or similar benefits and payments, is based upon the recognized need for provision of their education and support where parents have died or been disabled. Such purposes would not be served by placement of such payments in a fund for a child, for use in connection with other ends. There would appear to be no reason, either logical or legal, why the State should assume the burden for the care and support of children in the home when funds are available from Social Security, or similar benefits and payments, for such purposes. Insofar as counties are concerned, the same conclusion is logically and legally justified.

As indicated in a prior opinion on the matter issued by this office, such benefits, to the extent necessary for payment of a child's care and maintenance at the home, should be paid into the State's General Fund. (A.G.O. No. 244, March 8, 1957.)

As further indicated in another opinion on the matter from this office, counties are entitled to reduction of any costs to them from any such benefit payments, in connection with their secondary liability for the care, support and maintenance of children in the home. This is based upon the express provision in law that counties may have recovery or reimbursement for all moneys so expended, through appropriate legal action, if necessary. (A.G.O. No. 263, May 17, 1957; NRS 423.210, paragraph 3.)

We are appreciative of the fact that it might be desirable to authorize allocation and accumulation of at least some part of such benefit payments for the children's use, while at the home, or to be turned over to them upon discharge. However, such authorization must be sought through legislative action, inasmuch as present law fails to provide therefor.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-111 Health, State Department of—If hospital entity supplies general hospital and nursing home services, it could receive but one license.**

CARSON CITY, November 13, 1959

DR. DANIEL J. HURLEY, *State Health Officer, State Department of Health, Carson City, Nevada*

Attention: MR. DONALD A. BAKER, *Director, Division of Hospital Services*

STATEMENT OF FACTS

DEAR DR. HURLEY: Certain of Nevada's hospitals operate both a general hospital and a nursing home, in some instances in separate buildings, but always on the same site. In the past one license, in such instances, has been issued. Now it is supposed that more satisfactory welfare payments could be received by the hospital if each operation, i.e., (1) the general hospital operation, and (2) the nursing home operation, were individually licensed.

QUESTION

If one ownership or one sponsoring organization or governing entity has a general hospital and a nursing home upon the same site may the State Department of Health issue two licenses, that is, a license for each operation?

CONCLUSION

The question must be answered in the negative.

ANALYSIS

The provisions from which the answer is derived are NRS 449.010 to 449.240, under the general heading of "Hospitals and Maternity Homes," and the specific heading of "Licensing, Regulation and Inspection of Hospitals, Nursing and Maternity Homes."

Under the provisions of NRS 449.020, "hospital" is defined to mean an institution which operates facilities for the "diagnosis, care and treatment of human illness," etc., and includes "any sanatorium, rest home, nursing home, maternity home and lying-in asylum." The term "hospital" therefore includes both of the two functions and services heretofore mentioned.

Under NRS 449.030 it is provided that the entity which establishes or maintains a hospital shall obtain a license. Under NRS 449.040 the application for the license mentioned shall be made to the State Department of Health. Under NRS 449.080 the State Department of Health issues a license to the entity that sponsors and governs the hospital upon the payment of the proper license fee as regulated by the provisions of NRS 449.050. In these and other relevant sections the reference is to the license and in no section is it suggested that a sponsoring or governing entity with a number of hospital operations or hospital functions should have a license for each operation or function. We are therefore of the opinion that one hospital license to one governing entity meets the legal requirement, without regard to the number of hospital functions and hospital services that are supplied.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D. W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-112 The Nevada Gaming Commission Cannot Limit or Restrict the Area which a Licensed Disseminator of Race Horse Information may Serve within the State.**

CARSON CITY, November 13, 1959

NEVADA GAMING COMMISSION, *Carson City, Nevada*

STATEMENT OF FACTS

GENTLEMEN: One of the two licensed disseminators of race horse information has requested the Gaming Commission to designate the territory to be served by each and thereby restrict the area within the State which each disseminator may serve.

QUESTION

May the Gaming Commission limit or restrict the area which a licensed disseminator of race horse information may serve?

CONCLUSION

Any attempt by the Commission to limit or restrict the area within the State of Nevada which a licensed disseminator of race horse information may serve, would be in conflict with NRS 463.460 and therefore invalid.

ANALYSIS

In 1950 our Nevada Supreme Court had occasion to pass on the validity of Statutes of Nevada 1949, Chapter 152 (now, with certain amendments not material to this discussion, NRS 463.430 to 463.480, inclusive) in the case of *Dunn v. Tax Commission*, 67 Nevada 173. While that case deals primarily with the constitutionality of the Act and does not expressly decide the question you have presented, certain language employed by the court merits discussion here.

At page 184 of that opinion, the court, in answering the appellants' contention that the purpose of the Act is to benefit the race horse books and not for the protection of the public, stated that the "*mandatory* nature of the requirement to furnish the service (race horse information) on equal terms to *all* licensed race horse books or sports pool operators," does not support the appellants' position. (Italics supplied.)

Again at the bottom of page 187 in answering the appellants' contention that due process is violated because the Act is not sufficiently explicit, the court said:

In our opinion the Act is sufficiently explicit in describing the persons subject to its provisions in providing what may and may not be done under its provisions, and the penalties for violation. Nor is the requirement for adequate and efficient service to *all* race track book operators applying for same (be furnished) in like manner as furnished to other users *irrespective of the geographical scope involved* in the service so indefinite, uncertain or discriminatory as to violate due process. The state tax commission (now the Gaming Commission under the 1959 amendment) under its powers to make rules and regulations, may well "fill in the gaps." (Italics supplied.)

From the foregoing we must conclude that under NRS 463.460 it is mandatory upon all licensed disseminators of race horse information that they furnish the service to any

licensed operator applying for the same irrespective of the geographical location of such operator.

We reach this conclusion mindful of the power of the Commission to make reasonable regulations for the orderly administration of the law and for the protection of the public and in the public interest (NRS 463.440), or, as Mr. Justice Badt said in the case cited, "fill in the gaps." Since there has been no regulation adopted covering the situation, we are only concerned with the authority of the Commission to adopt a regulation to cover the matter outlined.

It is our opinion that the rule-making power of the Commission should at all times be liberally construed because of the need for stringent control over this type of business. Nevertheless, any regulation adopted by the Commission limiting or restricting the area a licensed disseminator of the information may serve would be contrary to the mandate of NRS 463.460 *requiring* the disseminator to furnish the information to *any* licensed book applying therefor, and being in conflict with the statute, invalid. Administrative bodies may not make regulations in conflict with or varying the provisions of a statute. (16 C.J.S. § 138.)

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: MICHAEL J. WENDELL, *Deputy Attorney General*

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**OPINION NO. 1959-113 Planning Board, Nevada State—Nevada Industrial Commission—Industrial Insurance Act construed and found inapplicable to job inspectors rendering services to board as "independent contractors" rather than "employees." Nature of services and relationships, under the Act, depends upon the particular facts of each case. Planning Board, a state agency, to extent provided, in applicable law, held entitled to recovery of industrial insurance premiums paid by it under mistake of fact and law.**

CARSON CITY, November 19, 1959

MR. M. GEORGE BISSELL, *Manager, State Planning Board, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. BISSELL: It is indicated that the State of Nevada Planning Board has always engaged job inspectors for their various projects as "Independent Contractors," as provided for in written contractual agreements for such services.

It is further indicated that several years ago the Nevada Industrial Commission directed the State of Nevada Planning Board to pay to such agency industrial insurance premiums for any such job inspectors engaged by the State of Nevada Planning Board as "Independent Contractors." The State of Nevada Planning Board, although of the opinion that exaction of said insurance payments was improper, has, nevertheless, reluctantly complied therewith.

Our advice is, therefore, requested on the following:

QUESTIONS

1. Does the Nevada Industrial Commission have the legal authority to require payment of insurance coverage from the State of Nevada Planning Board on job inspectors who, as "Independent Contractors," and pursuant to written contract

agreements, are engaged by said Planning Board to render such indicated inspectional services?

2. If our answer to the foregoing question is in the negative, does any liability attach to the State Planning Board, its members, staff or personnel, either as a state agency, or in their individual capacities, in the event that any such job inspector, engaged in the performance of contractual services for the State Planning Board, is injured on a state project during the period of his service contract?

3. If our answer to question No. 1 is in the negative, can the State of Nevada Planning Board presently recover all insurance payments exacted of, and paid by, said Planning Board to the Nevada Industrial Commission on the Job Inspectors whose services were engaged by and rendered to the Planning Board?

4. If our answer to question No. 1 is in the negative, are Job Inspectors, whose services are engaged by the State Planning Board, required under the law to carry industrial insurance coverage on themselves?

#### CONCLUSIONS

To question No. 1: As herein qualified: No.

To question No. 2: As herein qualified: No.

To question No. 3: Yes.

To question No. 4: As herein qualified: No.

#### ANALYSIS

We emphasize, at the very outset, that whether a person is to be deemed an "employee," or an "independent contractor," within the purview of the Nevada Industrial Insurance Act (NRS Chapter 616), involves a question of fact. Generalization, therefore, is improper, and should be avoided. This opinion is strictly limited to the particular facts herein set forth.

NRS 616.055, to the extent pertinent herein, provides as follows:

"Employee" and workman" are used interchangeably \* \* \* and shall be construed to mean every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, \* \* \*.

NRS 616.060, as here pertinent, provides:

"Employee" excludes:

1. Any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer.

NRS 616.105 defines "independent contractor," and provides:

"Independent contractor" means any person who renders service for a specified recompense for a specified result, *under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.* (Italics supplied.)

NRS 616.115 provides that "subcontractors" shall include independent contractors.

NRS 616.085 provides:

Subcontractors and their employees shall be deemed to be employees of the principal contractor.

NRS 616.275 provides as follows:

Where the state, county, municipal corporation, school district, a city under special charter and commission form of government, *or a contractor under the state*, county, municipal corporation, school district, or a city under special charter and commission form of government, is the employer, the terms, covenants, conditions and provisions of this chapter for the payment of premiums to the state insurance fund and the accident benefit fund, for the payment of compensation and the amount thereof, for such injury sustained by an *employee* of such employer, shall be conclusive, compulsory and obligatory upon both employer and *employee* without regard to the number of persons in the service of any such employer. (Italics supplied.)

NRS 616.280 provides as follows:

Before any person, firm or corporation shall commence work under any contract with the state or any political subdivision thereof, the contractor shall furnish to the public authority having charge of the letting of the contract a certificate of the commission certifying that the contractor has complied with the provisions of this chapter.

NRS 616.290 makes application of the chapter to “employers” having less than two “employees” *optional*.

NRS 616.265 makes any device waiving liability void, and provides as follows:

1. No contract of employment, insurance, relief benefit, indemnity, or any other device, shall modify, change or waive any liability created by this chapter.
2. A contract of employment, insurance, relief benefit, indemnity, or any other device, having for its purpose the waiver or modification of the terms or liability created by this chapter shall be void.

NRS 616.660 provides as follows:

Any official who fails or refuses to comply with the provisions of NRS 616.405 shall be guilty of a misdemeanor for each offense, and upon conviction shall be fined not less than \$50 nor more than \$200.

NRS 616.405 provides that after September 30, 1947, “it shall be the duty of every state office, department, board, commission, bureau, agency or institution, operating by authority of law \* \* \* to furnish the commission with a true and accurate payroll of the state office, department, board, commission \* \* \*.”

The Act, in all of its provisions, solely contemplates and applies to, the *employer-employee* relationship, in all of its possible forms. However, the weight of authority is that legislation of this kind, as a matter of general public policy, should be liberally construed to effect maximum industrial insurance coverage and protection. Such policy and liberal construction, therefore, assumes an *employer-employee* relationship generally, thus imposing the burden of an affirmative showing to the contrary, *on the basis of the actual relationship*, on any one claiming exemption from the Act.

Having noted these general principles and qualifications, we now consider the specific questions here involved.

The Act does not apply to “independent contractors” *who are truly such in fact*. And, whether one is or is not an “independent contractor” is governed by the statutory definition quoted above. The essential distinction between an “independent contractor” and an “employee” lies in the fact that the services rendered by the former are controlled by his principal only as to the results and not as to the means of attaining those results. In the case of an “employee,” the principal’s, or employer’s, control is continuous and exercised in respect of not only the results but also the means of attaining such results.

The Nevada State Planning Board’s functions involve state construction projects, calling for planning; development of specifications; negotiations for purchase of property; the use of engineers and architects; and putting out of projects for bid. All of the actual engineering, architectural, and construction work is performed, not by members or employees of the Board, but by others, under written agreements calling for such services and results. There is no supervision or control of the *means* by which these various professional or skilled services and results are performed or achieved. In fact, the Board, and its personnel, probably do not possess the professional qualifications or skill for exercise of supervisory control of the means for attainment of such results, nor are they required to perform such functions by law.

Job Inspectors’ responsibilities and functions are to see to it that building construction is actually performed in accordance with the blueprints and building specifications prescribed for a particular project. The Board relies completely on the skill of such Job Inspectors to perform and discharge such inspection responsibility, and to report back to the Board their finding as to whether or not there is compliance with, or deviation from, building construction as architecturally planned and specified. There is no supervisory or continuous control of the means or the manner in which said Job Inspectors shall do their work, nor even any regulation or control of the number of hours, of the working day or week, of Job Inspectors.

There has been submitted to us a form of contract providing for such services and results on the part of Job Inspectors engaged by the Board. Such form of contract, in our opinion, clearly defines and establishes a relationship of principal and “independent contractor,” rather than the relationship of “employer-employee.” It must necessarily be assumed that the relationship provided for in said contract will be maintained and adhered to in actual practice. If it is, we are of the opinion that the Act does not, and can not, apply. This conclusion is based upon the provisions of NRS 616.105, and 616.060, quoted above.

Some confusion in this matter is due to the provisions of NRS 616.085, 616.115, 616.275 and 616.280, cited above. We are of the opinion that such confusion can be dissipated, if such provisions are properly construed to give effect to the legislative intent.

The reference to the work “contractor,” “contractors,” “subcontractor” and “subcontractors,” as used in the Act, indicate that the Legislature contemplated application of the Act to relationships normally existing in the building industry. This industry, where the incidence of accident and injury is normally high because of the nature of the work involved, is a matter of serious concern, for which the Act would be expected to make adequate provision. In order to insure proper industrial insurance coverage in the building construction industry, the Act therefore, expressly provides that subcontractors and their employees shall be deemed to be employees of the principal contractor. (NRS 616.085.) *Only when acting as such “subcontractor” to a “principal contractor”* does NRS 616.115 apply to include “independent contractors.” It is possible for an “independent contractor” to be such, in fact, for one purpose, and a “subcontractor” and “employee,” for another purpose, as in the building industry.

Insofar as the relationship of contractors with state and other public authorities is concerned, the above-quoted statutory provisions are applicable to a limited extent. Thus, apart from the optional exemption provided by NRS 616.290, *an employee of a contractor under the State* would come within the purview of NRS 616.275 and 616.280.

But such is not the case here. The Board is a principal and not a “contractor” insofar as the Job Inspectors engaged by it are concerned. And such Job Inspectors are “independent contractors” and *not* “employees” of the Board. Unless exempted under the exception of NRS 616.290 (less than two employees), *Job Inspectors, as “contractors” must themselves secure industrial insurance coverage in compliance with the Act.*

The Board, and its personnel, members or employees, are without legal liability therefor, either in their official, or individual, capacities.

The foregoing analysis sufficiently supports our legal conclusions to questions 1, 2, and 4, as set forth above.

In addition to such legal conclusions, there are, of course, practical considerations. These are concerned with the risks connected with a Job Inspector’s duties and consequent possible accidents and injuries. Certainly, Job Inspectors should appreciate these risks, and provide for them by securing industrial insurance coverage for themselves. In any event, the Board, as a matter of policy, is not precluded from contractually requiring Job Inspectors whose services are engaged by it to secure such industrial insurance coverage, even though Job Inspectors could claim, and would be entitled to, exemption under NRS 616.290.

Finally, we consider the question (No. 3 above), whether recovery may be had of premiums for industrial insurance coverage heretofore paid by the State Planning Board for Job Inspectors, whose services were rendered as “independent contractors” rather than as “employees.”

While there may be cases in which a public body by virtue of the facts of the particular case is not entitled to recover funds wrongfully or illegally spent, *as a rule, when public funds have been paid out by a state, county or municipal corporation without legal or constitutional right to do so, such public body may maintain an action to recover such funds from the party receiving them.* If a public officer in direct violation of law pays out public funds, the state, county, or municipal corporation may maintain an action to recover such funds. For more potent reasons than those which permit an individual to recover payment made under a mistake of fact, it is held that public bodies may recover public funds paid under a mistake of fact. Even though the trend of modern authority prevents, as between individuals, recovery of payments voluntarily made under a mistake of law, public bodies are generally, but not in all cases, permitted to recover public funds paid under a mistake of law. (Italics supplied.)

(42 A.J. 777, sec. 83; 40 A.J. 858 et seq.; Generally on “Public Money Paid by Mistake,” see Note 63 A.L.R. 1346 et seq.; *Kiel v. Frank Shoe Mfg. Co.*, 245 Wis. 292, 14 N.W.2d 164, 152 A.L.R. 691.)

The mistake involved herein would be one of fact and law: a mistake of fact, in respect to the determination that Job Inspectors were “employees,” rather than “independent contractors”; and a mistake of law, in holding that “independent contractors,” such as the Job Inspectors here involved, are within the purview of the Act.

Both on principles of equity as well as public policy, therefore, we are of the opinion and conclude that public moneys, mistakenly paid as premiums for industrial insurance coverage for its Job Inspectors by the State Planning Board, are recoverable.

Since such a refund claim is a question arising under the Act, it may properly be submitted to the Nevada Industrial Commission for their appropriate action.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-114 Racing Commission, Nevada—Examiners, State Board of—Constitutional Law—Funds of the Nevada Racing Commission may be expended without appropriation, being “special” funds. Article IV, Section 19, and Article V, Section 21, Constitution, construed.**

CARSON CITY, November 25, 1959

MR. NEIL D. HUMPHREY, *Director of the Budget, Carson City, Nevada*

STATEMENT OF FACTS

Dear Mr. Humphrey: NRS 466.080, hereinafter quoted, authorizes the Nevada Racing Commission to expend money from the Nevada Racing Commission Fund.

The Legislature of 1957 made an appropriation to the Nevada Racing Commission. See Chapter 279, Section 28, page 382. Expenditures during that biennium, beginning July 1, 1957, by the Nevada Racing Commission were charged against the funds of the Nevada Racing Commission, and not paid from the general fund.

The Legislature of 1959 made no appropriation for the support of the Nevada Racing Commission. The Nevada Racing Commission has now submitted a claim to the Board of Examiners for \$1,000 to pay dues to the National Association of State Racing Commissioners for the years 1958 and 1959.

QUESTION

Is the Board of Examiners authorized to approve this claim for payment?

CONCLUSION

We have concluded that the Board of Examiners is authorized to approve this claim for payment.

ANALYSIS

NRS 466.080 provides the following:

1. The Nevada racing commission fund is created in the state treasury. The fund shall consist of all moneys deposited therein in compliance with the provisions of NRS 464.040. The commission is authorized to use the fund to pay the necessary and proper expenses of the commission. Claims against the fund shall be audited and paid as are other claims against the state.
2. The commission is also authorized to expend such sums of money received for the collection of license fees provided by NRS 466.120 as it may deem proper for efficient administration of the purposes of this chapter.

NRS 464.040 provides the amounts and manner of computing sums payable by the licensee (pari-mutuel racing) to the Nevada Gaming Commission, and in subsection 5 thereof provides that the sums received thereunder shall by the Nevada Gaming Commission be paid to the State Treasurer for deposit as follows:

- (a) Seven-eighths thereof to the general fund.

(b) One-eighth thereof in the Nevada racing commission fund.

NRS 466.120 provides that trotting and pacing meetings (races) shall be licensed to be conducted on definite days, and that the licensee shall pay to the Commission a license fee fixed by the Commission, of not less than \$50 or more than \$200 per day.

Article IV, Section 19, of the Constitution, provides the following:

No money shall be drawn from the treasury but in consequence of appropriations made by law.

The Board of Examiners is of constitutional origin. Section 21 of Article V provides, inter alia, that the Governor, Secretary of State and Attorney General, shall constitute a Board of Examiners, "with power to examine all claims against the state (except salaries or compensation of officers fixed by law), and perform such other duties as may be prescribed by law."

In arriving at the ultimate question of whether or not this claim may be allowed by the Board of Examiners, despite the fact that there has been no appropriation by the Legislature of 1959, for the Nevada Racing Commission, for the year beginning July 1, 1959, we are led by the above statutory material and constitutional provision to two preliminary questions, viz:

(1) Does NRS 466.080 constitute an appropriation within the meaning of Section 19, Article IV, of the Constitution?

(2) If this question be answered in the negative, the second question arises of whether or not the constitutional provision requires an appropriation before the Nevada Racing Commission may expend moneys from that fund?

NRS 466.080 creates a fund, not made up from general or any taxation, designates how it is to be augmented from time to time, authorizes the Commission to expend from the fund from time to time, but does not designate any maximum amounts, and provides that such expenditures "shall be audited and paid as are other claims against the state."

In *State v. LaGrave*, 23 Nev. 25, it is held that to constitute an appropriation no particular form of words is necessary, if the intention to appropriate is plainly manifest.

In *State v. Eggers*, 29 Nev. 469, one Sam P. Davis petitioned the court for a writ of mandate to require J. Eggers, the State Controller, to allow his salary and traveling expenses as chairman of the State Industrial and Publicity Commission. By the statute (Chapter 185, Statutes 1907) the salary of the chairman had been definitely provided. However, the allowance of traveling expenses had been provided for without providing a maximum amount. The former was good as an appropriation, under the constitutional provision, the latter was not. The court concluded that the provision for travel allowance would not constitute an appropriation within the meaning of Section 19, Article IV, for the reason that no maximum amount was designated and it being a blank check on the treasury could not stand.

While it is true that the appropriation of 1957, cited, did not provide that the appropriation should come from any particular fund, and such an appropriation usually is construed as from the general fund, the office of the Controller, properly, was guided by the specific statute (NRS 466.080) and debited from the Nevada Racing Commission Fund.

Upon the authority of the Eggers case cited, we are of the opinion that NRS 466.080 is not an appropriation within the meaning of Article IV, Section 19, of the Constitution, there being no maximum amount provided.

Although NRS 466.080 is not an appropriation within the constitutional provision, it clearly does constitute legislative authority to the Commission to pay from the Nevada Racing Commission Fund the "necessary and proper expenses of the commission." Having the authority to pay, is the Commission precluded from paying this bill by reason of the provisions of Article IV, Section 19, of the Constitution?

In *State v. McMillan*, 36 Nev. 383, the same questions were presented as here respecting appropriation by the Legislature and auditing. The fund was that of the Nevada Industrial Commission. The court held that Article IV, Section 19, respecting appropriations has no application to special funds not derived from taxation. The moneys of the Commission, of course, as in this instance, are deposited with the State Treasury. The court said:

The fact that the state treasurer is made the custodian of the fund does not necessarily make it a part of the state treasury.

The court then proceeded to distinguish between governmental entities that receive their funds from taxation, and those that receive them in other manners, and termed the fund a "special fund," not regulated or controlled by the provisions of Section 19 of Article IV of the Constitution.

The bond trust fund has been held to be a special fund upon the authority of *State v. McMillan*, supra, obviating the necessity of compliance with Article IV, Section 19, and Article V, Section 21, of the Constitution, heretofore mentioned. See: *Hill v. Thomas*, 70 Nev. 389, 270 P.2d 179.

That this is a special fund not derived from taxation, we have shown by the provisions of NRS 466.080, 464.040 and 466.120. Subsection 1 of NRS 466.080 reads as follows: "Claims against the fund shall be audited and paid as are other claims against the state." This appears, at first blush, to be contrary to the "special fund" doctrine, under which it is held that an appropriation need not be made and that claims against the fund need not be audited by the Board of Examiners.

May these two seemingly conflicting concepts be reconciled? We believe that they may. Under NRS 464.040, supra, we have pointed out that the receipts of the Commission are in no respect from taxation. We also observe that such receipts are by the Legislature apportioned seven-eighths to the general fund and one-eighth to the Nevada Racing Commission Fund. Having placed practically all of such receipts in the general fund and beyond the reach of the Commission to spend, the Legislature has by NRS 466.080 authorized the Commission from such one-eighth part to pay the "necessary and proper expenses of the commission."

We are, therefore, of the opinion that an appropriation is not essential to permit the payment of claims by this Commission, the fund being a "special fund," and that claims against the fund shall be audited and paid as are other claims against the State.

We are of the opinion that auditing is required, not because of the provisions of Section 21 of Article V of the Constitution, which has no application under the special fund doctrine, but by reason of the provisions of NRS 466.080, which provides for auditing.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-115 Banks, Superintendent of—A licensee as "Private Detective," may repossess chattels and collect money in connection with such repossession, but if he conducts a "Collection Agency," his business must be licensed as such. Chapters 648 and 649 of NRS construed.**

CARSON CITY, December 15, 1959

HONORABLE GRANT L. ROBISON, *Superintendent of Banks, Carson City, Nevada*

## STATEMENT OF FACTS

DEAR MR. ROBISON: Chapter 648 NRS provides for the licensing, regulation and bonding of private detectives. Section 648.010 NRS, inter alia, defines “private detective.” Subsection 4 thereof, in part, provides:

4. “Private Detective” means and includes any of the following:
  - (d) Any person who engages in the business of repossessing personal property for hire or reward.

No part of the statute expressly authorizes a “private detective” to collect moneys. Chapter 649 NRS provides for the licensing, regulation and bonding of collection agencies.

Section 640.020 NRS provides:

649.020 1. As used in this chapter “collection agency” means and includes all persons engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another.

2. “Collection agency” does not include any of the following unless they are conducting collection agencies:

(a) Individuals regularly employed on a regular wage or salary, in the capacity of credit men or in other similar capacity upon the staff of employees of any person not engaged in the business of a collection agency.

(b) Banks.

(c) Nonprofit cooperative associations.

(d) Abstract companies doing as escrow business.

(e) Duly licensed real estate agents.

(f) Attorneys and counselors at law licensed to practice in this state, so long as they are retained by their clients to collect or to solicit or to obtain payment of such clients’ claims in the usual course of the practice of their profession.

Both of these statutes (Chapters 648 and 649 NRS) have criminal penalties for violations including operating without a license. The latter statute (Ch. 649 NRS) is under the administration of the Superintendent of Banks. (Ch. 465, Stats. 1959.)

Some licensees under Chapter 648 NRS, contend that they have the right to carry on a collection agency, by virtue of the license under Chapter 648, without being licensed under Chapter 649 of NRS.

Another question is presented of the legal right of companies or individuals, not licensed under either chapter, and not domiciled in Nevada, to repossess cars from Nevada domicilaries.

## QUESTIONS

Question No. 1. Would an individual, licensed under the provisions of Chapter 648, who also would conduct a collection agency business, without having obtained a license under the provisions of 649.050 NRS, be in violation of and subject to the penalties provided by Section 649.210 NRS?

Question No. 2. Would a company not qualified in Nevada, or individual domiciled in another state, neither of which are licensed under the provisions of Chapters 648 or 649, whose business is repossessing automobiles, in lieu thereof, collecting delinquent

payments thereon, be in violation of and subject to the penalties provided in the above cited chapters?

#### CONCLUSION

Question No. 1. Certain exceptions to the requirement that a license as “collection agency,” be obtained, are enumerated by statute. Another exception also exists, namely, the right of a private detective to repossess chattels, sold on conditional sales contracts, and the right to accept delinquent installments in lieu of the repossession of such chattels. Apart from these exceptions an entity falling within the definition of “collection agency,” must be licensed as such under the provisions of Chapter 649, irrespective of being licensed under Chapter 648, and failing would be subject to penalties.

Question No. 2. A company not qualified here, or individual domiciled in another state, would have no rights or privileges in this respect that are denied to companies or individuals that are domiciled in Nevada. The law does not contemplate that nonresident individuals may qualify for either license.

#### ANALYSIS

We first consider question No. 1.

As we have shown by 648.010, subsection 4(d), of NRS, a “private detective” includes, “any person who engages in the business of repossessing personal property for hire or reward.” It follows that if one is duly licensed as a “private detective,” he is authorized to repossess personal property for hire or reward.

One would be naive indeed to suppose that a person authorized to repossess a car, would not ever be confronted with offers to pay up the delinquent contractual payments upon condition that the car would not be repossessed. Such offers or tenders are made by delinquent conditional purchasers, and authority to accept the payments is implied by the authority to repossess the cars. Failure of such an agent to accept such sums if tendered would ordinarily be a breach of the contract by the legal owner of the car, rendering such legal owner liable in damages. The authority of such agent to accept the delinquent payments in lieu of repossession may therefore be inferred. If inferrible as to the repossession of cars, it may also be inferred as to the repossession of other chattels sold upon conditional sales contracts. Such collections under such circumstances would not be a violation of the provisions of Chapter 649, nor would such duly licensed private detective be in violation of the Collection Agency statute, if his collection undertakings were all conducted in connection with chattel repossession authority. Such would not be a collection agency business within the meaning of the provisions of Chapter 649.

“Collection Agency” is defined by 649.020 NRS, and the exceptions to the definition are noted. We have noted another exception, not mentioned in 649.020 NRS, namely, those collections that are made in connection with authority to repossess a chattel sold upon conditional sales contract, upon which one or more installments have become delinquent.

If a collection agency is conducted, in a manner not to fall within the exceptions above noted, it would be necessary for it to be licensed, under the provisions of Chapter 649, and if not so licensed it would be subject to the penalties as provided in this chapter, notwithstanding the fact that the operator is licensed under the provisions of Chapter 648.

We now consider question No. 2.

The question has been answered heretofore, to the effect that if the individual or company were domiciled in Nevada it would be necessary that a license be obtained under the provisions of Chapter 649, as a “collection agency,” unless the operation falls within one of the exceptions heretofore enumerated. This question, however, is in respect to an individual or company domiciled in another state, for we are clearly of the opinion that a nonresident (person or company) in the absence of a statute granting special

privileges, would not enjoy any rights or privileges, in this respect, that are denied to persons or companies domiciled here.

We have not overlooked the fact that one of the requirements to the granting of license as "private detective," is six months of Nevada residence (684.080 NRS, subsection 6), and that a like provision applies to the granting of collection agency license. Section 649.070 NRS, subsection 2(a). These provisions prevent the licensing under either chapter, of a nonresident individual, and require a foreign corporation to qualify here for six months prior to its license under either chapter.

These chapters (Chapters 648 and 649) are designed to protect the public from fraud and imposition for both operations (private detective and collection agency) are "coupled with a public interest." Accordingly, both contain bonding provisions. To hold that nonresidents have special privileges, and are not subject to the bonding and other restrictive provisions, would be to invite trouble, fraud and imposition, to be perpetrated upon our citizens.

RESPECTFULLY SUBMITTED,  
ROGER D. FOLEY, *Attorney General*  
By: D.W. PRIEST, *Chief Deputy Attorney General*

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**OPINION NO. 1959-116 District Attorney, Washoe County—Public Administrators—Applicable statutory provisions construed as precluding public administrators from recovery of any allowance for furnishing information concerning escheatable estates. Public Administrators are under a statutory duty to furnish such information in any event by virtue of their office and governmental responsibilities and functions. NRS 154.130 held as authorizing payment of authorized reward based upon actual amount finally recovered for the State, after deduction for claims, costs and administrative allowance.**

CARSON CITY, December 18, 1959

HONORABLE WILLIAM J. RAGGIO, *District Attorney, Washoe County, Reno, Nevada*

Attention: MR. EMILE J. GEZELIN, *Chief Deputy District Attorney*

STATEMENT OF FACTS

DEAR MR. RAGGIO: In connection with the discharge of official responsibilities and duties our opinion is requested on the questions hereinafter stated.

QUESTIONS

1. May a public administrator collect, legally, the reward authorized under NRS 154.130 for furnishing original information concerning property escheatable to the State of Nevada?
2. Is the reward authorized under NRS 154.130 calculated as five (5%) percent of:
  - (a) The gross value of the estate?
  - (b) The net value of the estate?
  - (c) The value of that portion of the estate escheating to the state?

CONCLUSIONS

To question No. 1: No.  
To question No. 2a: No  
2b: No.  
2c: Yes.

#### ANALYSIS

Chapter 253 of Nevada Revised Statutes, governing Public Administrators, has been carefully reviewed and the provisions thereof conclusively establish the fact that Public Administrators are public officials charged with well-defined and fixed public responsibilities and duties by statute.

They are elected to office; they must take the constitutional oath for faithful performance of the duties of their office; they must furnish official bonds for faithful discharge of official duties; they are empowered to require information of any person concerning estates and the property and condition thereof, upon which no other person has then administered; they must file reports with the district judges with respect to any and all estates handled by them in their official capacity; and they must also render quarterly financial reports of all fees and compensation of whatsoever kind or nature received by them in their official capacities with the county commissioners. (See Chapter 253, Nevada Revised Statutes.)

In short:

The administration of the estate of a deceased person by a public administrator is *the discharge of a governmental function in which the public administrator acts for the state*, while the ordinary administrator appointed under the pertinent provisions of the Administrative Act acts in a private capacity for private persons and is not an officer within the legal definition of that term. (Italics supplied; see 56 A.L.R.2d 1183, 1186, citing *Crews v. Lundquist*, 361 Ill. 193, 197 N.E. 768, *People v. Crosby*; 141 Cal. App.2d 172, 296 P.2d 438. Also, see *Estate of McMillin*, 46 Cal.2d 121, 292 P.2d 881; *Estate of Miller*, 5 Cal.2d 588, 594, 55 P.2d 491, *holding that moneys received by public administrators in their official capacities are public moneys*; 21 A.J. 828 et seq.; 42 A.J. 884 et seq.; 43 A.J. 77 et seq.

Ann.Cas. 1918 B 1059 (Public Administrators).  
22 R.C.L. 362 (Public Officers).  
12 L.R.A. 529 (Escheat).  
11B Cal.Juris. 900 et seq.  
21 Cal.Juris. 811.

And, at page 1198 of 56 A.L.R.2d:

\* \* \* The purpose of the law creating the office of public administrator was to provide a public officer, acting under his oath of office and official bond who should be in a position at all times to administer estates where there is a failure of heirs or other persons to act. While acting in one sense as the personal representative of the deceased, in a broader sense he represents the government and acts in a governmental capacity. (*Estate of Miller*, supra.)

Also, at page 1199 of 56 A.L.R.2d:

The public administrator is charged with a trust of vital importance. As a public officer he is entrusted with the administration of estates of deceased

persons who have no relatives within the jurisdiction. He should be efficient, diligent, and scrupulously honest in handling the property and estates entrusted to him. (Citing *People v. McAtee*, 35 Cal.App.2d 329, 95 P.2d 471.)

In Section 347, 43 A.J. 139, the following appears:

\* \* \* At common law, public officers were generally not permitted to take any fees for the performance of official duties, except such as were expressly allowed by law or permitted by custom and usage. But compensation by way of usage is not favored by the courts. Therefore, when compensation is claimed by a public officer, he may be called upon to support his claim by some provision of the law entitling him to demand it, and if there is no such provision, no law fixing a salary or compensation for the services connected with the office, the office may be considered an honorary one, which should nevertheless be accepted. The absence of any provision for compensation carries with it the implication that the services of the incumbent are gratuitous, and, according to some decisions, no compensation can be recovered in such case. Unless compensation is allowed by law, an officer may not lawfully demand payment as upon a quantum meruit for services rendered. (Footnote citations.)

In 43 A.J. pp. 148-149, the following also appears:

\* \* \* *Fees allowed a public officer are matters of strict law, depending upon the very provisions of the statute.* They are not open to equitable construction, nor to any discretionary action on the part of the officials. (Footnote citations.)

The foregoing should suffice to indicate the nature of the office of public administrators, their duties and responsibilities, the public trust charged to them, and the limitations imposed upon their fees or compensation in their performance of public and official duties.

NRS 253.050 provides: "For the administration of the estates of deceased persons public administrators shall be paid as other administrators or executors are paid."

Insofar as here pertinent, NRS 154.130 provides as follows:

Any person furnishing original information of any property escheatable to the State of Nevada, with the necessary evidence to sustain the information in that behalf, to the court of the county where the property is located, and to the attorney general, shall be entitled to receive, *upon the final recovery of the property 5 percent of the value of the property so recovered* \* \* \*. (Italics supplied.)

NRS 253.050, above quoted, in our opinion definitely limits the compensation or fees which a public administrator may receive to such statutory allowances as may be authorized for any person acting in a representative capacity on behalf of a decedent. That a public administrator is appointed as an administrator in a particular estate, results from the fact that there is an absence of heirs or other persons entitled to letters testamentary or letters of administration. A public administrator, in other words, is entitled to administer an escheatable estate, only by virtue, or under color, of his office and not otherwise. Generally, the information he secures and can furnish concerning an escheatable estate, derives from his official position and public office.

In our considered opinion, it would manifestly be contrary to public policy to permit public administrators to receive any allowance not expressly authorized by law, or to be compensated for performance of any service imposed upon him as a matter of official duty in any case, as an incident of his public office and trust responsibility on behalf of the State. In other words, the information which he secures concerning an escheatable estate comes to him in his public or governmental capacity, and in such capacity, a public administrator is under the *statutory duty* of making full disclosure and report of such information in any event, regardless of the fact that he received no compensation or allowance therefor. In our opinion, NRS 154.130 must be construed as applicable only to persons who furnish information concerning escheatable estates, when said persons are not under any statutory duty to do so in any event by reason of their governmental or public responsibilities and office.

An officer's or public employee's duty of loyalty to the public and to his superiors is similar to that of an agent of a private principal. He is bound to impart material information which he has received in the course of his employment and is derelict in his duty when he allows others to profit from his silence. He is further bound to act impartially in matters pertaining to the administration of his duties. (43 A.J. 78.)

A public officer who knowingly or negligently fails or refuses to do a ministerial act which the law or legal authority absolutely requires him to do may be compelled to respond in damages to one to whom performance was owing, to the extent of the injury proximately caused by the nonperformance. (43 A.J. 90, and see 43 A.J. 128-129, Sections 328 and 329.)

We have already noted that under Chapter 253 of Nevada Revised Statutes, public administrators are public officers with a statutory duty to administer escheatable estates and charged with the additional statutory duty of making full report and account of their discharge of official responsibilities. This statutory obligation is clearly broad enough to include the report of any information concerning escheatable estates. Compensation or allowance of any "reward" for furnishing of information which must, in any event, be reported as a matter of statutory duty, cannot, in our opinion, be deemed a reasonable intentment of NRS 154.130.

We next consider the second question submitted to us and stated above.

Even at common law, escheats and forfeitures were not favored. In the case of escheats, to maintain continuity of title and prevent lapses to property, the estate of a decedent leaving no heirs was deemed to escheat to, or vest in, the sovereign immediately upon a person's demise. The sovereign could claim escheat, but might forego such right, or neglect to establish his claim. In modern times and under present law, succession to property is exclusively governed by statute.

NRS 154.130 (quoted above as herein pertinent) expressly provides that the allowance for information furnished concerning escheatable estates, shall be calculated "\* \* \* upon the final recovery of the property, 5 percent of the value of the property so recovered." In other words, it is not the gross value of the property as of the time of decedent's death, nor the net value of the property after payment of creditors and administration expenses, but the value, if any, of the actual estate or recovery to the State on the final accounting and distribution of the assets made available to, and recovered for, the State. (See *Brown v. U.S.*, C.C.A. 1933, 65 F.2d 65; *In re Robert's Estate*, 194 P.2d 28, 85 C.A.2d 609.)

Support for the foregoing conclusion may be predicated upon the broad public policy necessarily involved in respect to escheatable estates. The administration of escheatable estates should be conducted with diligence and as expeditiously as possible in order to decrease the expenses and avoid lessening the amount of the proceeds to be paid to school or educational funds. (*In re Ohlsen's Estate*, 75 P.2d 6, 159 Oregon 197; NRS

154.010.) The public interest and welfare is substantially involved in assuring maximum recovery to the State. If allowance of the “discovery reward” were to be based upon the gross value of the estate, careful and diligent administration of the estate might well be impaired from lack of any interest or concern therewith on the part of an administrator or other person. Also, administrative expenses might be unduly and improperly incurred in an unnecessarily increased amount. And, lastly, final settlement of the estate and recovery for the State might be unduly delayed without good reason. Predicating the allowance on the value finally recovered for the State constitutes a wise legislative requirement intended to obviate such possible results, which would, manifestly, be contrary to the public interest and welfare.

We deem it proper to include within the scope of this opinion some brief observations and comments on a related question, namely, the duties and powers of public administrators with respect to estates which may be pending when their term ends or they resign from office.

Generally, since a public administrator is appointed administrator in each particular estate by grant of letters of administration, his authority to act as an administrator in any given estate does not automatically terminate upon expiration of his term or resignation. Nonetheless, his appointment as administrator in any estate, in the absence of heirs or other persons qualified therefor, derives as an incident of the office held by him; apart from such fact, he has no right or priority thereto.

In states where public administrators are compensated for their services by fixed salaries, no serious problem exists. But where, as in this State, public administrators are dependent upon such statutory fees as are allowable in connection with their administration of estates, a definite problem is involved. Such allowances of fees for administration of estates pertain to the office, rather than the particular person therein who may have been appointed administrator in an estate by virtue of his holding the office of public administrator at the time. For this reason, it must be presumed that, as a general rule, upon expiration of their terms or resignation, public administrators will surrender all uncompleted estates to their successors. Any exception to such general rule must be based upon good and substantial grounds, and a showing that removal of the appointed administrator would, in fact, create difficulty or result in undue delay in settlement and closing of the estate.

NRS 253.120, relating to this matter, provides as follows:

*Public administrators shall, at the expiration of their terms of office, surrender up to their successors in office all the books or papers belonging or appertaining to the office, including all exhibits, estates, money and property in their possession; but upon the expiration of the term of office of any public administrator before the entry of a decree of distribution in any estate for which the public administrator is the duly appointed, qualified and acting administrator, if good cause be shown therefor, the court shall enter an order in such estate, authorizing and directing a person to whom letters have been issued, to close up the estate as expeditiously as possible, or the court shall enter an order requiring the filing of a petition for letters by the successor in office of the public administrator. (Italics supplied.)*

We are of the considered opinion that *routine* approval of continued administration of estates by public administrators after they leave office is not consistent with due protection of the public interest. As a practical matter, it should be remembered that once out of office as a public administrator, a person is no longer under the statutory duty of making periodical reports and accountings to the courts or the county commissioners. Consequently, the public interest in estates carried over by public administrators leaving office may be adversely affected by loss of information and control over such matters, made possible on the basis of such reports and accounting. Certainly, proper

administration of such estates and expeditious settlement thereof, in the public interest, is rendered more difficult.

We trust that the foregoing sufficiently answers your questions and proves of assistance to you in clarification of the general problem connected with the functions and responsibilities of Public Administrators.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-117 Agriculture, Department of—Plant Industry, Division of—Applicable statutes reviewed and found adequate and sufficient to authorize transfer and deposit of rural rehabilitation trust funds now with the United States Government to State Treasurer. Upon such transfer said funds are to be held in trust by the State Treasurer and made available to Department of Agriculture, as needed and available for authorized guaranteed loans, in accordance with a proposed agreement between the State Department of Agriculture and Farmers Home Administration (U.S.). Advice given that State Department of Agriculture utilize fully the administrative facilities and experienced personnel of Federal Agency to process loan applications. Department of Agriculture should establish definite policy for handling of all loan applications impartially and without preference, to extent of available funds, upon clearance with, and recommendation of, the Federal Agency.**

CARSON CITY, December 22, 1959

MR. LEE M. BURGE, *Director, Division of Plant Industry, Department of Agriculture, P.O. Box 1209, Reno, Nevada.*

#### STATEMENT OF FACTS

DEAR MR. BURGE: It appears that under an existing agreement between the State Department of Agriculture and the United States Government (Farmers Home Administration) the Nevada Rural Rehabilitation Trust Fund has been, and presently is being, administered by the United States Government, for authorized uses and purposes in the State of Nevada. The actual unloaned cash assets in said Trust Funds are on deposit with the United States Government.

It is now contemplated that a new agreement shall be executed by and between the Nevada State Department of Agriculture and the United States Government (Farmers Home Administration) which agreement would provide for transfer by the United States Government of such unloaned cash assets, and liquidated sums as they accrue and become available, to the State Department of Agriculture for deposit with the Nevada State Treasurer, with reservation of power to the United States Government (Farmers Home Administration), however, to make use thereof, as available and needed, for guaranteed loans on farm property and soil and water development projects in the State of Nevada.

The only apparent difference between the existing and proposed agreements is that under the new agreement the available unused and accruing Trust Funds would be on deposit with the Nevada State Treasurer, and the State Department of Agriculture would make same available to the Farmers Home Administration (U.S.) on a guaranteed basis, *or*, itself, use the funds for Rural Rehabilitation loans as deemed advisable under the

charter limitations of the defunct Rural Rehabilitation Corporation, to which the Nevada State Department of Agriculture succeeded. (NRS 561.580.)

Because the amount of money in the Trust Fund is not great, the State Department of Agriculture is of the considered opinion that it, itself, would be unwarranted, at least at this time, in establishing a Farm Loan Bureau within the Department to process loan applications, make appraisals and collections, and handle the many detailed matters necessarily involved in the proper administration of such a program. However, said Trust Fund assets would be available for formulation and administration of some kind of expanded state rural rehabilitation program by the Department of Agriculture, working in closer cooperation and conjunction with the Farmers Home Administration, United States Government. Such an expanded state service may be rendered more possible by the fact that, under the new agreement, the United States Government would be authorized to sell any secured loans to investment companies at times when the money market was favorable, thereby making additional Trust Fund moneys so derived available for further loans.

The Department of Agriculture, in connection with the proposed new agreement, is, however, concerned with certain matters embodied in the following questions, submitted to us for opinion and advice.

#### QUESTIONS

1. Is NRS 561.600 adequate and sufficient to authorize the transfer and deposit of Rural Rehabilitation Trust Funds to the Nevada State Treasurer, and to provide the necessary control, supervision, and administration thereof, in accordance with the proposed agreement, by the State Department of Agriculture?

2. Is there anything in the proposed new agreement to be executed between the United States Government and the Nevada State Department of Agriculture which might result in the assumption by the Department of Agriculture of an unreasonable or undesirable burden or responsibility?

#### CONCLUSIONS

To question No. 1: Yes

To question No. 2: As herein qualified: No

#### ANALYSIS

NRS 561.580 expressly authorizes and empowers the State Department of Agriculture to act as the agency of and in behalf of and for the State of Nevada, with respect to all trust funds and assets of the defunct Nevada Rural Rehabilitation Corporation.

NRS 561.590 expressly authorizes the State Department of Agriculture to enter into and execute agreements of the kind here involved with the Secretary of Agriculture of the United States.

NRS 561.600, relating to "Use of funds by state department of agriculture where not administered by Secretary of Agriculture," provides as follows:

1. Notwithstanding any other provisions of law, funds and the proceeds of the trust assets which are not authorized to be administered by the Secretary of Agriculture of the United States under the provisions of NRS 561.590 *shall be received by the state treasurer.* (Italics supplied.)

2. *Such fund is hereby appropriated and may be expended or obligated by the state department of agriculture for the purpose of NRS 561.590 or for use by the state department of agriculture for such of the rural*

*rehabilitation purposes permissible under the charter of the now defunct Nevada rural rehabilitation corporation as may from time to time be agreed upon by the state department of agriculture and the Secretary of Agriculture of the United States. \* \* \*. (Italics supplied.)*

NRS 561.610 enumerates the "Powers of state department of agriculture," substantially authorizing said Department to administer said fund, and do any and all things reasonably necessary or implied therewith, to effect the express and intended objectives connected with the creation of the now defunct Nevada Rural Rehabilitation Corporation and the trust funds made available thereby and thereunder.

On the basis of the foregoing statutory provisions, therefore, we are of the opinion that the transfer and deposit with the State Treasurer of the unloaned cash assets in said Trust Fund, and any additional accruals thereto, is amply authorized. We are also of the opinion that the said fund assets must be kept in trust by the State Treasurer and made available to the State Department of Agriculture for the uses and purposes hereinbefore outlined. The consent of the State Department of Agriculture to the withdrawal of any moneys from said fund for use by the Farmers Home Administration (U.S.), in accordance with the provisions of the proposed agreement would, of course, be necessary, and should be stipulated as an express requirement in said proposed agreement.

Turning our attention to the second question here involved, we are of the opinion that no undue or undesirable burden would be assumed by the State Department of Agriculture. In substance, the provisions of the proposed agreement merely effectuate the transfer of the unused Trust Fund moneys to the control and jurisdiction of the State Department of Agriculture. The proposed agreement will substantially enable the Federal Agency to receive and process loan applications from eligible persons in Nevada to the same extent as at present, but will enable the State Department of Agriculture to participate more actively in the use of fund moneys in connection with any rural rehabilitation program of its own, as well as derive the benefits of investment possibilities available to the Federal authorities for increase of the fund.

We are appreciative of the fact that the present assets in the fund may not warrant the Department in establishing and maintaining its own Farm Loan Agency. The Federal Government already has such agencies in operation, with experienced personnel and established administrative and supervised controls and procedures. It would appear, therefore, that it would be to the best interest of the Department of Agriculture to make full use of these available and proffered services on the part of the Federal Agencies so long as possible and desirable.

In other words, the Department of Agriculture should enter into an arrangement with the local or regional Farmers Home Administration (U.S.) Agency to process all loan applications, and submit same to the Department with recommendations. The Department should reserve to itself the authority, power and option either to approve and accept such recommendations, or not. This reservation would appear to be justified on the basis of present Federal policy to abide by, and act in full accordance with, the views or policies of the respective states in such matters, especially where states have developed definite rural rehabilitation plans and programs of their own.

It is assumed that the Department of Agriculture would only approve and accept applications on a *guaranteed loan* basis. On this assumption, therefore, all that would be necessary is adoption and promulgation by the Department of Agriculture of a definite policy that it would grant *guaranteed* loans, to the extent of available funds therefor, impartially and without favor or preference of any kind, upon clearance with and approval of application by, and recommendation of, the Farmers Home Administration (U.S.) *and* the further approval of the State Department of Agriculture.

We trust that the foregoing information serves to clarify the matter somewhat and proves helpful to you in connection with a resolution of your problem. If we can be of further assistance to you, please feel free to call upon us.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-118 Basic Sciences, Nevada State Board of Examiners—  
Applicable statutes reviewed and found to provide legal authority for execution  
of a reciprocal agreement with Arkansas Healing Arts Board, the official or  
public board exercising similar jurisdiction, functions, and powers in Arkansas.**

CARSON CITY, December 24, 1959

DR. KENNETH C. KEMP, *Secretary-Treasurer, Board of Examiners In the Basic Sciences,  
University of Nevada, Reno, Nevada*

STATEMENT OF FACTS

DEAR DR. KEMP: The Board of Examiners in the Basic Sciences, State of Nevada, had a reciprocal agreement with a corresponding similar board in the State of Arkansas until the early part of the current year when the Arkansas Board was abolished and replaced by the Arkansas Healing Arts Board. (Arkansas Act 187 of 1959, approved March 6, 1959 with immediate effect.) The Healing Arts Board serves in the same capacity as the previous Basic Science Board, and, we are informed, has more stringent regulations and requirements for examination. The Arkansas Healing Arts Board has requested the execution of a reciprocal agreement of the same kind as was previously in effect between the two states.

The members of the Nevada Board of Examiners in the Basic Sciences are of the opinion that the requirements presently in effect in the State of Arkansas have been upgraded and are equal to or better than those in the State of Nevada, and, therefore, are desirous of establishing reciprocity with the Arkansas Healing Arts Board, but has some doubt as to whether it is authorized to enter into such an arrangement with a Healing Arts Board. In this connection, we are informed that the Nevada Board of Examiners does not recognize the results of other boards, e.g., National Board, Chiropractic Boards, and others of a similar nature.

A copy of the Arkansas Act 187 of 1959, hereinbefore referred to, has been submitted to us for review in connection with our advice and opinion on the following question:

QUESTION

Is the Board of Examiners in the Basic Sciences, State of Nevada, legally authorized to enter into a reciprocal agreement with the Arkansas Healing Arts Board?

CONCLUSION

Yes.

ANALYSIS

The doubt entertained by the Nevada Board of Examiners in the Basic Sciences concerning its legal authority to enter into a reciprocal agreement of the kind indicated, apparently stems from, and is predicated upon, the particular title which its counterpart has in Arkansas, namely, Healing Arts Board.

However, it is not the *particular name* of a board, but its *official* status, character, functions, and authority, as well as its requirements and standards, which are determinative of the question as to whether a reciprocal agreement would be legally authorized under applicable Nevada law.

The Arkansas Healing Arts Board, as provided in the 1959 Arkansas Act 187, is the official *state* agency charged with the responsibilities, functions, powers and authority of giving examinations in the basic sciences and licensing or otherwise qualifying and regulating the activities of persons engaging in the healing arts in the State of Arkansas. These are precisely and substantially the very same functions, responsibilities and jurisdiction of the Nevada Board of Examiners in the Basic Sciences.

The nonrecognition by the Nevada Board of Examiners of such bodies as the National or Chiropractic Boards has legal support and justification in the fact that the latter, or similar boards, are *professional*, rather than *state or official*, in character or status and functions or responsibilities. The protection of the health, safety and welfare of every citizen is, both generally and properly, a matter of public or state interest. Legislative enactments providing for desirable safeguards and regulatory protective requirements are recognition of public or state concern in such matters. Because *professional* boards may not, necessarily, be always wholly objective or entirely impartial in connection with a determination as to the needs or requirements which might best serve the public interest, most states and jurisdictions (as a matter of policy and legislative wisdom) have created and conferred upon *state or public boards and agencies* the requisite powers and authority for protection of the public interest.

The Arkansas Healing Arts Board is that state's official or public authority having jurisdiction in examining and certifying as qualified all persons desirous of engaging in the healing arts. The Nevada Board of Examiners is of the opinion that the requirements and standards in effect by the Arkansas Healing Arts Board are, at least, equal to those established for and maintained and required in, the State of Nevada. NRS 629.080, by express provision or necessary legislative intentment authorizes reciprocal agreements of the kind here involved, in proper circumstances. The Nevada Board of Examiners, we are informed, is of the considered opinion that, apart from the difference in the name of the Arkansas Board, the circumstances are proper for such an agreement. It is the substantial and legal or official character of the Arkansas Board that is determinative and controlling, rather than the particular name which it bears.

We conclude, therefore, that the Nevada Board of Examiners in the Basic Sciences is legally authorized to enter into the reciprocal agreement indicated herein.

See: Attorney General's Opinion No. 48, dated April 24, 1951; Attorney General's Opinion No. 7, dated February 7, 1955; Attorney General's Opinion No. 90, dated August 9, 1951; Attorney General's Opinion No. 108, dated September 20, 1955.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-119 Nevada State Hospital—Repatriation of nonresident patient at Hospital held not mandatorily required, but permissive and discretionary, under applicable law. Advice given that authorized agreement be negotiated with state of patient's legal residence for public assistance purposes to assume deficit in cost of care and maintenance of patient in Nevada, on basis of special circumstances here indicated.**

CARSON CITY, December 28, 1959

SIDNEY J. TILLIM, M.D., *Superintendent, Nevada State Hospital, P.O. Box 2460, Reno, Nevada*

#### STATEMENT OF FACTS

DEAR DR. TILLIM: It appears that a female patient, aged 78, was committed to the Nevada State Hospital on June 12, 1957. This patient, together with a daughter, had long been residents of the State of New York, and had only established residence in Nevada some three (3) months prior to the commitment to the Nevada State Hospital. Confirmation concerning the New York residence of the patient has been received from the New York Department of Mental Hygiene with advice that the patient is eligible for repatriation and medical care and treatment in a New York institution.

We are furnished with certain information which, it is suggested, justifies certain special consideration in connection with the matter. That is: that the only close kin of the patient is the daughter who accompanied the patient to Nevada; that said daughter desires to continue to reside in Nevada, so as to be near a married son, long employed in Nevada; that the patient has no living relatives or other persons having any interest or concern for her living in New York State; that patient's daughter resides alone and has little means, depending upon a small pension which she receives and occasional help from her married son; and, that the patient has an income of only \$46 (per month) from Social Security, so that there are no apparent available resources to reimburse fully the State of Nevada for her care and maintenance for such remaining period of time as she may require same.

#### QUESTION

Does applicable Nevada law make mandatory upon the Superintendent of the Nevada State Hospital the repatriation of all nonresident patients who are confined in, admitted or committed to the Hospital, so as to require him to return any such patient to the state in which they have legal residence for public assistance purposes.

#### CONCLUSION

No.

#### ANALYSIS

NRS 433.580, relating to "Repatriation of nonresident and resident patients," provides as follows, insofar as here pertinent:

1. For the purpose of repatriation, all nonresident patients who are confined in, admitted or committed to the hospital *may* be returned to the state in which they have legal residence. (Italics supplied.)
2. For the purpose of facilitating the return of such patients, the superintendent *may* enter into reciprocal agreements, consistent with the provisions of this chapter with the proper boards, commissioners or officers of other states for the mutual exchange of such patients confined in, admitted or committed to a state hospital in one state whose legal residence is in the other, and may give written permission for the return and admission to the Nevada state hospital of any resident of this state when such permission is conformable to the provisions of this chapter governing admissions to the hospital. (Italics supplied.)

NRS 433.590 relates to "Expenses for repatriation," and provides that all expenses for the return of a patient to the state of legal residence shall be paid by the patient or

relatives or persons responsible for his care and treatment under his commitment or admission. The expenses for return of an indigent patient may be paid by the state. The expenses for return of a resident of this state to the Nevada State Hospital shall not in any case be a charge against or paid by the State of Nevada.

NRS 433.600 relates to "Payment of expenses of repatriation," and provides:

The costs and expenses of returning such patients to the state in which they have residence, when assumed by the state, shall be advanced from funds appropriated for the general support of the hospital, and shall be paid out on claims as other claims against the state are paid.

On the basis of the foregoing statutory provisions, it is reasonably clear that the repatriation or return of patients in the Nevada State Hospital to the state where they have legal residence for public assistance purposes is not mandatory but permissive. The word used in the statute is "may," and not "shall."

The conclusion thus reached, however, does not fully resolve the problem. The fact is, apparently, that the particular patient here involved and her closest legally-responsible relative, the daughter, do not possess sufficient resources to defray the costs of the patient's care, maintenance and treatment at the Nevada State Hospital, thus resulting in expense to the State of Nevada. Such expense could be avoided if the patient were returned to New York State where she has legal residence for public assistance purposes.

On the other hand, the patient is aged, has no relatives or other persons living in New York State who have any interest or concern for her, and would, undoubtedly, be aggrieved by any separation at so great a distance from her daughter, now resident in Nevada. Such unnecessary and avoidable hardship is definitely contrary to known welfare policies prevailing in the two states here involved, as well as generally in all the states in this country.

On the basis of the authority and power provided in NRS 433.580, it is suggested that the Superintendent of the Nevada State Hospital communicate with the New York Department of Mental Hygiene and the New York Department of Welfare, advise said agencies of the factual circumstances here involved, and request said agencies to assume any deficit in the cost and maintenance of the patient resulting from her hospitalization in the State of Nevada. Such assumption of financial and legal liability for New York residents in other states under circumstances such as those outlined herein has been standard practice and procedure in the past and probably is present practice also, where public assistance is involved. "The shoe may be on the other foot" in some other case where a Nevada legal resident found it necessary to apply for public assistance under like circumstances in the State of New York, and where the State of Nevada would be called upon to assume legal and financial responsibility for said New York public assistance.

Reciprocal agreements to cover situations of the kind here under consideration have been in effect for many years and are the accepted practice. Establishment thereof in the State of Nevada is, apparently long overdue. We have already indicated that sufficient legal authority therefor is provided in existing law.

We suggest, therefore, that action be taken as herein advised.

Respectfully submitted,  
ROGER D. FOLEY, *Attorney General*  
By: JOHN A. PORTER, *Deputy Attorney General*

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**OPINION NO. 1959-120 State of Nevada Does Not Have Right to Regulate Indians Taking Fish from Waters of Truckee River within Confines of Pyramid Lake Indian Reservation; but Does Have Such Right as to Non-Indians.**

CARSON CITY, December 28, 1959

MR. FRANK GROVES, *Director, Fish and Game Department, State of Nevada, Post Office  
Box 678, Reno, Nevada*

STATEMENT OF FACTS

DEAR MR. GROVES: The lower Truckee River lies on the Pyramid Lake Indian Reservation in Washoe County, Nevada, from Pyramid Lake approximately to the town of Wadsworth. This year the Tribal Council of the reservation has requested a year-round open fishing season on the Truckee from Wadsworth down to the Numana Dam, with the river closed to non-Indians from Numana Dam down to Pyramid Lake. The Washoe County Game Board has met and suggested a season on the Truckee from the California state line to Pyramid Lake of May 14th to October 21st, inclusive. Thus, the recommendation of the County Game Board is in direct conflict with the Indians' request regarding the waters of the Truckee situate within the reservation.

QUESTION

Does the State of Nevada have the right to regulate Indians and non-Indians taking fish from the waters of the Truckee River within the confines of the Pyramid Lake Indian Reservation?

CONCLUSIONS

Your question is answered in the negative as to the Indians and in the affirmative as to the non-Indians.

ANALYSIS

The Pyramid Lake Indian Reservation was created by an Executive Order of President Grant on March 23, 1874. In Opinion No. 914, Report of Attorney General 1948-1950, this office held that since the Federal Government has exclusive jurisdiction over Indian tribes when they are on reservations, the State cannot enforce its fish and game laws against an Indian within the domain of an Indian reservation. See also, *In re Blackbird*, 109 F.139.

While it is true that our Legislature has enacted NRS 41.430, whereby the State of Nevada, pursuant to the provisions of a federal act, assumed jurisdiction over public offenses committed by or against Indians in the areas of Indian country in Nevada, except in areas specifically excluded by the Governor, the Pyramid Lake Indian Reservation has been excluded from the operations of this section by proclamation of Governor Charles H. Russell, issued on the 27th day of June, 1955.

However, in the case of non-Indians our Supreme Court has held that the State, having the right to utilize its police power for the preservation and protection of fish in its public waters, has the right to regulate the taking of fish from the public waters within the boundary of the Pyramid Lake Reservation by all parties not Indian wards of the government. This decision is based on the general principle of law that state courts have jurisdiction on Indian reservations over offenses not committed by or against an Indian. *Ex Parte Crosby*, 38 Nev. 389.

Respectfully submitted,  
Roger D. Foley, *Attorney General*

By: WILLIAM N. FORMAN, *Special Deputy Attorney General for Nevada Fish and Game Commission*

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