

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1961

**OPINION NO. 61-199 SHERIFFS AND CONSTABLES; [NRS 248.265](#)**—Sheriffs and constables may collect fees for travel incurred in unsuccessful attempts to serve process.

Carson City, January 9, 1961

Honorable Wayne O. Jeppson, District Attorney, Lyon County, Yerington, Nevada

**STATEMENT OF FACTS**

Dear Mr. Jeppson:

The District Attorney of Lyon county seeks the opinion of this office on the following question:

**QUESTION**

Is the Sheriff of Lyon County entitled to recover mileage for travel in unsuccessful attempts to serve process?

**CONCLUSION**

The Sheriff of Lyon County is entitled to recover mileage for travel in unsuccessful attempts to process.

**ANALYSIS**

[NRS 248.265](#) provides, in part, as follows:

1. The sheriff of Lyon County shall be allowed to charge and collect the following fees:

For serving a summons or complaint, or any other process, by which an action or proceeding is commenced, except a writ of habeas corpus, on every defendant \$2.00

For traveling and making such service, per mile in going only, to be computed in all cases the distance actually traveled, for each mile .....30

If any two or more papers are required to be served in the same suit at the same time, where parties live in the same direction, one mileage only shall be charged.

\* \* \*

6. All fees collected by the sheriff of Lyon County shall be paid into the county treasury on or before the 5th day of each month.

Nevada is one of the minority of jurisdictions which permits sheriffs and constables to recover mileage for travel in attempting to serve process which was not actually or lawfully served or made. *See* 80 C.J.S. 541.

In the case of *Washoe County v. Humboldt County*, [14 Nev. 123](#) (1879), the Court held that a sheriff was entitled to his fees “for miles actually traveled in attempting to find and serve jurors

whose names appeared upon the venire, but who could not be found and served.” The Court there construed a portion of Section 1 of the Statutes of 1875, page 147, which read as follows:

“The fees allowed to Sheriffs in the counties of this State shall be as follows: \* \*  
\* “For traveling, per mile, in serving such supoena or venire, in going only, fifty cents for the first ten miles, and for each and every additional mile, forty cents; but when two or more witnesses or jurors live in the same direction, traveling fees shall be charged only for the most distant.”

The Court stated:

The sheriff was entitled to fees and mileage for serving the twenty-four jurors, and in the event of the jurors living in different directions, the statute (Stat. 1875, 147) authorizes the allowance of mileage whether the jurors named in the venire be found or not. The mileage in such cases is necessarily made in “serving such venire.”

We have noted that [NRS 248.265](#) contains the phrase “for traveling *and* making such service.” Whereas, the statute construed by the Court in the cited case contains the phrase “for traveling \* \* \* *in* serving such subpoena or venire.” We do not think, however, that the difference in language merits a difference in construction. The provisions of the Nevada Revised Statutes governing fees of sheriffs and constables, with the exception of Lyon and Mineral Counties, contain language substantially the same as appears in the statute construed by the Court. (See [NRS 248.280](#), [NRS 248.290](#), [NRS 258.290](#), [NRS 258.125](#) through [NRS 258.160](#).)

Our search shows that *Washoe County v. Humboldt County*, supra, has never been modified or overruled on this point, and , accordingly, we must conclude that sheriffs and constables in this State may collect fees for travel incurred in unsuccessful attempts to serve process.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Earl Monsey  
Deputy Attorney General

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**OPINION NO. 61-200 EMPLOYMENT SECURITY DEPARTMENT; EXECUTIVE DIRECTOR**—Section 612.605, 612.610, 612.615, 612.227 and 41.010 NRS construed. Funds provided in addition to those granted by congress for administration of the Employment Security Department of the State of Nevada. Lease-Purchase Agreement for purchase of land and office buildings by Executive Director of Employment Security Department pursuant to 612.227 NRS may be enforced by legal action against the State of Nevada in the event of default in payment of rents be lessee.

Carson City, January 11, 1961

Mr. Richard Ham, Executive Director, Nevada Employment Security Department, P. O. Box 602, Carson City, Nevada

### STATEMENT OF FACTS

Dear Mr. Ham:

You have asked this office for our opinion in connection with the Lease-Purchase Agreement of September 16, 1960 between the State of Nevada, by and through the Employment Security Department, as lessee, and Brunzell Construction Co., Inc., of Nevada, as lessor, as amended by Amendment of Lease dated January 5, 1961.

### QUESTIONS

1. Is a Lease-Purchase Agreement for purchase of office buildings and land entered into pursuant to 612.227 NRS enforceable by the lessor against the State of Nevada?
2. In the event of nonpayment of rent by the lessee pursuant to the agreement can lessor file suit against the State of Nevada for the collection of past due rents?
3. Are there funds available for the payment of said rent by lessee other than funds appropriated by the Congress of the United States?

### CONCLUSIONS

- Question No. 1: Yes.  
Question No. 2: Yes.  
Question No. 3: Yes.

### ANALYSIS

Suits against the State of Nevada are generally authorized under Section 41.010 NRS which provides that a person who has presented a claim against the State for services or advances authorized by law, and for which an appropriation has been made but of which the amount has not been fixed by law, to the Board of Examiners and which claim the Board or the State Comptroller has refused to allow, may commence an action in Ormsby County for the recovery of the portion of the claim which shall have been rejected. The statute further provides that in such actions against the State, summons is served upon the State and the action proceeds as in other civil actions to final judgment. Should there be a judgment under such action, it is provided under Section 41.030 that upon presentation of a certified copy of the final judgment, the State Comptroller shall draw his warrant for the amount awarded by the judgment.

This statute requires that the claim be made for services authorized by law. The contract of the Employment Security Department for acquisition of useful office space is a service authorized by law. Section 612.227 has specifically authorized the Lease-Purchase Agreement hereinbefore referred to.

A continuing appropriation has been made for the payment of this contract under Section 612.605. Therein it is provided that there is created in the State Treasury a special fund known as the unemployment compensation administration fund. That statute further provides that all moneys which are deposited or paid into that fund are "hereby appropriated and made available to the Executive Director." That fund consists of all moneys appropriated by this State as well as all moneys received from the United States and all moneys from any other source for such purpose. Hence, those funds are appropriated for the use of the Executive Director for lawful services for which he is authorized to contract. Subsection 3 of Section 612.605 specifically provides that all moneys in that fund shall be expended *solely* for the purpose of defraying the cost of the administration of the Employment Security Department. It is our opinion that rental payments are part of the cost of administration authorized by law as services for which the Executive Director is entitled to contract, and for which an appropriation has been made.

The State is not immune from suit under any doctrine of sovereign immunity precluding suit for the reason that the use of the building is for a service rendered and an appropriation from a fund has been made for that purpose. The amount of expenditure for administration of the Employment Security Department has not been fixed by law but is a general authority to the

Executive Director which, in this case, you have fixed by the contract pursuant to your general authority.

As a further supplement to the Unemployment Compensation Administration fund created and appropriated under Section 612.605, there has been arranged by the Legislature provisions for appropriation from the general fund. I refer you to Section 612.610 which provides in general that if any moneys are found by the Department of Labor because of any action or contingency to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Department of Labor for the proper administration of the Employment Security Department “*it is the policy of this State that such money shall be replaced by moneys appropriated for such purpose from the general fund of this State to the unemployment compensation administration fund for expenditure as provided in [NRS 612.605](#).*”

This latter section, we believe, makes it mandatory on the State of Nevada as a matter of policy to supply the unemployment compensation administration fund with moneys for the proper administration of the chapter whenever the fund is insufficient. The last section quoted provides that upon receipt of notice of a finding from the Department of Labor the Executive Director shall promptly report the amount required for such replacement to the Governor, and the Governor shall at the earliest opportunity submit to the Legislature a request for the appropriation of such amount. This section for reimbursement of the unemployment compensation administration fund is an emergency section.

In addition to this there is another fund called the Employment Security fund created under Section 612.615. This money is appropriated and made available to the Executive Director to be used in the absence of federal funds. In the event federal funds are not available to finance expenditures for the administration of the employment security laws of the State of Nevada, resort may be had to that fund. In fact, that section of the law provides that it shall be a revolving fund to cover expenditures when federal funds have been requested and not yet received and “any balance in this fund shall not lapse at any time but shall be continuously available to the Executive Director for expenditures consistent with this chapter.”

### CONCLUSION

Therefore, it is concluded that in the event of nonpayment of rent lessor is entitled to bring suit against the State of Nevada when his claim has been rejected and, upon obtaining judgment, the judgment is a valid collectible judgment against the State of Nevada.

Very truly yours,

ROGER D. FOLEY  
Attorney General

By: Charles E. Catt  
Special Deputy Attorney General  
For The Employment Security Department

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**OPINION NO. 61-201 COUNTIES, CITIES; [NRS 244.285](#), [NRS 278.570](#)**—Washoe County is subject to the building code regulations and fees prescribed by the City of Reno with respect to such construction the county may undertake within the city limits.

Carson City, January 19, 1961

Honorable Roy Lee Torvinen, City Attorney, Reno, Nevada

### STATEMENT OF FACTS

Dear Mr. Torvinen:

The County of Washoe on several occasions has constructed or caused to be constructed buildings and other structures within the confines of the City of Reno. The City Attorney of Reno has requested our opinion on the following question relative to such construction.

### QUESTION

Are the regulations and fees prescribed by the building code of the City of Reno applicable to county buildings or other structures constructed by the County of Washoe within the city limits of Reno?

### CONCLUSION

Washoe County is subject to the building code regulations and fees prescribed by the City of Reno with respect to such construction the county may undertake within the city limits.

### ANALYSIS

The following legislation is pertinent to the instant question:

[NRS 244.285](#) The board of county commissioners shall have power and jurisdiction in their respective counties 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; \* \* \*.

[NRS 278.020](#) For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures.

[NRS 278.570](#) The governing body of any city or county may provide for the inspection of structures and the enforcement of the zoning regulations by means of the withholding of building permits. For such purpose the governing body may establish and fill a position of city or county building inspector, and may fix the compensation attached to the position, \* \* \*.

[NRS 278.580](#) The governing body of any city or county may adopt a building code, specifying the design, soundness and materials of structures and rules, ordinances and regulations for the enforcement of the building code.

2. The governing body may also fix a reasonable schedule of fees for the issuance of building permits.

3. A city building code which has rules, regulations and specifications more stringent than the building code of the county within which such city is located shall supersede, with respect to the area within a 3-mile limit of the boundaries of such city, and provision of such building code not consistent therewith.

[NRS 244.368](#) is identical to paragraph 3 of the above cited statute, but appears in the section of NRS devoted to county government.

[NRS 278.610](#) 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 then in effect.

The provisions of Chapter 278 apply to special-charter cities, as well as cities incorporated by general law. See [NRS 278.010](#) 1(b).

Article XII, Sections 10e, 10f, 10.235, 10.530 and 9a of the Charter of the City of Reno variously empower the city council to regulate the construction of wooden buildings, prescribe material to be used in construction, prevent the erection of unsafe buildings, provide for the inspection of unsafe buildings in the interest of fire protection, regulate height, size, and location of buildings, and enact an ordinance adopting a uniform building code without publication. Section 15-1 (as amended) of the Reno Municipal Code adopts the 1958 Uniform Building Code, Section 4-24 (as amended) created the office of building inspector.

In the case of *Green County v. City of Monroe*, 3 Wis.2d 196, 87 N.W.2d 827, the Court held that a county was not subject to a city zoning ordinance in locating and constructing a county jail on county property. The Court said:

By statute the county board must construct the jail at the county seat. Under our statutes counties have extensive police powers. The state has its own building code governing the construction of public buildings. The state code is very comprehensive and covers safety in construction, sanitation, ventilation, and other details. The responsibility for the enforcement of the state building code is not left to cities but is delegated to the state industrial commission and in the case of a county jail the plans are also subject to inspection and approval by the state department of public welfare. The general words of the statutes conferring zoning powers on cities cannot be construed to include the state, or in this instance the county, when in conflict with special statutes governing the location and construction of a county jail.

In *Hall v. City of Taft*, 47 Cal.2d 177, 302 P.2d 574, it was held that a municipal corporation's building regulations were not applicable to the construction of a public school building within the municipality by a school district. The Court said that school districts are agencies of the state for the local operation of the state school system and added:

Moreover, in connection with the foregoing and as an additional ground why the construction of school buildings by school districts are not subject to the building regulations of a municipal corporation in which the building is constructed, is that the state has completely occupied the field by general laws, and such local regulations conflict with such general laws, when we consider the activity involved.

In *Community Fire Protection District v. Board of Education*, (Mo.) 315 S.W.2d 873, the Fire Protection District sought to compel a school district to comply with an ordinance of the fire district requiring building permits and setting a general building code. Under Missouri law fire districts are established as political subdivisions. The Court held that the school district must obtain the building permit.

\* \* \* it is clear to us that the Legislature has subjugated the School District's general power to construct buildings to the Fire District's specific power to regulate the construction of buildings in the furtherance of fire prevention. \* \* \* Inasmuch as the Fire District is exercising police power delegated to it by the State, the School District is just as subservient thereto as if the provisions of the Fire District's ordinances had been prescribed by the State itself.

The Missouri Court distinguished the Hall case (supra) “because the State of California had invested the Board of Education with complete authority in the field of building construction.”

In *County of Cook v. City of Chicago*, 311 Ill. 234, 142 N.E. 512, it was held that a county must comply with the fire regulations of a municipal corporation within the limits of which it erects a county building. The Court said:

It is urged that the county is an arm of the state to which there has been committed the control of the county buildings, and that it is not, therefore, subject to the police power of the city. While the county is an agency of the state, it is likewise a creature of the state, vested with only the powers conferred upon it by the state. It is not correct, therefore, to say that the county is a part of the state in the exercise of police power.

It is apparent from reading the foregoing cases that the mere fact that a political body is a subdivision of the state is not sufficient to exempt that body from local building regulations. In addition the applicable statutory framework must show an intent on the part of the Legislature to endow the affected subdivision with authority to regulate the mode of construction which it is authorized to undertake. [NRS 244.285](#), supra, generally authorizes Washoe County to construct public buildings. It does not, however, contemplate regulating the nature of such construction. The Legislature has seen fit to confer this police function upon the City of Reno by virtue of the provisions of [NRS 278.580](#) and the cited charter provisions. We are, therefore, of the opinion that the county is subject to the building code regulations prescribed by the city with respect to such construction the county may undertake within the city limits.

The situation presented by the County of Washoe when it undertakes to construct public buildings within the City of Reno can be contrasted with a similar undertaking on the part of a duly authorized department or commission of the State of Nevada.

[NRS 341.150](#) provides:

1. The state planning board shall furnish engineering and architectural services to all state departments, boards or commissions charged with the construction of any state building, the money for which is appropriated by the legislature. All such departments, boards or commissions are required and authorized to use such services.

2. The services shall consist of:

- (a) Preliminary planning.
- (b) Designing.
- (c) Estimating of costs.
- (d) Preparation of detailed plans and specifications.

The board may submit preliminary plans or designs to qualified architects or engineers for preparation of detailed plans and specifications if the board deems such action desirable. The cost of preparation of preliminary plans or designs, the cost of detailed plans and specifications and the cost of all architectural and engineering services shall be charges against the appropriations made by the legislature for any and all state buildings or projects, or buildings or projects planned or contemplated by any state agency for which the legislature has appropriated or may appropriate funds. The costs shall not exceed the limitations that are or may be provided by the legislature.

3. The board shall:

- (a) Have final authority for approval as to architecture of all buildings, plans, designs, types of construction, major repairs and designs of landscaping.

- (b) Solicit bids for and let all contracts for new construction or major repairs to the lowest qualified bidder.

- (c) After the contract is let, have supervision and inspection of construction or major repairs. The cost of supervision and inspection shall be a charge against the

appropriation or appropriations made by the legislature for the building or buildings.

The cited statute clearly grants the State Planning Board the power to regulate the mode and manner of construction of state buildings and in our opinion preempts any local regulation.

Since the fees charged for obtaining building permits are not regarded as a tax for revenue purposes but merely as a means of defraying the expense of regulation, Washoe County is not immune from payment of such fees. *See Daniels v. Point Pleasant* (N.J.), 129 A.2d 265.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Earl Monsey  
Deputy Attorney General

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**OPINION NO. 61-202 MUNICIPAL CORPORATIONS; JURISDICTION OF MUNICIPAL COURT**—When one is charged with a crime by complaint under city ordinance, and demurs thereto, contending that the ordinance is unconstitutional, the municipal judge must certify the action to the district court for trial if “tax assessment, or levy” is involved, otherwise the municipal court must try action.

Carson City, January 20, 1961

Honorable Sidney R. Whitmore, City Attorney, City of Las Vegas, Las Vegas, Nevada

### **STATEMENT OF FACTS**

Dear Mr. Whitmore:

Inquiry of your office recently submitted to the undersigned raises questions of procedure in the municipal court. The question is entirely one of law, and requires of this office that we outline the distinguishing features of those criminal cases commenced in the municipal court, in which it is incumbent upon the municipal judge to certify the action to the district court to hear, try and determine.

### **QUESTIONS**

Question No. 1. If one is charged with a crime under an ordinance of the City of Las Vegas, and demurs to the complaint upon the ground that the ordinance which is invoked is unconstitutional, does it then become incumbent upon the municipal judge to certify the action to the district court to try and determine?

Question No. 2. If a defendant wishes to test a city ordinance as to its constitutionality, under which he is charged with the commission of a public offense, should he file a demurrer or a motion to dismiss the complaint?

### **CONCLUSIONS**

Question No. 1.

If the crime charged, pursuant to ordinance, is founded upon a tax assessment or levy, the municipal judge, upon the filing of a demurrer raising such question, shall certify the action to



the district court for trial therein. This would include actions in which the city seeks to collect a license tax, but it does not include actions in which the penalty is a municipal fine, unless such municipal fine arises out of a failure to pay a license tax. When violation of the ordinance calls for the imposition of a municipal fine, for example, by reason of a traffic violation, and the ordinance is not based upon the imposition or collection of a license tax or levy, there is no authority for certifying the action to the district court, nor could the district court properly accept jurisdiction in respect to such action.

Question No. 2.

When a defendant wishes to test the validity of a city ordinance as to constitutionality, under which he is charged with the commission of a public offense, he should demur to the complaint, specifically pointing out the constitutional defect, as authorized by the provisions of [NRS 185.110](#).

## ANALYSIS

Section 6 of Article VI of the Constitution of the State of Nevada in part provides:

Sec. 6. The district courts in the several judicial districts of this state shall have original jurisdiction in \* \* \*, (actions involving) the legality of any tax, impost, assessment, toll or municipal fine, \* \* \*; and also in all criminal cases not otherwise provided for by law. They shall also have final appellate jurisdiction in cases arising in justices courts and such other inferior tribunals as may be established by law. \* \* \*.

Section 8 of Article VI of the Constitution makes provision for the jurisdiction of justices' courts.

Section 9 of Article VI of the Constitution provides:

Sec. 9 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 several courts of record.

Pursuant to Section 8 of Article VI of the Constitution, the Legislature enacted Section 66.070 NRS. Section 1 thereof, in part, provides:

1. The parties to an action in a justice's court cannot give evidence upon any question which involves \* \* \* or the legality of any tax, impost, assessment, toll or municipal fine; nor can any issue presenting such question be tried by such court; and if it appear, from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath that the determination of the action will necessarily involve the question of \* \* \*, *the legality of any tax, impost, assessment, toll or municipal fine*; the justice must suspend all further proceedings in the action and certify the pleadings, \* \* \*, to the clerk of the district court of the county. From the time of filing such pleadings or transcript with the clerk of the district court, the district court shall have the same jurisdiction over the action as if it had been commenced therein. (Emphasis supplied.)

[NRS 185.110](#), as to procedure in justices' courts, provides:

185.110 The defendant may demur to the complaint when it appears upon the face thereof:

1. That it does not conform to the requirements of [NRS 185.020](#).
2. That the facts stated do not constitute a public offense.

[NRS 185.020](#) provides that the complaint in criminal actions in justices' courts must distinctly state the particulars of time, place, person and property involved, so that the defendant may understand distinctly the character of the offense complained of.

[NRS 4.370](#) defines the jurisdiction of the justices' courts.

By act of 1911, the Legislature incorporated the town of Las Vegas. In Chapter 152, Statutes of 1955, the Legislature amended Section 29 of the City Charter of the City of Las Vegas, respecting the powers, jurisdiction and procedure of the municipal court of said city and provided inter alia:

\* \* \* that nothing herein contained shall be so construed as to give such court jurisdiction to determine any such cause when it shall be made to appear by the pleadings or the verified answer that the *validity of any tax assessment, or levy* shall necessarily be an issue in such cause, in which case the court shall certify such cause to the district court in like manner and with the same effect as provided by law for certification of causes by justice courts. (Emphasis supplied.)

This section also provides:

The said court shall be treated and considered as a justice court whenever the proceedings thereof are called into question.

Also the following:

Appeals to the district court may be taken from any final judgment of said municipal court in the same manner and with the same effect as in cases of appeal from justice courts in civil and criminal cases, as the case may be.

The statute permitting the incorporation of a city by general law contains a similar provision, to the provision, heretofore quoted, as contained in the Las Vegas City Charter. [NRS 266.555](#), subsection 4, in part, provides:

4. Nothing contained in subsection 3 shall be so construed as to give the municipal court jurisdiction to determine any such cause when it shall be made to appear by the pleadings or the verified answer that the *validity of any tax, assessment or levy*, \* \* \* shall necessarily be an issue in such cause, in which case the court shall certify such cause to the district court in like manner and with the same effect as provided by law for certification of causes by justices' courts. (Emphasis supplied.)

The statutes heretofore quoted, parceling out the jurisdiction in criminal actions between justices' courts and district courts, are constitutional. *State of Nevada v. Rising*, [10 Nev. 97](#).

It will be observed under [NRS 66.070](#), when it appears from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath that the determination of the action will necessarily involve the question of the "legality of any tax, impost, assessment, toll or municipal fine" the justice must suspend all further proceedings and certify the pleadings to the clerk of the district court. It will also be observed that under Section 29 of the Las Vegas City Charter when it shall be made to appear by the pleadings or the verified answer that the "validity of any tax assessment, or levy" shall necessarily be an issue in such cause, the municipal court is required to certify the action to the district court. The enumeration of instances in which there shall be certification to the district court, from either of the courts mentioned, as designated by statute or city charter, is compatible with Section 6 of Article VI of the Constitution, and appears to be exclusive.

When an action is certified by either court to the district court it is not certified for an advisory opinion by the district court, but “the district court shall have the same jurisdiction over the action as if it had been commenced therein.” ([NRS 66.070](#).)

In the event an action is erroneously certified to the district court by the justice’s court or the municipal court, it would be the responsibility of the district court to remand it to the court from which it had been erroneously certified, with disclaimer of jurisdiction and mandate to the lower court to proceed and hear, try and determine the action. *Bancroft v. Pike*, [33 Nev. 53](#), p. 80.

No ambiguity of meaning of terms appears in [NRS 66.070](#), or Section 29 of the Charter of Las Vegas, with the possible exception of the meaning of “municipal fine.” The term “municipal fine” as used in these sections has been construed in its strictest sense and not in its broad and comprehensive meaning of “municipal.” It means fines imposed by the city. *People v. Johnson*, 30 Cal. 98.

The Dixon case must be distinguished, before the correct rule may be pronounced, by deduction from the authorities. *In re Dixon*, [40 Nev. 228](#), 161 P. 737. Dixon, an attorney-at-law, failed to pay his license tax to the City of Reno, demanded pursuant to a city ordinance. He was arrested under complaint based upon the ordinance, and the crime resulting from such failure, and held in custody. Dixon demurred to the complaint contending that the municipal court had no jurisdiction. The municipal court overruled his demurrer, declined to certify the action to the district court and proceeded to try and convict him. Thereafter by an original proceeding in habeas corpus in the supreme court, that court found that the ordinance involved the validity of a license tax, and was within the forbidden area insofar as the municipal court was concerned. The court concluded that the judgment of the municipal court was void, for want of jurisdiction.

Neither should the provision that the municipal court be treated as a justice court whenever proceedings are involved, create any apprehension or confusion as to the separate jurisdictions of the courts, for the rule mentioned is one of procedural as distinguished from substantive law.

It follows from the foregoing that when it is made to appear from the pleadings or the verified answer that only when the “validity of any tax assessment, or levy,” shall necessarily be an issue in the case, the municipal judge shall certify the action to the district court.

The situation to which you have specifically referred is one in which a city ordinance is challenged as to constitutionality, not as to a license tax in which case it would be proper for the municipal judge to certify the action to the district court, under the authority of the Dixon case, but as to the legality of a municipal fine, pronounced pursuant to an ordinance regulating the use of motor vehicles, in which case there is no authority of the municipal judge to certify the action to the district court.

With respect to Question No. 2 we are of the opinion that the legal sufficiency of a criminal complaint in the justice’s court or the municipal court, is tested solely by demurrer, there being no statutory authority for the interposition of a motion to dismiss the complaint. The concept of motion to dismiss is limited to civil actions.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. PRIEST  
Deputy Attorney General

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**OPINION NO. 61-203 CORPORATIONS**—The annual publication of “last year’s business” contemplated by statute is the calendar year and not a fiscal year at variance therewith. Publication and filing is required also in cases in which the period covered is less than 12 months. [NRS 80.190](#) construed.

Carson City, January 26, 1961

Honorable John Koontz, Secretary of State, Carson City, Nevada

### STATEMENT OF FACTS

Dear Mr. Koontz:

A foreign corporation qualified to do business in Nevada on July 21, 1960. It operates upon a fiscal year basis, beginning May 1 and ending April 30 of the following year.

### QUESTION

Is a corporation which is qualified to do business in Nevada and which operates on a fiscal year basis, as distinguished from a calendar year basis, required to publish a statement of its last year's business, and file a copy with the County Assessors, under the provisions of [NRS 80.190](#), for the calendar year immediately preceding?

### CONCLUSION

We have concluded that, since the statute makes no provision for the publication and filing to cover a fiscal year, differing from the calendar year, the computation of the corporation's "last year's business" must be the calendar year; also that this corporation must publish and file before or during the month of March, 1961, despite the fact that it will report less than one full calendar year, to be exact from July 21, 1960, to December 31, 1960.

### ANALYSIS

[NRS 80.190](#), in part, provides:

1. 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. \* \* \* (Emphasis supplied.)
2. The secretary of the corporation publishing the statement shall file a copy with the assessor of each county in this state in which the corporation is doing business.

The language employed is crystal clear and requires no interpretation. In effect it provides that all foreign corporations doing business in this State at such time shall, during the month of January, February or March, publish a statement of last year's business. The language "last year's business," since the publication must be completed during a period beginning January 1 and ending March 31, refers only to the calendar year. Publications are not to be made at different times or for different fiscal years to meet the convenience of the corporation, but are to be made at a definite time, for a very definite year, namely, the calendar year.

We are of the further opinion that the publication must be made prior to March 31, 1961, by the corporation which qualified on July 21, 1960, despite the fact that the statement will cover less than one full year. In fact, it will cover the period beginning July 21, 1960, and ending December 31, 1960. The statute should be construed as if it recited "last year's business or fraction thereof."

Respectfully submitted,

ROGER D. FOLEY

Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-204 MOTOR VEHICLE CARRIER LICENSE FEES; EXEMPTIONS;  
[NRS 706.670 1\(D\)](#) CONSTRUED**—A land and livestock company purchasing livestock in Idaho and Nevada and transporting the livestock in trucks owned by the company upon Nevada roads to California to pasture until marketable is not a “producer” of livestock exempt from motor carrier license fees by virtue of the provisions of [NRS 706.670](#) 1(d).

Carson City, January 27, 1961

Mr. Louis P. Spitz, Director, Department of Motor Vehicles, Carson City, Nevada

### STATEMENT OF FACTS

Dear Mr. Spitz:

An inquiry to this office from the Department of Motor Vehicles relates that Wolfsen Land and Cattle Company of Los Banos, California purchases livestock in Nevada and Idaho and transports the livestock in trucks owned by the company across Nevada highways to California where the livestock is pastured prior to resale. The Department’s inquiry enclosed correspondence from the Wolfsen Land and Cattle Company claiming that the cattle it hauls on Nevada roads have been owned by the company for several months prior to their movement; that the cattle are taken to California to feed until “such time as they are marketable”; and that “transportation of cattle to the most favorable feeding location is the principal function of the trucks that we operate on Nevada roads.”

An audit undertaken by the Department resulted in an assessment against the land and cattle company for motor vehicle carrier fees under the provisions of [NRS 706.010](#) through 706.700. The company has paid the fuel tax and audit charges, but protests the payment of the fees assessed claiming it is exempt by virtue of the provisions of [NRS 706.670](#) 1(d) (cited below) which excludes the transportation of livestock to market by producers from carrier license fee requirements.

### QUESTION

Is a land and livestock company purchasing livestock in Idaho and Nevada and transporting the livestock in trucks owned by the company upon Nevada roads to California to pasture until marketable is not a “producer” of livestock exempt from motor carrier license fees by virtue of the provisions of [NRS 706.670](#) 1(d).

### ANALYSIS

[NRS 706.520](#) provides, in part, as follows

\* \* \* every person operating motor vehicles in the carriage of persons or property for hire, or as a private carrier, shall, before commencing the operation thereof and annually thereafter, secure from the department a license for each and every such motor vehicle to be operated, and make payments therefor as provided in [NRS 706.010](#) to [706.700](#), inclusive.

[NRS 706.100](#) defines “private motor carrier of property” to mean “any person engaged in the transportation by motor vehicle of property sold, or to be sold, or used by him in furtherance of any private commercial enterprise.” It seems clear to us (nor have the protestants claimed otherwise) that the operations of the Wolfsen Land and Cattle Company in purchasing livestock and transporting them through Nevada to pasture, with a view toward resale, places that company within the scope of the broad statutory definition of private motor carrier above cited, and that the company is accordingly subject to make payment of the fees provided in [NRS 706.010](#) through 706.700 unless it is otherwise declared exempt.

[NRS 706.670](#) exempts several forms of transportation from carrier fee requirements; subparagraph (d) of that section reads as follows:

(d) The transportation of livestock and farm products to market by the producer thereof, or such producer’s employee, or merchandise and supplies for his own use in his own motor vehicle.

Webster states that a “producer” is “one who produces, brings forth, or generates, one who grows agricultural products, or manufactures crude materials into use.” A land and livestock company in the business of purchasing and reselling livestock does not satisfy this definition.

In *Ex parte Iratacable*, [55 Nev. 263](#), the cited subsection was attacked as being arbitrary and discriminatory. The Nevada Supreme Court upheld its constitutionality. The discussion contained in that opinion shows the Court viewed the provision as exempting livestock growers from license fees, not brokers or wholesalers.

The next class which it is claimed was arbitrarily exempted are the producers of livestock. Of course, the legislature in exempting this class took into consideration the extent to which this privilege is exercised, as well as other circumstances and the conditions. The livestock industry is one of the leading industries of the state, and we must assume that the legislature well knew that, except in rare instances, the livestock grower transports his product to market in large numbers and by railway. Distances are great in Nevada, and to contemplate the transporting of large quantities of livestock by motor vehicles once or twice a year would necessitate an undue investment in such vehicles for such rare use. Occasionally it may be desirable to transport a blooded bull by truck, or to use a truck to convey an animal to a nearby neighbor or butcher. In view of the conditions and customs of the ranchers, known to the legislature, we think the exemption not unreasonable or arbitrary.

It was the opinion of one of our predecessors that Nevada ranch owners who purchased bull calves from midwestern states, and transported them to Star Valley where they were kept for six months prior to being offered for sale to Nevada stockmen, were not exempt from payment of a private carrier’s license fee by virtue of the provisions of what is now [NRS 706.670](#) 1(d). The opinion called attention to the general rule relating to the construction and application of statutory exemptions:

Those who seek shelter under an exemption law, must present a clear case, free from doubt, as such laws being in derogation of the general rule must be strictly construed against the person claiming the exemption and in favor of the public. 17 R.C.L. 522; 27 C.J. 237; *Erie Railway Co. v. Pennsylvania*, 21 L.Ed. 595. (Attorney General’s Opinion B-15, October 17, 1949.)

We are of the opinion, based on the reasons stated above, that the Wolfsen Land and Cattle Company is not a “producer” exempt from payment of motor vehicle carrier fees by virtue of the provisions of [NRS 706.670](#) 1(d)(supra).

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Earl Monsey  
Deputy Attorney General

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**OPINION NO. 61-205 STATE DEPARTMENT OF EDUCATION; COUNTY SCHOOL DISTRICT FUNDS; ESTABLISHMENT OF SPECIAL ACCOUNTS THEREIN FOR FEDERAL AND STATE MATCHING FUNDS FOR PRESCRIBED PURPOSES AS AGREED BETWEEN FEDERAL GOVERNMENT AND STATE; EXEMPTION OF SUCH SPECIAL FUNDS FROM OTHER APPLICABLE BUDGETARY REQUIREMENTS AND CONTROLS. (CF. ATTORNEY GENERAL OPINION NO. 325, MARCH 26, 1954)**—Applicable statutes construed and held to provide sufficient legal authority for State Department of Education to execute agreement with Federal Government for acceptance of federal funds on a state matching basis, and for said State Department of Education to prescribe establishment of special accounts as part of county school district funds for use of such aggregated funds for agreed purposes, separate and exempt from other and usual restrictions or limitations imposed by budgetary requirements and controls.

Carson City, January 31, 1961

Mr. Dwight F. Dilts, Assistant Superintendent of Public Instruction, Nevada State Department of Education, Carson City, Nevada

### STATEMENT OF FACTS

Dear Mr. Dilts:

We are informed that by memorandum from the State Department of Education, dated April 27, 1959, addressed to County Treasurers, County Auditors and County Superintendents of Schools, request was made for the establishment of special funds for the handling of federal moneys made available and received pursuant to Public Law 864 (the National Defense Education Act), as supplemented by state matching funds.

It further appears that some County Treasurers and County Auditors have posed questions as follows:

- (1) Are they authorized to receipt for such funds?
- (2) Should a special fund be established in respect of any such federal funds?
- (3) Is any such special fund authorized under existing provisions as contained in [NRS 387.170](#) and [387.175](#)?
- (4) Inasmuch as expenditures from such special funds would be in excess of those originally budgeted and approved for payment out of the county school district fund, would deposit and inclusion of such moneys in, or to the account of, the county school district fund be authorized and valid?

The foregoing questions would appear to be encompassed within the scope of the two following questions to be considered herein.

### QUESTIONS

1. Do [NRS 387.170](#) and [387.175](#) authorize the establishment of a special fund to handle the receipt of federal moneys which are earmarked for a special purpose?

2. Would expenditures from county school district funds, for purposes and in amounts which have not been budgetarily specified and approved, be violative of the law and, therefore, prohibited, under the factual circumstances here involved relative to federal moneys made available and received for the particular or special purposes provided in Public Law 864, the National Defense Education Act?

## CONCLUSIONS

Question No. 1: Yes

Question No. 2: No.

## ANALYSIS

[NRS 385.100](#) (“Regulations prescribing conditions under which funds, commodities or services from federal agencies may be accepted for use by public schools”) designates and authorizes the State Board of Education to regulate the execution of all state contracts and agreements for funds, services, commodities or equipment which may be provided by agencies of the Federal Government. The State Plan submitted by the State Education Department to qualify the State of Nevada for the federal funds here involved provided for responsibility and accountability of the State Education Department, *on the state level*, for proper use and expenditure of any federal funds which might be made available and allocated to the State of Nevada. (Confer [NRS 387.050](#).)

[NRS 387.095](#) (“Accounts and audits: Regulations of state board of education”), insofar as here pertinent, provides that:

The state board of education shall:

1. Prescribe regulations for the keeping of accounts and records and the making of reports by or under the supervision of boards of trustees of school districts. Such accounts and records shall, at all times, be available for inspection and audit by authorized officials \* \* \*.

In our considered opinion, the power to regulate the establishment of accounts and the keeping of records in connection with the same is of a plenary nature, and any such regulation is directive and mandatory.

[NRS 387.170](#) (“County school district fund: Creation; transfers”), as here relevant, provides as follows:

1. There is hereby created in each county treasury a fund to be designated as the county school district fund. \* \* \*

[NRS 387.175](#) (“Composition of county school district fund”), as here relevant, provides as follows:

The county school district fund shall be composed of: \* \* \*

2. All moneys received from the Federal Government for the maintenance and operation of public schools. \* \* \*
6. Any other receipts, including gifts, for the operation and maintenance of the public schools in the county school district.

The foregoing provisions constitute sufficient statutory authority for receipt and inclusion in county school district funds of the federal moneys here involved. So far as we can determine, the



questions raised on the county level relative to receiving and handling such federal moneys (as matched by the State) is due to confusion relative to the distinction between county school district funds and *accounts* (as categorized for specified purposes) which may properly be established to comprise the aggregate county school district funds. In short, a number of specially designated *accounts* may properly and validly be established, all of which *accounts* would comprise a county school district fund.

Finally, there also appears to be some confusion as to whether expenditure of such federal moneys (as matched by state funds) are subject to those budgetary requirements and controls which regulate and are generally in effect with respect to other state appropriated moneys apportioned to county school district funds. The simple answer to this is that the funds here in question are *not* subject to such budgetary requirements and controls, and that such *additional* funds are made available to each county school district, *subject, however, to regulatory administrative control of the State Department of Education as to expenditures therefrom and accountability therefor.*

We conclude, therefore, that statutory authority is sufficient and adequate regarding the power of the State Department of Education to accept the federal funds here involved, and for said department to prescribe the establishment of *a special account*, as part of the county school district fund, in which account there shall be deposited the federal funds respectively apportioned to each county school district (together with apportioned matching state funds). It is also our opinion that such funds, so deposited in the prescribed special account, are outside the scope of general budgetary requirements and controls, being subject to the regulatory administrative control of the State Department of Education as required by the agreement executed by said Department with the federal governmental agency involved. (*See* Attorney General Opinion No. 325, dated March 26, 1954.)

We trust that the foregoing sufficiently answers your inquiry and proves helpful in removing obstacles and delays to proper and effective utilization of the funds involved for the purposes intended.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Deputy Attorney General

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**OPINION NO. 61-206 EDUCATION, STATE DEPARTMENT OF; COUNTY SCHOOL DISTRICTS; CONSTITUTIONAL LAW; (REFERENCES: ATTORNEY GENERAL OPINION 704, NOVEMBER 29, 1948; ATTORNEY GENERAL OPINION 3, JANUARY 29, 1959)**—Applicable constitutional and statutory provisions construed as prohibiting lease-purchase agreements intended to effect the construction and acquisition of new school buildings and other school facilities of a capital nature by county school districts.

Carson City, February 2, 1961

Mr. Byron F. Stetler, Superintendent of Public Instruction, Nevada State Department of Education, Carson City, Nevada

#### STATEMENT OF FACTS

Dear Mr. Stetler:

It appears that the Washoe County School Board has inquired concerning the legality of the construction of an administrative building on a lease-purchasing plan of financing. Specifically, it is contemplated that the building would be financed by private capital and the School District would pay rent therefor for an agreed number of years, at the termination of which the building would then become property of the School District.

We are further informed that the question was previously submitted to the District Attorney of Washoe County for his advice and opinion, and that he indicated that he did not consider it proper that he should rule on the matter since the question was statewide in application.

### QUESTION

Are lease-purchase agreements for the construction and acquisition of school buildings and other school facilities authorized and valid under presently existing law?

### CONCLUSION

No.

### ANALYSIS

The question here involved concerns subordinate public entities of the State—in the instant case, county school districts. In previous opinions of this office, substantially involving the same general question in relation to the State, the following determination and conclusions were reached:

1. \* \* \* State Cannot Incur Debt in Excess of the Sum of 1 Percent of Assessed Valuation for New Construction—This Amount Cannot Be Exceeded With Legislative Approval. (Attorney General Opinion No. 704, November 29, 1948.)
2. 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. (Attorney General Opinion No. 3, January 29, 1959.)

The latter of these two conclusions was in answer to a query by the Director of the Statute Revision Commission who entertained some doubt as to the constitutional validity of proposed legislation, which he was requested to draft, which would have authorized the State of Nevada “\* \* \* by means of so-called ‘lease-purchase’, to acquire public buildings and certain other capital improvements.” The proposed legislation would have expressly authorized lease-purchase agreements on the part of the state departments and agencies. If ever introduced, the proposed legislation was never enacted; certainly, it does not constitute part of present Nevada statutory law.

Reference is made to the aforesaid opinions of this office for the detailed analysis of the general problem here involved. In the instant case, it must suffice to set forth only such salient considerations as appear specifically pertinent herein.

A review of the debates of the delegates to the convention which developed the Nevada Constitution shows considerable concern and interest in securing economical government and sound financial practices. (Nevada Constitutional Debates and Proceedings, by Andrew J. March, Official Reporter.) In general, the founders of the various state governments, including the State of Nevada, were agreed upon four inflexible principles to regulate and limit the fiscal policies of state and county public officials, namely:

1. That departments and agencies of government operate on a budgeted cash basis.

2. That the total maximum allowable state indebtedness be related to the valuation of the total taxable property within the state in an amount as determined by a fixed percentage of such valuation of total taxable property.

3. That the maximum tax rate of ad valorem taxation be constitutionally established to regulate and limit the tax burden on the people which might legally be imposed or exist at any time; in the case of Nevada, this has been established in the maximum sum of \$5 per \$100 per year.

4. That, to the extent that same may be possible, a maximum allowable period of time be prescribed for the redemption and settlement of public debts.

As here relevant, Article IX of the Nevada Constitution, which relates to finance and state debt, provides as follows:

Sec. 3. 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 specially 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 debt 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.

As here relevant, Article X of the Nevada Constitution, which relates to "Taxation," provides 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.

The courts have generally looked to the substance rather than the form of agreements in ruling on the question whether a contract, lease, or conditional sales contract complied with constitutional requirements and limitations. Thus, as quoted in Attorney General Opinion No. 3, dated January 29, 1959, hereinabove mentioned, the Court in the California case of *In City of Los Angeles v. Offiner*, 122 P.2d 14, 16 (1942), made the following observations:

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 valid. (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 mortgage, lease, or conditional sale.

Attorney General Opinion No. 3, dated January 29, 1959, also makes reference to an article entitled "Lease-Financing By Municipal Corporations As a Way Around Debt Limitations" (Vol. 25, 1956-1957, The George Washington Law Review, beginning at page 377). Said article points out that the questioned "leases" in practice are nonterminable; 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, therefore is borrowing and not renting. The author of said article is credited as concluding that though a great deal of ingenuity and dexterity has been displayed in the various attempts made to avoid the constitutional limitations and prohibitions, present debt limitations are too inflexible, and there is considerable doubt concerning their validity. Moreover, it should also be noted that circumventions of the law by such means and procedures can certainly not be held to comply with legislative intent as held at the time of the adoption of the involved constitutional limitations, and that if existing conditions and needs warrant it, such constitutional limitations should be amended with the sanction of popular support. In short, "the best way to insure repeal of a bad law is to enforce it strictly."

It would serve no useful purpose to review the judicial determinations on the question and to attempt to distinguish the varying statutory and constitutional provisions involved in the rationale of such court decisions. The judicial authorities have been collected to some extent under the heading of "Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitutional or statutory limitation of indebtedness," in 71 A.L.R. 1318. The weight of authority and the preferred view of the question is that which we have indicated.

One category of cases which may be considered as an exception to the rule herein outlined relies on the "special fund" doctrine, holding that if the moneys with which the payment of installments or "rent" is made are derived from other than state tax levies (e.g. federal funds, contributions by employers-employees as in N.I.C., or other special operations), and are not a direct burden upon the taxpayer as such, then the constitutional inhibition does not apply. (*See Boe v. Foss*, 77 N.W.2d 1, *Garrett v. Swanton*, 13 P.2d 725.)

Clearly, such is not the case in the situation embraced within the scope of the question under consideration.

As might be expected, and most properly, the Nevada Supreme Court, in the case of *Ash v. Parkinson*, [5 Nev. 15, at page 26](#), has held that claims against the State which are paid when due, are not "debts" within the constitutional limitation. This decision, however, does not reach the crux of the question here involved.

While county school district funds are undoubtedly authorized for *rental* of schoolhouses when necessary ([NRS 387.205](#), [387.260](#), 393,080, 393.140), the agreement must, in face, be nothing more than one for a *rental* of such facilities.

Our review of applicable statutes amply supports and confirms our conclusion that the approved procedure and established means of constructing or purchasing new school buildings and other capital improvements and facilities is by borrowing money therefor by the issuance and

sale of bonds, when so authorized by the electors on the basis of a bond election. (*See* [NRS 387.160](#), [387.335-387.735](#).) The Legislature, by enactment of the statutory provisions last mentioned, has plainly and abundantly manifested its desire and intent, and such schematic and complete enunciation of policy excludes any agreement substantially circumventing and nullifying legislative purposes and aims, in addition to constitutional restrictive controls.

We are of the opinion, therefore, that lease-purchase agreements for the construction and acquisition of school buildings and other facilities of a capital nature would be violative of both constitutional and statutory restrictions and limitations.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Deputy Attorney General

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**OPINION NO. 61-207 NEVADA STATE HOSPITAL**—Change of domicile to Nevada of parents of mentally incompetent minor, subsequent to commitment of such child by court of sister state, does not, during such commitment, effect a change in domicile of such child.

Carson City, February 6, 1961

Sidney J. Tillim, M. D., Superintendent, Nevada State Hospital, P. O. Box 2460, Reno, Nevada

### **STATEMENT OF FACTS**

Dear Dr. Tillim:

Your inquiry for an official opinion of this department, recently assigned to the undersigned deputy, presents principally questions of law.

We are asked to review the law with reference to situations in which minors are committed to institutions for the mentally ill, in sister states in which the parents then reside and are domiciled, with reference to the legal effect of such commitment and the status of the minor, in cases in which the parents subsequently move to the State of Nevada and establish a bona fide residence and domicile here. Although we should deal with the question generally with a view to guidance of your department, we should specifically review the laws of the State of Idaho.

### **QUESTION**

If a minor then domiciled in a sister state, is adjudged by a court of competent jurisdiction therein, to be an insane or feeble-minded person, and as a consequence is committed to an institution of such state for institutional care and treatment, and thereafter during the period of such commitment, and while such child is still a minor, the parents establish a bona fide residence and domicile in Nevada, what are the powers of the Nevada State Hospital in respect to the acceptance of the responsibility for the institutional care of such child, by virtue of a decree of a Nevada court or otherwise?

### **CONCLUSION**

We have concluded that when a state, through its duly constituted officers, and in the manner provided by law, enters an order committing a minor, then residing and domiciled in such state,

to an institution therein, as an insane or feeble-minded person, it becomes *parens patriae* (possesses exclusive sovereign guardianship powers as to the person) over said child, and that such power and duty of the sovereign that committed it is unaffected by a change of residence and domicile of the parents. It follows that during the continuance of such status and until it is restored to sanity, such child's domicile does not change as a consequence of a change in the domicile of the parents, and since it is not a resident of or domiciled in Nevada, a Nevada court would not acquire jurisdiction to commit such child to the Nevada State Hospital, nor is said hospital authorized to accept such child for institutional care, in consequence of repatriation provisions of the law, or otherwise.

### ANALYSIS

For the most part, admissions to mental institutions are based upon court orders of commitment. With certain exceptions, hereinafter noted, residence and domicile of the incompetent within the asylum state is a prerequisite to admission. In respect to the Idaho law see 11 Idaho Code—State Charitable Institutions, Chapter 3, Sections 66-301 to 66-312.

Under Section 66-336 Idaho Code, both resident and nonresident patients may be admitted to the appropriate state hospital. This section provides in part:

\* \* \* Once a patient has been hospitalized in a hospital for the mentally ill operated by the state, when the welfare of the patient is not being jeopardized, such patients as are indigent shall be deported to the state of *their residence* provided that they will be received in an appropriate hospital for the mentally ill of that state. (Emphasis supplied.)

Under [NRS 433.330](#) to [433.350](#) patients may be admitted to the Nevada State Hospital upon their voluntary application, provided that they are residents of Nevada for one year ([NRS 433.030](#)), and provided that they are able to pay for the services of the hospital ([NRS 433.340](#)).

Under the provisions of [NRS 433.300](#) noneducable, mentally retarded children who *are residents* of Nevada, may be received and cared for at the Nevada State Hospital by court order (subsection 1, a), or by reason of the parents' application without court order (subsection 1, b).

We find only one exception to the requirement of one year's residence and domicile, as a condition prerequisite to admission to the Nevada State Hospital; and this is in connection with the commission of a felony. Before or after trial (if convicted) for a felony, a person may, by court order, in a proper case, be confined in the Nevada State Hospital ([NRS 178.400](#) to [178.470](#)), even though he is not a Nevada resident or domiciliary. We have found no other exceptions to the requirement of one year's residence and domicile in Nevada, as a condition precedent to admission to the hospital, either by way of original commitment or repatriation, for under the repatriation statute, providing for a transfer of patient to Nevada, ([NRS 433.580](#)) residence is required.

Having stated generally the statutory laws of the states here concerned, we now consider a principal question, viz: Under the assumed facts as to residence, domicile and commitment in Idaho, does a change of domicile of the parents to Nevada effect a change of domicile of the incompetent committed minor?

This question must be answered in the negative. The State of Idaho having taken charge of the person of the incompetent minor has created, by the order committing the incompetent minor to an Idaho institution for institutional care, the status of guardian and ward, and under the doctrine of *parens patriae*, has deprived and divested the parents of the physical control and custody of their child.

\* \* \* a minor, deprived of parental care and control, is a ward of the state, over whom the state may exercise its sovereign power of guardianship; and to effect such power the legislature may make reasonable regulations for the minor's protection and welfare. (67 C.J.S. 624.)

To the same effect *see Hannon v. Hannon*, 206 S.W. 2d 305, wherein the Court said:

When adjudged to be not compos mentis a person becomes the special ward of the Court making the adjudication of the Court of commitment so long as the commitment continues and conditions remain unchanged.

If the child during commitment arrives at the age of majority, and thereafter is discharged by an order of the Court restoring it to sanity, its parents having established a bona fide domicile in Nevada during its commitment and minority, it (he) would not upon receipt of the order of discharge, become a resident of Nevada, for being of full legal age such person would be permitted to establish his residence at will, and as a result of his own choice, as evidenced by physical presence and intent. *Hannon v. Hannon*, supra.

It is our opinion therefore, under the assumed or stated facts, that the domicile of the minor continues and will continue in Idaho until it is discharged from the institution to which it has been committed by the Idaho court, and since the child is not domiciled in Nevada, and this case does not fall within one of the enumerated exceptions, the Nevada State Hospital cannot accept the child, for institutional care, even under the repatriation statute.

It is our further opinion that the parents, although now domiciled in Nevada, continue to be legally liable under the Idaho statutes, for the support and institutional care of the incompetent child, which liability is not affected by their change of domicile.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-208 SOIL CONSERVATION DISTRICTS**—Supervisors of the Kings River Soil Conservation District do not have the authority to promulgate a regulation in respect to purity of seed, plants and cuttings, as possibly affected by weeds and diseases, within the area embraced by said district. Chapter 548 NRS construed.

Carson City, February 7, 1961

Mr. Lee M. Burge, Executive Officer, Department of Agriculture, Division of Plant Industry,  
P.O. Box 1209, Reno, Nevada

#### **STATEMENT OF FACTS**

Dear Mr. Burge:

The Kings River Soil Conservation District, of Orovada, Nevada, has been duly and regularly organized pursuant to the provisions of Section 548.185, et seq., of the Nevada Revised Statutes.

The district now proposes to operate an "Insect, Weed, and Plant Disease Control District Under the Direction of Kings River Soil Conservation District." In this respect it is proposed to promulgate "weed and insect control regulations to be incorporated in the requirements" of the district. We have before us a copy of the proposed regulations which do not require full recital herein. Sufficient to state, by way of summary, that the proposed regulations all have for their

purpose the retention of the purity of seed, plants and cuttings, as possibly affected by weeds and certain enumerated plant diseases.

Item No. 8 of the proposed regulations provides as follows:

8. Conclusion. Whereas it is in the interests of conservation and will benefit all parties farming in the Kings River Valley that the agricultural areas be kept free of weeds and diseases, and it is the responsibility of the Kings River Soil Conservation District to further the interests of conservation and to assist the cooperators, it is now and will in the future be a condition for becoming a cooperator of the District that all cooperators approve and sign an agreement to abide by the above-stated regulations.

### QUESTION

Does the Kings River Soil Conservation District have the authority to promulgate regulations which have for their purpose the retention of the purity of seed, plants and cuttings, as possibly affected by weeds and diseases, within the area embraced by said district?

### CONCLUSION

No, the district does not have such authority.

### ANALYSIS

The objectives of the proposed regulations are laudable. However, we are here concerned with the question of whether or not the Legislature has granted such powers to the supervisors of the district under the provisions of [NRS 548.340](#) et seq. If such powers had been granted, which they have not, either expressly or by inference, we would then pursue the investigation of whether or not the Constitution permits such delegation of powers.

A careful examination of Chapter [NRS 548](#) clearly shows that the purpose of the chapter is soil conservation only. Under [NRS 548.095](#), the Legislature has declared the legislative policy and has enumerated conditions of wasteful land use tending to waste, impoverish and exhaust the soil. Under [NRS 548.100](#), the Legislature has further declared legislative policy and enumerated the consequences of unwise and wasteful land use. Under [NRS 548.105](#), the Legislature has declared legislative policy in respect to corrective measures.

[NRS 548.105](#) provides the following:

548.105 It is hereby declared, as a matter of legislative determination, that to conserve soil resources and control and prevent soil erosion, it is necessary:

1. That land use practices contributing to soil wastage and soil erosion be discouraged and discontinued, and appropriate soil conserving land use practices be adopted and carried out.

2. That among the procedures necessary for widespread adoption are:

(a) The carrying on of engineering operations such as the construction of terraces, terrace outlets, check dams, dikes, ponds, ditches and the like.

(b) The utilization of stripcropping, lister furrowing, contour cultivating, and contour furrowing.

(c) Land irrigation.

(d) Seeding and planting of waste, sloping, abandoned or eroded lands to water-conserving and erosion-preventing plants, trees and grasses.

(e) Forestation and reforestation.

(f) Rotation of crops.

(g) Soil stabilization with trees, grasses, legumes and other thick-growing, soil-holding crops.



- (h) Retardation of runoff by increasing absorption of rainfall.
- (i) Retirement from cultivation of steep, highly erosive areas and areas now badly gullied or otherwise eroded.

The powers of the districts and the supervisors thereof are provided in [NRS 548.340](#), et seq., and nothing contained therein suggests the powers here proposed to be asserted. We therefore conclude that the purpose of this grant of power, is soil conservation, and nothing more, and that it does not include that which is here proposed.

It is too well established to require the citation of authorities that public officers, boards, commissions and agencies of government, have only such powers as are specifically delegated to them and the powers reasonably inferrable to the execution of the powers expressly granted.

In *State v. Miles*, 5 Wn.2d 322, 105 P.2d 53, the Court said respecting the rule-making power:

In exercising the rule-making power, however, such administrative officers and boards must act within the limits of the power granted to them. (Citing cases.) The basis for that proposition is, of course, that rules and regulations which have the effect of extending, or which conflict in any manner with, the authority granting statute do not represent a valid exercise of authorized power, but, on the contrary, constitute an attempt by the administrative body to legislate. *Anhauser-Busch, Inc. v. Walton*, 173 Me. 57, 190 A. 297.

For the foregoing reasons the conclusion is inescapable that the Legislature did not intend to grant to the supervisors of a soil conservation district the power to promulgate rules and regulations of the type and content here proposed.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-209 MOTOR VEHICLE CARRIER FEES; EXEMPTIONS; [NRS 706.670](#) 1(C) CONSTRUED—[NRS 706.670](#) 1 (c) exempts from carrier license fees only those private carriers who have an established place of business within a given city. Said exemption applies only to those vehicles which regularly and habitually operate from that city and use that city as the center of operations. The exemption, moreover, is applicable with reference to one city only.**

CARSON CITY, February 10, 1961

MR. LOUIS P. SPITZ, *Director, Motor Vehicle Department, Carson City, Nevada*

#### STATEMENT OF FACTS

DEAR MR. SPITZ: Your letter of January 24, 1961, in substance, poses the following question:

#### QUESTION

Are vehicles of a private motor carrier who maintains a place of business and is licensed to do business in several cities, exempt from carrier license fees if the vehicles operate within a five-mile radius of any city or town in which the carrier maintains a business location?

## CONCLUSION

[NRS 706.670](#) 1(c) exempts from carrier license fees only those private carriers who have an established place of business within a given city. Said exemption applies only to those vehicles which regularly and habitually operate from that city and use that city as the center of operations. The exemption, moreover, is applicable with reference to one city only.

## ANALYSIS

Subsection 1 (c) of [NRS 706.670](#) exempts “city or town draymen and private motor carriers of property operating with a five mile radius of the limits of a city or town \* \* \*” from carrier license fee requirements. This office has in three prior opinions had occasion to construe this section or substantially similar sections of the Nevada Code. *See* the following Attorney Generals’ Opinions: No. 139, June 11, 1934; No. 303, May 26, 1946; and No. 34, April 4, 1951.

It was concluded in the opinion dated April 4, 1951 that the phrase “within a five mile radius of the limits of a city or town” had reference only to the particular city or town wherein “the principal place of business” of the carrier was located. We are generally in accord with the view that the exemption can extend with reference to only one city or town; however, limiting the exemption to that city in which the “principal place of business” of the private carrier is located seems to us unwarranted and too narrow.

The case of *Continental Baking Co. v. Woodring*, 55 R.2d 347, affirmed 286 U.S. 352, 52 S.Ct. 595, 76 L.Ed. 1155, construed a Kansas statute containing language similar to that contained in [NRS 706.670](#). That case was cited with approval by the Nevada Supreme Court in *Ex parte Iratacable*, [55 Nev. 263](#), and referred to by our predecessors in support of their opinions. The Federal Court, in the *Continental Baking Co.* case, *supra*, said:

The Legislature very properly intended to exempt those vehicles which regularly and habitually operate within the limits of the city, such as the delivery trucks of the retail store. The Legislature realized that around every city of the state there was a penumbra of towns that was outside the city limits; that in their daily routine these city delivery trucks cross the city limits repeatedly in going back and forth into these outlying additions. In so doing, the trucks use the state improved highways but slightly, for the streets of these outlying additions are not generally a part of the state system.

\* \* \*

We think a fair construction of the statute is that there are exempted private carriers who have an established place of business within a city, be they resident or nonresident, and who use that city as the center of the operations of that vehicle.

In view of the above, we are of the opinion that the Legislature contemplated that the exemption created by subsection 1(c) of [NRS 706.670](#) should extend only to those private carriers who have an established place of business within a given city; who employs vehicles which regularly and habitually operate from that city; and who use that city as the center of operations for the vehicles in question. It follows that if these criteria are satisfied, the exemption is applicable with respect to one city only, notwithstanding the fact that the carrier may have business locations in several cities.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Earl Monsey  
Deputy Attorney General

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**OPINION NO. 61-210 CITIES; [NRS 268.030](#) CONSTRUED**—City Council and Clerk of the City of Wells must comply with the provisions of [NRS 268.030](#) and publish quarterly financial statements, notwithstanding provisions of the City Charter authorizing posting of such statements.

Carson City, February 13, 1961

Honorable Robert O. Vaughan, City Attorney, City of Wells, P.O. Box 108, Elko, Nevada

### STATEMENT OF FACTS

Dear Mr. Vaughan:

Section 17 of the Charter of the City of Wells conflicts with the provisions of [NRS 268.030](#) with respect to the publication of quarterly statements of finances of the city. The charter provision authorizes either publication or posting of the city's financial statements, while the statute makes publication mandatory except in the case of a city located in a county where no newspaper is published.

### QUESTION

Is the City of Wells required to published its quarterly financial statements?

### CONCLUSION

The City Council and Clerk of the City of Wells must comply with the provisions of [NRS 268.030](#) and publish quarterly financial statements, notwithstanding the provisions of the City Charter authorizing posting of such statements.

### ANALYSIS

Pertinent portions of the applicable legislation are herein set forth:

[NRS 268.030.](#)

1. After March 23, 1939, the city clerk and city council of every incorporated city in this state, whether incorporated under the provisions of chapter 266 of NRS or under the provisions of a special act, shall cause to be published quarterly in some newspaper, published as hereinafter provided, a statement of the finances of the city, showing receipts and disbursements, exhibiting in detail the bills allowed and paid. The statement shall be signed by the mayor and attested by the city clerk, and shall be published in a newspaper published in such city. If there shall be no newspaper published in such city, then the financial statement shall be published in a newspaper published in the county, and if there be no newspaper published in the county, such financial statement shall be posted by the city clerk at the door of the city hall.

2. Any city officer in this state who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$500, or by imprisonment in the county jail not to exceed 6 months, or by both fine and imprisonment.

Wells City Charter—Section 17:

\* \* \* The councilmen shall cause complete and full records of all such claims and transactions to be kept by the city clerk in books secured for that purpose; said board of councilmen *shall require a statement to be published or posted, as may be designated by them*, in January, April, July, and October of each year, showing a full and clear and complete statement of all taxes and other revenue collected and expended during the preceding quarter, indicating the respective sources from which the moneys are derived, and also indicating the disposition made thereof and all outstanding bonds and other obligations. (Emphasis added.)

[NRS 268.030](#), cited above, clearly discloses an intention of the part of the Legislature to supersede conflicting local legislation on the subject of publication of city financial statements. The statute requires publication by “every incorporated city in this state, whether incorporated under the provisions of chapter 266 of NRS or under the provisions of a special act.” The cited charter provision was enacted in 1927 (Chapter 104, Statutes of Nevada 1927) and has remained unamended. [NRS 268.030](#) was enacted in 1939 and amended in 1943. (Chapter 130, Statutes of Nevada 1939 and Chapter 57, Statutes of Nevada 1943.) Although it does not appear in the Nevada Revised Statutes, Section 3 of the 1943 amendment provides that “all acts and parts of acts in conflict herewith are hereby repealed.”

It was stated in *Ronnow v. City of Las Vegas*, [57 Nev. 332](#), a case involving the reconciliation of conflicting general statutes and city charter provisions, that the “chief concern is to learn the intent of the legislature.” The language contained in [NRS 268.030](#) and its legislative history clearly manifest an intention on the part of the Legislature that the provisions of that statute ought to prevail over any prior conflicting portion of the Wells City Charter. It is our opinion that the city’s quarterly financial statements must be published.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Earl Monsey  
Deputy Attorney General

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**OPINION NO. 61-211 AGRICULTURAL EXTENSION AGENT; VETERINARIANS—**

One who supplies gratuitously pregnancy tests of cows and semen tests of bulls is not engaged in the practice of veterinary medicine. [NRS 638.010](#), et seq., construed

Carson City, February 17, 1961

Honorable A. D. Demetras, District Attorney, County of White Pine, Ely, Nevada

**STATEMENT OF FACTS**

Dear Mr. Demetras:

The District Agricultural Agent, serving White Pine County with headquarters in Ely, under request from ranchers has gratuitously given the pregnancy test for cows and semen test for bulls within his district. He has inquired as to whether or not he is in violation of the law. You have rendered an opinion thereon. Many officials within the district are interested and you have therefore referred the question to this department, in order that a determination thereon may have statewide dissemination and application.

### QUESTION

Is a District or County Agricultural Agent forbidden to gratuitously pregnancy-test cows and semen-test bulls, within his district or county?

### CONCLUSION

We have concluded that the gratuitous giving of such tests by one not licensed as a veterinarian are not forbidden by law.

### ANALYSIS

[NRS 638.010](#), subsection 2, defines the practice of veterinary medicine as follows:

2. "Practice of veterinary medicine, surgery, obstetrics or dentistry" is defined as follows:

(a) The opening or maintenance of an office or hospital for consultation or the treatment or prevention of disease of domesticated animals by means of drugs, medicines, surgical or dental operations, the administration or prescribing of sera, vaccines, drugs, pharmaceuticals or biological preparations for the treatment, or prevention or diagnosis of disease, or otherwise.

(b) An announcement to the public or any individual in any way of a desire or readiness or willingness to perform any of the acts mentioned in paragraph (a) or to perform any of the acts in paragraph (a) for the doing of which a person receives or expects to receive any money, fee, salary or other consideration of value.

(c) The illegal use, in connection with his name, by any person giving veterinary advice or performing veterinary services without charge or the expectancy of compensation, directly or indirectly, therefor, of the words "doctor," "veterinarian," "veterinary," "veterinary surgeon," "veterinary dentist," or the letters "Dr.," "D.V.M.," "V.M.D.," "M.D.C.," "V.S.," or any other letters, symbol or title, indicating that such person is graduated from some school or college which is authorized by law to confer such degree.

This definition of practices and representations which would constitute the practice of veterinary medicine, does not, in our opinion, expressly or by reasonable inference, include the tests here under consideration, when such are, as here, given gratuitously.

We find no provision in the law respecting district and county agricultural agents ([NRS 549.010](#) et seq.) which, expressly or by reasonable inference, authorizes this type of tests to be given by such agents. In other words such agents have no particular authority in this respect by reason of their official positions. Their authority is that of the public generally, to perform the act gratuitously, which, when so performed, does not constitute the practice of veterinary medicine.

[NRS 638.090](#) provides that it is unlawful to practice veterinary medicine in Nevada, without first procuring a license therefor. This has no application for the reason heretofore mentioned.

[NRS 638.150](#), subsection 1, enumerates certain operations and practices which might be considered, when done by another, as the practice of veterinary medicine, but provides that when done gratuitously, such practices do not fall within the provisions of the chapter.

We note, in your opinion, you have concluded that the giving of these tests, gratuitously, appears not to be forbidden by law, but that it would appear to be the better practice as a practical matter, to leave such tests to the services of veterinarians. We are in accord with this conclusion.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-212 OPTOMETRY, STATE BOARD OF**—Applicant for optometry license by examination, must, among other things, have at least 5 years of college and professional training. Applicant for optometry license by reciprocity provisions of the law, must, among other things, have at least 5 years of college and professional training. [NRS 636.155-636.205](#) construed.

Carson City, February 27, 1961

Dr. Robert T. Myers, Secretary, Nevada State Board of Optometry, P. O. Box 2466, Reno, Nevada

### STATEMENT OF FACTS

Dear Dr. Myers:

In or about the year 1948, optometry schools in and across the country began to give a 5-year course (studies above the high school level) prior to graduation and conferral of the degree of Doctor of Optometry. Prior to that time the equivalent course normally required not to exceed 4 years.

The optometry statute of 1955, effective March 24, 1955, (Chapter 208, Statutes 1955; [NRS Chapter 636](#)) repealing the former regulatory statutes, authorizes licensing after passing of an examination as well as licensing under a reciprocity arrangement of persons licensed in other states in which the “standard requirements of such out-of-state examination were at least equivalent” to the requirements of licensing under the provisions of NRS 636.

### QUESTIONS

Question No. 1. In the event an application for licensing by examination is made showing professional training taken prior to 1948, consisted of 4 years of combined college and professional training, is such an applicant under the provisions of Chapter 636 NRS an eligible applicant for examination?

Question No. 2. In the event an application for licensing by reciprocity is made, by a licensee of a sister state, whose combined college and professional training taken prior to 1948, consisted of 4 years of work, and graduation from a recognized institution, with no showing of any subsequent training, is such licensee eligible for licensing in Nevada under the present law?

### ANALYSIS

On March 24, 1955, as aforesaid, the following provisions became the law:

[NRS 636.130](#) provides:

636.130 The board (Nevada State Board of Optometry) shall have the power to grant or refuse licenses after examination or by reciprocity, and to revoke or suspend the same for any of the causes specified in this chapter.

[NRS 636.135](#) provides:

636.135 The board shall accredit schools in and out of this state teaching the science and art of optometry which it finds are giving a sufficient and thorough course of study for the preparation of optometrists.

[NRS 636.155](#) provides:

636.155 Satisfactory evidence must be filed with the secretary showing the following qualifications of an applicant:

1. Age not less than 21 years.
2. Citizenship of the United States.
3. Good moral character.
4. Preliminary education equivalent to 4 years in a registered high school.
5. Graduation from a school of optometry accredited by the established professional agency and the board, *maintaining a standard of 5 college years*, and including as a prerequisite to admission to the courses in optometry, at least two academic years of study in a college of arts and sciences accredited by the Association of American Universities or a similar regional accrediting agency. (Emphasis supplied.)

From the foregoing ([NRS 636.135](#)) it is clear that the board is authorized to accredit schools teaching the science of optometry, when satisfied of the thoroughness of the teaching.

From the provisions of [NRS 636.155](#), subsection 5, it is clear that the application for examination must among other things show that the school of the applicant is accredited by the board and that it maintains a standard of 5 college years, including certain prerequisite work. No exceptions for one trained prior to 1948 are provided. It follows that one must have the required qualifications or be ineligible to be accorded the privilege of taking the examination, without respect to the time that one graduated from a recognized school of optometry.

[NRS 636.205](#), subsection 1, is of exacting requirements in respect to licensing in Nevada by reciprocity. It recognizes that certain states may license under much less demanding requirements than those enumerated under [NRS 636.155](#). It therefore requires among other things that if a licensee of another state is to be accorded licensing in Nevada by reciprocity and without examination he must show to the Nevada Board that he has passed an examination in the state in which he is licensed in which the "standard requirements of such out-of-state examination were at least equivalent to those of the examination prescribed by" Chapter 636 of NRS. It follows that if the license issued by the sister state was upon a course of study of 4 years, and graduation from an accredited institution followed, which has not been supplemented since graduation by the licensee of the sister state, such licensee would not be qualified under the law to receive a Nevada license through reciprocity provisions.

The statute is clear and the Legislature has not seen fit to allow exceptions to the 5-year training provision, which might have been allowed to those trained prior to a certain date, or to those who have been licensed from or prior to a certain date. We are not concerned with the wisdom of the legislation since the construction is clear. If this interpretation appears severe, the remedy is by statutory amendment.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-213 INTERSTATE COMMERCE; PHARMACY, NEVADA STATE BOARD OF**—A state cannot tax commerce exclusively interstate; it cannot tax business which constitutes such commerce or the privilege of engaging in it. [NRS 639.100-639.170](#) construed.

Carson City, March 6, 1961

Mr. W. L. Merithew, Secretary, State Board of Pharmacy, P. O. Box 1087, Reno, Nevada

### STATEMENT OF FACTS

Dear Mr. Merithew:

A manufacturer and wholesaler of drugs, presumably corporate in form, produces drugs and medicines in California. It sells a part of its product in wholesale lots through sales representatives, to retail outlets in Nevada, ships the merchandise to these outlets, and bills the retail outlets for the merchandise. This manufacturer and wholesaler does not maintain a warehouse or office in the State of Nevada.

[NRS 639.170](#), subsection 1, inter alia provides that the State Board of Pharmacy may collect as a fee, not more than \$100 for issuance of a manufacturer's or wholesaler's permit, and a like sum annually for the renewal of such permit. The statute makes no provision or distinction between types of manufacturers or wholesalers, e.g., those that do both an interstate and intrastate business, or those that do an interstate or intrastate business solely.

### QUESTION

May an out-of-state manufacturer and wholesaler of drugs and medicines, as aforesaid, selling drugs in Nevada in the manner indicated, be required by the Nevada State Board of Pharmacy to pay to the board the sum of \$100 for issuance of a manufacturer's or wholesaler's permit, and the further sum of \$100 annually for the renewal thereof?

### CONCLUSION

The privilege of occupational tax may not be exacted under the circumstances stated herein, which, if permitted, would constitute a burden upon interstate commerce, forbidden by Article I, Section 8, of the Constitution of the United States.

### ANALYSIS

[NRS 639.100](#) provides the following:

639.100 1. Except as otherwise provided in this chapter, it is unlawful for any person to manufacture, compound, sell, dispense or permit to be manufactured, compounded, sold or dispensed any drug, poison, medicine or chemical, or to dispense or compound, or permit to be dispensed or compounded, any prescription



of a medical, dental, chiropody or veterinarian practitioner, unless he is a registered pharmacist under the provisions of this chapter.

2. Sales representatives or manufacturers or wholesalers selling only in wholesale lots and not to the general public and compounders or sellers of medical gases need not be registered pharmacists under the provisions of this chapter, but no person shall act as a manufacturer or wholesaler unless he has obtained a permit from the board. Each application for such permit shall be made on a form furnished by the board. Upon approval thereof by the board and the payment of the required fee, the board shall issue a permit to such applicant. Each permit shall be issued to a specific person for a specific location, and shall be renewed annually before July 1 of each year.

[NRS 639.170](#) in part provides:

639.170 1. The board shall charge and collect not more than the following fees for the following services: \* \* \*

For issuance of manufacturer's or wholesaler's permit, \$100.

For issuance of annual renewal of permit for manufacturer or wholesaler, \$100.

Article I, Section 8, of the Constitution of the United States, in part, provides:

The Congress shall have the power \* \* \* To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.

That the provision for the exaction of \$100 for a wholesaler's permit, constitutes a privilege or occupational tax, there can be no question. It is not an exaction for a service to be rendered by the State Board of Pharmacy, as for example inspection and supervision of the manufacturing process, which, of course, is a proper function of the Federal Government, under the provisions of Section 374, of Title 21 U.S.C.A. No service is contemplated to be rendered in consideration of the exaction.

In the reported cases, many similar and varying situations are considered, including cases in which both an intra and inter state business is conducted by the corporation sought to be taxed; for example, the services rendered by public utilities, warehousing or manufacturing property and facilities located within the state, and used in the operation, and cases in which the tax is measured by the amount of the business. (*See* 105 A.L.R. 12 et seq., under the annotation "Foreign Corporations—Taxation".) The specific determination required herein makes detailed analysis of the many and varied cases unnecessary; moreover such review is of questionable value and help.

Under the facts outlined herein, the matter is distinctly and solely a problem of taxation by a state in a manner placing an undue burden upon interstate commerce.

It is well settled that "unless the corporation is engaged in interstate commerce, and except for the effect of the commerce clause of the Federal Constitution, a foreign corporation may be excluded by a state altogether, or it may be admitted upon such terms with respect to taxation as the state may choose to impose, and if the corporation wishes to avail itself of the privilege of doing business within the state, it must comply with the conditions imposed." (Citing authorities) 105 A.L.R. 13.

We quote further from the same authority as follows:

It is well settled under these constitutional provisions that interstate or foreign commerce may not be taxed by a state and that a state may not impose upon a foreign corporation a tax for the privilege of engaging in such commerce.

Further from the same authority, p. 33, we quote:

The imposition by a state upon a foreign corporation engaged exclusively in interstate commerce, of a tax for the privilege of carrying on such business, violates the commerce clause. (Citing authorities.)

Also, p. 33:

It has been stated broadly in a number of cases that a foreign corporation whose sole business in the state is interstate or foreign commerce cannot be subjected by the state to the payment of a tax for the privilege of doing business or exercising its corporate functions in the state. (Citing authorities.)

In *Cooney v. Mountain States Telephone and Telegraph Co.*, 294 U.S. 384, 79 L.Ed. 934, Chief Justice Hughes, writing the opinion, said:

But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it.

Finally, the provisions of [NRS 639.170](#), providing for the issuance of a permit upon payment of the occupational tax of \$100, are ineffectual when applied to a situation, such as this, involving an operation of *interstate commerce* solely; such provisions must, therefore, be construed as not intended to govern such operations. However, if the operation were *intrastate*, under the authorities heretofore cited, these provisions would be fully effectual.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-214 COUNTY RECORDER; LAND SURVEYOR; ENGINEERS, PROFESSIONAL**—Map of plat of subdivision may not be recorded unless signed by currently licensed Registered Land Surveyor.

Carson City, March 15, 1961

Honorable John F. Mendoza, District Attorney, Clark County, Las Vegas, Nevada

### STATEMENT OF FACTS

Attention: Charles L. Garner, Deputy

Dear Mr. Garner:

A Nevada registered professional civil engineer, not certified by the State Board of Registered Engineers as a qualified or Registered Land Surveyor, has prepared a subdivision map, under the provisions of [NRS 278.320](#) et seq., which he has tendered for recordation. The District Attorney for the Recorder has asked for an official opinion.

### QUESTION

Is it required that before a map or plat of a subdivision may be recorded by the County Recorder of the County in which the land lies, that it must be signed by a Registered Land Surveyor?

## CONCLUSION

We have concluded that the question must be answered in the affirmative.

## ANALYSIS

[NRS 625.010](#) creates the State Board of Registered Engineers and [NRS 625.020](#) authorizes the Board to designate the recognized “branches of engineering.” Pursuant to such authority the Board (we are informed) has designated the following branches of engineering: Civil, Mechanical, Electrical, Mining, Geological and Structural. Perhaps there are other branches. If so, it is unimportant for this opinion.

Under [NRS 625.180](#) the prerequisite qualifications for examination by the State Board for registration as a professional engineer are set out, and under [NRS 625.190](#) the Board is authorized to hold oral and written examinations for such registration, which examination under the provisions of [NRS 625.200](#) shall consist of a two-day test. Under [NRS 625.210](#) the Board is authorized upon payment of the registration fee to issue a certificate of registration to the successful applicants. Under subsection 2 thereof it is provided: “2. The certificate shall authorize the practice of professional engineering, *followed by the branch or branches for which he is qualified.*” (Emphasis supplied.)

Under the provisions of [NRS 625.250](#) et seq., it is provided that land surveyors be registered by the Board and the requirements and conditions of such licensing are specifically provided. The minimum knowledge requirements are provided under [NRS 625.270](#), and under [NRS 625.280](#) the scope of the one-day examination is detailed.

Two other significant provisions exist with reference to the licensing and regulations of Registered Land Surveyors, viz:

(1) [NRS 625.310](#) provides that the secretary of the Board shall transmit to all County Recorders of the State a list showing the names and addresses of all licensees (Registered Land Surveyors), which list shall be kept up to date, showing at all times to all Recorders a complete record of suspensions, revocations, reinstatements, etc.

(2) [NRS 625.330](#) provides:

625.330 1. A registered land surveyor may practice land surveying and *prepare maps, plats, reports, descriptions or other documentary evidence in connection therewith.*

2. Every map, plat, report, description or other document issued by a registered land surveyor shall be *signed by him*, endorsed with his certificate number, and may be stamped with his seal, whenever such map, plat, report, description or other document is *filed as a public record* or is delivered as a formal or final document. (Emphasis supplied.) (Chapter 242, Statutes 1955, p. 391.)

[NRS 625.520](#) makes it unlawful to practice engineering without a license, and [NRS 625.540](#) also makes it unlawful to practice land surveying without a license. However the penalties differ, and the fact that the two offenses are not dealt with by one section is significant.

[NRS 278.320](#) et seq., provide for the filing of maps by a subdivider, the manner of preparation, the content, and time and requirement of recording.

Under the provisions of [NRS 278.360](#), subsection 2, it is, in part, provided:

2. No final map of a subdivision as defined in this chapter shall be accepted by the county recorder for record unless all provisions of this chapter and of any local ordinance have been complied with.

From the foregoing citations and deductions of and from the statutes, we conclude:

1. That the license granted to an engineer by the Board may certify that his qualification is that of Civil Engineer.
2. That for such a license the examination provided is two days.
3. That the examination for Land Surveyors requires only one day.
4. That information as regards Land Surveyor licenses and licensees must be sent to all County Recorders and must, by the Board, be kept current with such Recorders, but no such requirement is provided with reference to Civil or other engineers.
5. That maps of subdivisions must be recorded and must be signed by licensed Land Surveyors. It is not provided that they may be signed by duly licensed Civil Engineers.
6. That maps and subdivisions that do not comply with the provisions of the law are to be rejected by the Recorders.
7. That the punishment for violations of the law differs as between duly licensed Civil Engineers and duly licensed Land Surveyors.

It is therefore our opinion that the map or plat to qualify for recordation must, under the provisions of [NRS 625.330](#), be signed by a Registered Land Surveyor, who, at the time of signing and offering for recordation, is qualified as a record with the County Recorder as a licensed and Registered Land Surveyor, and whose license, issued by the Board is (under [NRS 625.310](#)) in good standing. This opinion is in harmony with Attorney General Opinion No. 301 of November 5, 1953, which holds that the licensing of a Civil Engineer is not the same as the licensing of a Land Surveyor, nor are the powers and functions identical.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-215 TAXATION; [NRS 372.325](#); [NRS 372.305](#)**—Gross receipts from the sale of materials and supplies to a contractor and its subcontractors engaged in the performance of a construction contract for the Washoe County School District are not exempt from sales tax by reason of the fact that they will ultimately be incorporated into a school district structure.

Carson City, April 25, 1961

Honorable William J. Raggio, District Attorney, Washoe County, Reno, Nevada

### STATEMENT OF FACTS

Dear Mr. Raggio:

The Board of Trustees of the Washoe County School District contemplates letting for bid a contract for the construction of a new high school within Washoe County. Although we have not been furnished with a copy of the proposed contract, we are advised that it provides that the general contractor is to be billed at the end of each month, by each of his separate subcontractors, for all materials which are to be incorporated into the school building. The general contractor then is to compute his total bill for that month, which will be certified by the architect and presented to the school board. Upon payment the school board takes title to that portion of the

building which has been constructed. After receipt of payment the general contractor is to pay the amounts due his subcontractors and their suppliers. Under the terms of the proposed contract all materials become the property of the school board when they are incorporated into the permanent structure.

## QUESTION

Are the gross receipts from the sale of materials and supplies to a contractor and its subcontractors, which are to be incorporated into a high school constructed by the Washoe County School District, exempt from the provisions of the Nevada State Sales and Use Tax Act?

## CONCLUSION

Gross receipts from the sale of materials and supplies to a contractor and his subcontractors, engaged in the performance of a construction contract for the Washoe County School District, are subject to sales tax.

## ANALYSIS

[NRS 372.105](#) imposes a sales tax upon all retailers at the rate of 2 percent of the gross receipts “from the sale of all tangible personal property sold at retail in this state \* \* \*.” Gross receipts from the sale of tangible personal property to counties, cities, districts, or other political subdivisions of the State are exempt from sales tax ([NRS 372.325](#) (4).)

Notwithstanding the elaborate contract provisions relating to passage of title and the manner of payment to the contractor which are recited above, it is clear that, although the materials here in question will ultimately be owned by the Washoe County School District, they will not be sold to the school district; rather, the supplies and materials will be sold to the general contractor and its subcontractors.

[NRS 372.305](#) reads as follows:

There are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in this state of, tangible personal property used for the performance of a contract on public works executed prior to July 1, 1955.

The above cited statute implies that gross receipts from the sale of personal property used for the performance of public works contracts *executed after July 1, 1955* are subject to the provisions of the sales and use tax.

It has frequently been held that the tax immunity afforded political bodies does not extend to contractors engaged in work for such entities. *See Boeing Airplane Co. v. State Commission of Revenue, etc.*, 152 Kan. 712, 113 P.2d 110; *Standard Oil Co. v. Lee*, 145 Fla. 385, 199 S. 325; *James v. IDravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318.

Materialmen’s sales to contractors have been held taxable retail sales in the following cases:

*St. Louis v. Smith*, 342 Mo. 317, 114 S.W.2d 1017; *Albuquerque Lumber Co. v. Bureau of Revenue*, 42 N.M. 58, 75 P.2d 334; *Craftsman, Painters and Decorators v. Carpenter*, 111 Colo. 1, 137 P.2d 414; *Atlas Supply Co. v. Maxwell*, 212 N.C. 624, 194 S.E. 117; *Northern Improvement Co. v. Engen*, ..... N.D. ...., 68 N.W.2d 463. *See* 163 A.L.R. 276, supplemented at 171 A.L.R. 697.

Based on the reasons stated above, we conclude that gross receipts from the sale of materials and supplies to a contractor and its subcontractors engaged in the performance of construction for the Washoe County School District, are not exempt from sales tax by reason of the fact that they will ultimately be incorporated into a school district structure. Attorney General’s Opinion No. 65, dated May 20, 1955, reached a similar conclusion with respect to materials used by contractors engaged in construction for the United States.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Earl Monsey  
Deputy Attorney General

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**OPINION NO. 61-216 BARBERS AND BARBERING; COSMETOLOGY**—It is not lawful for a licensed cosmetologist, not also licensed as a barber, to cut or trim men’s hair, for compensation. Chapters [NRS 643 and](#) 644 construed.

Carson City, May 2, 1961

Mr. Velton L. Tinsman, Secretary-Treasurer, State Board of Barber Examiners, 700 Wilkinson Avenue, Reno, Nevada

### STATEMENT OF FACTS

Dear Mr. Tinsman:

A duly licensed male beautician, under the provisions of Chapter 644 NRS (Cosmetology) and not licensed under the provisions of Chapter 643 NRS (Barbers and Barbering) is advertising for and performing men’s haircutting for compensation.

### QUESTION

Is a licensed cosmetologist, not also licensed as a barber, permitted to cut men’s hair for compensation?

### CONCLUSION

The question is answered in the negative.

### ANALYSIS

[NRS 643.010](#), subsection 5 provides, in part, as follows:

5. “Practice of Barbering” is defined to be any of, or any combination of, or all of the following practices for cosmetic purposes:
  - (a) Shaving or trimming the beard, or cutting or trimming the hair.

[NRS 643.020](#) creates the “State Barbers’ Health and Sanitation Board,” and authorizes appointment by the Governor. [NRS 643.030](#) makes provision for the organization and salary of the officers of the Board, and [NRS 643.040](#) provides for the meetings, quorum, seal and quarters of the Board. [NRS 643.050](#) makes provision for the powers and duties of the Board, including the rule making power, and, under subsection 4, makes provision for the issuance, refusal, renewal, suspension and revocation of certificates of registration or licenses. In short, under the provisions of this chapter, barbers and their characteristics are defined, and they are licensed, supervised and regulated.

[NRS 643.180](#) provides:

643.180 This chapter shall not apply:

1. To beauty parlors and beauty operators.
2. To embalmers or undertakers in cutting the hair or trimming the beard of any deceased person in preparation for burial or cremation.
3. To any person employed on a railroad train engaged in interstate commerce.

[NRS 643.190](#) in part provides:

643.190 It shall be unlawful:

1. For any person in this state to engage in the practice or attempt to practice barbering without a certificate of registration, health and sanitation issued by the board pursuant to the provisions of this chapter.

In a similar manner Chapter 644 of NRS defines cosmetology, creates a State Board of Cosmetology and defines its powers and duties, provides for licensing of cosmeticians or cosmetologists and for suspension or revocation of licenses, grants rule making powers, and otherwise authorizes the Board to regulate the trade.

[NRS 644.020](#) in part provides:

3. “Cosmetology” shall be construed to include any branch or any combination of branches of the occupation of a hairdresser and cosmetician, and any branch or any combination of branches of the occupation of a cosmetician, or cosmetologist, or beauty culturist, which are not or may hereafter be practiced, and is defined as the following practices:

(a) Arranging, dressing, curling, waving, cleansing, singeing, bleaching, tinting, coloring or straightening the hair of any person with the hands, mechanical or electrical apparatus or appliances, or by any means; or similar work incident to or necessary for the proper carrying on of the practice or occupation provided by the terms of this chapter.

(b) Cutting, trimming, or shaping the hair of *women and children*. (Emphasis supplied.).

On the basis of the provisions of [NRS 644.020](#), [3\(b\)](#), it is therefore clear that a licensed cosmetician or cosmetologist is authorized to cut or trim the hair of women and children. It is also clear that this section does not authorize them to cut and trim the hair of men. This conclusion is based upon a cardinal rule of statutory construction—inclusio unius est exclusio alterius—translated to mean “the inclusion of one is the exclusion of another.”

[NRS 643.010](#), subsection 5(a), does not in the same manner, limit licensed barbers as regards the trimming or cutting of hair. Licensed barbers under this section may trim or cut the hair of women and children, as well as men. But, as already indicated, under the cosmetology statute quoted, licensed cosmeticians may not trim or cut the hair of men.

[NRS 643.180](#) is not in conflict with this construction, for it merely recites that the three classes therein enumerated shall not be required to comply with the provisions of the statute. As regards the beauty operators, the intent is clear, namely, that the Legislature had in mind that beauty operators are regulated otherwise. This section is a denial of jurisdiction and not a grant of power.

It is, therefore, clear, that under [NRS 643.190](#), it is not lawful for a licensed cosmetician, not also licensed as a barber, to cut or trim men’s hair for compensation.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-217 INSURANCE, DEPARTMENT OF**—An insurance agent, duly licensed under state law, and who has currently paid his license tax to the municipality or county in which is located his principal office, may not be charged another license tax for operations authorized by the state license. (Reference: Attorney General's Opinion No. 17, dated March 4, 1959, in harmony.)

Carson City, May 9, 1961

Honorable Raul A. Hammel, Insurance Commissioner, State of Nevada, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. Hammel:

The City of Elko was incorporated by special act as distinguished from incorporation under general law. *See* Chapter 84, Statutes 1917, page 127. The charter has been amended from time to time by legislative act. Subsection 10 of Section 30 of the charter authorized the Board of Supervisors (the city governing body) to fix and collect a license tax upon:

\* \* \* insurance companies, fire, life and accident, and agents or solicitors for the same, surety companies and agents or solicitors for the same \* \* \*.

This provision of the charter has not been amended, expressly, and it will be observed that authority to tax an agent or solicitor does not hinge upon whether or not his business headquarters of business office is within the city. Neither does it depend upon whether or not he has paid a license tax to another city, the location of his business office.

In *Southern Nevada Life Underwriters Association v. City of Las Vegas* (1958), [74 Nev. 163](#), 325 P.2d 757, the Nevada Supreme Court held that a license issued by the Commissioner of Insurance of the State of Nevada, to an underwriter with agency established in Las Vegas, did not prevent the City of Las Vegas from exacting a license tax, pursuant to city ordinance.

After release and publication of the Supreme Court opinion above mentioned, it appears that insurance agents, duly licensed under the state's regulatory laws, and soliciting insurance contracts elsewhere than in the city or town in which they maintain their business office headquarters, have been required to pay an additional license tax to such other cities or counties even though they have already paid the current license tax to the city or county in which their principal office is located.

### QUESTION

May a duly and currently state licensed insurance agent or solicitor, also duly and currently licensed under the license tax provisions of the municipality or county in which he has his principal office and principal place of business, be required to pay a further license tax to either another municipality or county, as a condition precedent to the privilege of soliciting insurance business or otherwise operating as an insurance agent within such municipality or county?

### CONCLUSION



No. When a duly and currently state licensed insurance agent or solicitor has discharged his current license tax obligation in the city or county in which he maintains his principal office and principal place of business, he may not be taxed by another municipality or another county within the State for the privilege of operating therein under his state license.

## ANALYSIS

Prior to approval of Chapter 43, 1961 Statutes of Nevada, subsection 2 of [NRS 686.020](#), with respect to the charges to be made by the State Department of Insurance for the various licenses, provided:

2. The possession of a license, under the provisions of this Title, shall be authorization to transact such business as shall be indicated in such license and shall be in lieu of all licenses required to solicit insurance business within the State of Nevada..

By Chapter 43, 1961 Statutes of Nevada, subsection 2 of [NRS 686.020](#) was amended to provide the following:

2. Notwithstanding the provisions of any general or special law, the possession of a license, under the provisions of this Title, shall be authorization to transact such business as shall be indicated in such license and shall be in lieu of all licenses, whether for regulation or for revenue, required to solicit insurance business with the State of Nevada, *except that each city, town or county may require a license for revenue purposes only for any insurance agent whose principal place of business is located within the city or town or within the county outside the cities and towns of the county, respectively.* (Emphasis supplied.)

Prior to Chapter 43, 1961 Statutes of Nevada, under the provisions of [NRS 266.355](#), city councils, of cities incorporated under general law, were authorized to impose and collect a license tax upon:

(j) Abstract of title companies or persons furnishing abstracts of title, bankers, brokers of any, every and all kinds, building and loan companies and agents and solicitors for the same, *insurance companies, fire, life and accident, and agents or solicitors for the same*, and surety companies and agents or solicitors for the same. (Emphasis supplied.)

By the amendment contained in Chapter 43, 1961 Statutes of Nevada, and under the provisions of [NRS 266.355](#), such cities (we omit for the moment those cities formed under special charter) may by ordinance exact a license tax upon all lawful trades and callings, including:

(k) *Insurance agents who solicit, negotiate or effect contracts of insurance in any of the classifications listed in chapter 681 of NRS, but only for revenue purposes and only if the principal place of business of such agents is located with in the city.* (Emphasis supplied.)

Under the provisions of [NRS 269.020](#) et seq., boards of county commissioners are authorized to enact ordinances within limited areas, for the government of unincorporated towns and rural areas lying within the county. Prior to Chapter 43, 1961 Statutes of Nevada, the respective boards of county commissioners were authorized under the provisions of [NRS 269.170](#) to place a license tax upon:

1. (i) Brokers, commission merchants, factors, general agents, *insurance agents*, mercantile agents, merchants and traders, stockbrokers. (Emphasis supplied.)

Under the provisions of Chapter 43, 1961 Statutes of Nevada, the county commissioners of their respective counties are authorized to place a license tax (effective as to unincorporated areas within their respective counties), by amendment to [NRS 269.170](#), upon:

1. (k) *Insurance agents who solicit, negotiate or effect contracts of insurance* in any of the classifications listed in chapter 681 of NRS, but only for revenue purposes and only if the principal place of business of such agents is located in such unincorporated town or city. (Emphasis supplied.)

To this point, and on the basis of the unambiguous language of the statute, it results that, if an insurance agent is duly licensed by the State Department of Insurance, and has paid his license tax where his office or principal place of business is located, he may not be charged a further license tax by a city incorporated under general law ([NRS 266.355](#)), nor may he be charged a further license tax by boards of county commissioners, to permit him to solicit or sell insurance in unincorporated towns or rural areas ([NRS 269.170](#)).

If [NRS 686.020](#) (as amended by Chapter 43, 1961 Statutes of Nevada) is effective as to cities chartered by special act (as distinguished from cities formed under general law), i.e., if such charters are effectually amended by said 1961 Statute, it would follow that such cities are also powerless to exact a license tax from insurance agents previously licensed by the state office and by the city or county in which is located the principal place of business.

We must, therefore, next address ourselves to the following question:

Is [NRS 686.020](#), as presently amended, effective as to cities chartered under special act?

In our considered opinion, it is; such charters may be amended by general law.

Cities incorporated by special act as regulated by the provisions of Section 1, Article VIII of the Constitution. (*State v. Ruhe*, [24 Nev. 251 at 263](#); *City of Virginia v. Chollar-Potosi G. & S. M. Co.*, [2 Nev. 86](#).)

Section 1, Article VIII, Nevada Constitution, provides:

The legislature shall pass no special act in any manner relating to corporate powers except for municipal purposes; but corporations may be formed under general laws, and all such laws may, from time to time, be altered or repealed.

In *Virginia v. Chollar-Potosi G. U S. M. Co.*, supra, the Court said the language of Section 1, Article VIII is ambiguous, but the meaning intended could be expressed as follows:

The legislature shall pass general laws for the formation of corporations, but no corporation (except corporations for municipal purposes) shall be created by special act.

We show the constitutional authority for the creation of such cities only to show that nothing contained in the Constitution rules out the conclusions here reached.

Vol. 2, McQuillin-Municipal Corporations, page 541, Section 9.24, states the general rule thus:

The general rule is that, in the absence of restrictions in the constitution of the state, the charters of all public corporations, including incorporated cities and towns, are always subject to legislative amendment or alteration and repeal.

Special charters may be amended by general laws. *May v. City of Laramie*, 58 Wyo. 240, 131 P.2d 300.

Since the matter involved in our inquiry is entirely prospective, namely, the right of a city in the future to collect a license tax from a state licensed insurance, who has theretofore paid the license tax to another local political subdivision (where the agent has his principal office), constitutional principles (i.e., the deprivation of property without due process, or impairing the obligations of contracts) are not involved. *See The Trustees of Dartmouth College v. Woodward*, 4 Wheat 629.

It follows, therefore, that [NRS 686.020](#), as amended by Chapter 43, 1961 Statutes of Nevada, is effective as to municipalities formed under special act, as well as those formed under general law.

Attorney General Opinion No. 17, dated March 4, 1959, is in harmony with the conclusions here reached.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-218 COLORADO RIVER COMMISSION**—Since the Basic Contractors have contracts which obligate the State until May 31, 1966, with options to renew, none of the Davis energy is available to White Mountain Cooperative, Inc., and Overton Power District when the Davis contract is canceled and renewed.

Carson City, April 19, 1961

Mr. A. J. Shaver, Chief Engineer, Colorado River Commission, 215 East Bonanza, Las Vegas, Nevada

### STATEMENT OF FACTS

Dear Mr. Shaver:

Applications have been received by the Colorado River Commission from White Mountain Cooperative, Inc., for 30,000 kilowatts capacity and from Overton Power District for 10,000,000 kilowatt hours annually of Davis Dam power. Said applicants claim to be preference customers as defined by Nevada's contract with the United States for Davis Dam power.

The Nevada-United States contract is dated March 29, 1950, and was amended June 1, 1957. Pursuant to the terms thereof, the United States has terminated said contract as of December 31, 1962, and will renew same for substantially the same amount of power as the present contract supplies, which is 45,000 kilowatts.

It is upon said cancellation and renewal that said applicants contend they are entitled to preference by the State in the sale of said power.

Paragraph 10 of the present contract with the United States provides as follows:

#### Preference in Sales of Power and Energy by the State

As far as is consistent with the laws of the State of Nevada, the State shall, in selling power and energy delivered hereunder, give preference to municipalities and other public corporations or agencies; and also to cooperatives and other non-profit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendment thereof.

Contracts for all of said Davis power, pooled with 386,000,000 kilowatt hours of Hoover power were entered into individually with the Basic Contractors operating in the Henderson area. The Davis energy was estimated to be 236,000,000 kilowatt hours annually. The Basic contracts are identical in form and language, except as to amounts of capacity and energy allocated to each of them. Paragraph 6(b) of said contracts refers to said 386,000,000 kilowatt hours and said 236,000,000 kilowatt hours and provides that rates and charges for electric energy are based on pooled power as above described and will in no event exceed the average rate based on such pool.

Section 4 of the said Basic contracts as amended December 1, 1950, provides:

#### Delivery of Energy

(a) The State agrees to use all means available and at its disposal, under the terms and conditions stipulated herein and within the limits of the generating capacity available to it under the provisions of "Exhibit 6," to cause the United States and the State's operating agents to deliver at contracted voltages at the BMP, Henderson, Nevada, and the Company agrees to take and/or pay for, at cost to the State, electrical energy for use exclusively within the State of Nevada in accordance with and subject to the provisions of Exhibits 1, 2, 3, 4, 5 and 6 hereof, from and after the date of initial service as hereinafter defined.

(b) The electric energy involved hereunder will be delivered as three phase alternating current at a nominal frequency of sixty (60) cycles per second and at a nominal delivery voltage of from 13,500 volts to 14,000 volts at the 13.8 Kv busses in the Bureau of Reclamation 230/13.8 Kv substations. The electric energy delivered will be \_\_\_\_\_ kilowatt hours per twelve (12) months period beginning June 1st of each year, hereinafter defined and called the "*annual withdrawal of energy*" and such energy will be delivered in amounts which the Company may require and specify during the twelve (12) month period hereinafter determined and called the "contract rate of delivery," \_\_\_\_\_ kilowatts, for the operating year beginning June 1, 1951, and ending May 31, 1952.

(c) In addition, the Company will notify the Secretary of the Colorado River Commission, Carson City, Nevada, on forms to be prescribed by him, not later than May 1, 1951, and each May 1st thereafter, as long as this contract remains in force as to the Company's annual contract rate of delivery for each succeeding operating year.

(d) On or before November 30, 1961, the Company shall have the option of executing a contract with the State for generating capacity, the effective period of such contract to be June 1, 1966 to May 31, 1987. Such contract for generating capacity must be its terms make the State whole for Company's proportionate share of all costs incurred or to be incurred by the State for the installation and payment on any generating machinery and equipment installed for the use of the State and its contractors. Such contract shall further provide that the relinquishment of any or all of the Company's energy pursuant to the contract and regulations, shall not relieve the Company from its obligation to pay its proportionate share of all charges incurred or to be incurred by or on behalf of the State for generating machinery and equipment.

(e) In the event the Company elects not to execute the contract outlined in (d) above, it will notify the Secretary of the Colorado River Commission, Carson City, Nevada, in writing on or before November 30, 1961, that it shall not continue its BMP power delivery beyond May 31, 1966.

(f) The Company's obligations for generating capacity for the period June 1, 1951 until May 31, 1966, shall be limited to its annual contract rate of delivery except as otherwise provided for in the billing demand paragraph of Article Six of this contract.

(g) The Company shall have the right to use energy at greater than said contract rate of delivery or in excess of the amount specified as the annual withdrawal of energy only if and when it is available, as conclusively determined by the State in writing, but such use shall not constitute an increase in the annual contract rate of delivery, or the annual withdrawal of energy. No additions or material changes in the amounts or characteristics of the load shall be made without the written permission of the State; and the Company agrees to hold the State harmless as against any suits, claims, charges, or demands occurring or arising on account of or, because of any such additions or changes made without such written permission. All excess or surplus power and/or energy used at greater than the operating contract rate of delivery or taken in excess of the amount specified as the annual withdrawal of energy shall be paid for by the Company at costs to the State.

(h) The electric service will be furnished continuously except, (1) For interruptions or reductions due to uncontrollable forces as herein defined and (2) For temporary interruptions or reductions which, in the opinion of the State, are necessary or desirable for the purposes of maintenance, repairs, replacements, installation of equipment, or investigation and inspection; provided, that the State, except in case of emergency as determined by the State, will give the Company reasonable advance notice of such temporary interruptions or reductions and will remove the cause thereof with diligence; provided further in no event shall any liability accrue against the State, the Commission, their officers, agents and/or employees by reason of any interruptions or reduction in the delivery of power and energy hereunder, nor shall the Company be entitled to any compensation or reimbursement for any such interruptions or reduction except as hereby provided.

(i) The Company shall not look to the State for compensation for injury or damages of any kind which in any manner may arise out of the operation and maintenance of any portion of the Boulder or Davis Power Plants, or from the operation and maintenance of any of the transformer or transmission facilities which may be used to transmit electrical energy for use by the Company or from any change which may be made in the transmission voltage of said facilities, or from failure of the Government for any cause whatever to generate or deliver electrical energy to the State, provided, however, the State will energetically protest injury to the Company resulting from improper or careless operation or maintenance by the United States Government or its operating agents and use its best offices to secure justice and satisfactory service for the Company.

The Basic Contractors contend that they are entitled to all of the power they now have including all of Davis and Hoover.

In addition to the use of all of the power now under contract to said Basic Companies, which is approximately 622,000,000 kilowatt hours of pooled Davis and Hoover, said Basic Companies have contracts for steam power. Said steam power costs substantially more than the Davis or Hoover power.

If the Basic Companies lose any of the Davis power they will be required to purchase additional steam power at an increased cost over the hydro power.

All of the Basic Contractors are direct consumers of said power, with the exception of California Pacific Utilities Company, which is a utility company serving the Henderson area generally.

The United States-Nevada Davis contract requires minimum payments of \$45,000 per month. At certain periods the amount of power used for such particular periods from Davis was less than the minimum, which required the Basic Contractors to pay said minimum.

## QUESTION

Is any of the Davis power available to said applicants upon the cancellation and renewal of the Davis contract on December 31, 1962?

## CONCLUSION

Since the Basic Contractors have contracts which obligate the State until May 31, 1966, with options to renew, none of the Davis energy is available to said applicants when the Davis contract is canceled and renewed.

## ANALYSIS

Paragraph 4, *supra*, as amended, of said Basic contracts defines the amounts, extent and term of capacity and energy.

Unfortunately, the provisions of said paragraph are not too clearly spelled out on such matters and require interpretation. One of the fundamental principles of contract law is to attempt to ascertain the intent of the parties and to give a reasonable meaning to all its provisions. The courts always prefer an interpretation which reaches fair and reasonable results to one which imposes harsh and unfair effects on one party (Williston on Contracts, Vol. III, Sections 619-620, pages 1783-1787; *see Pittsburgh Railway v. Keokuk Bridge Co.*, (1894) 155 U.S. 156, holding that termination of a related lease did not terminate a contract referring thereto).

It seems clear that the capacity and energy referred to in paragraph 4(b), under the provisions of paragraph 4(f), would obligate the parties for such power until May 31, 1966.

Paragraph 4(d) is not quite as clear. Said paragraph provides *inter alia*, as follows:

On or before November 30, 1961, the Company shall have the option of executing a contract with the State for generating capacity, the effective period of such a contract to be June 1, 1966, to May 31, 1987.

Neither the amount of capacity nor the source is specified therein. Again under the authorities cited, *supra*, the intent of the parties must be ascertained.

In a somewhat similar situation, the United States Supreme Court in *Canal Company v. Hill* (1872) 82 U.S. 94, held:

The large investment of capital made by the appellee in sole reliance on the water-power which the lease secures, with the full knowledge which the appellants had of this reliance and intended investment, renders it necessary that we should look carefully to the substance of the original agreement, of January, 1864, as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements. It is not to be presumed that they intended to provide for a certain aperture in the canal without respect to the amount of water it would discharge and the purpose which that water was to accomplish. What the appellee sought was *water-power* to drive the machinery of an expensive mill. The appellants knew this to be his object, and the thing leased or granted was intended to be, and in fact was, *water* as the means of creating such power. It was not only water but a *certain quantity of water*, namely (in the words of the lease), "so much water as will pass through an aperture of two hundred square inches," under certain conditions specified. The parties clearly had in view a fixed quantity of water to be received in a given time. (Emphasis by the Court.)

It would appear in the instant matter that from the facts above set forth the Basic Contractors required all of the power to which they were entitled under the original contract, plus additional steam power; hence, if the authorities hereinabove cited are followed, the option provides for all of the said capacity and energy to which they were entitled under the present contract.

The above would seem to be a simple solution of the problem, except for the applicants claiming a portion of the Davis power as preference customers.

The Davis Dam Act, S693, Section 3, provides that the Flood Control Act of 1944 (Public Law No. 534, Seventy-eighth Congress) shall govern preferences under said Act.

The said Flood Control Act contains language substantially similar to the Reclamation Acts 43 U.S.C. 522, and 43 U.S.C. 485h, giving preference in the sale of public power to municipalities, R.E.A.'s, etc.

The purpose of said preference acts is clearly stated by the United States Attorney General in the following opinion:

A contract between a gas and electric company and the United States whereby the company surrenders and conveys all its rights within the physical limits of the Salt River Reclamation Project and in lieu thereof the United States agrees to furnish to the company in the city of Phoenix, Arizona, a specified amount of electrical energy generated at its works at the Roosevelt Reservoir at a stipulated sum of money and for a term not exceeding ten (10) years, and further agrees that while serving power to the company under the terms of the contract, it will refrain from entering into a *general retailing of power* to customers in such city, and from *furnishing power to any one in said city to be again sold or retailed*, does not violate the provision of this Section (43 U.S.C. 522) 30 Opinion Attorney General 197. (Emphasis added.)

The emphasized parts of said opinion point out the policy of the United States which has been uniformly adhered to in construing sales of power when the rights of preference customers and nonpreference customers are in issue. The purpose of such laws and the policy of the United States in distributing public power is clearly stated in said opinion. An analysis of said opinion clearly defines the intent of Congress in enacting the various preference statutes, supra, in that such policy and purpose is to sell said power in such a manner that the ultimate consumer obtains such power at the lowest possible cost. The Administration does not require any preference customer to sell to other preference customers but only to sell at retail and not at wholesale. For example, the Overton Power District could take said power, if available, as a preference customer and resell same to any business firm, industrial user or farmer without limitation. By the same token, the State can take said power from Davis Dam as a preference customer and sell to any consumer without limitation.

When the Davis Dam power became available in 1950, only the Basic Contractors applied for same. No preference customers made application. The contracts and options were entered into in good faith by all parties. All of said Basic Contractors with the exception of California Pacific Utilities Co., are ultimate consumers of said power. The said California Pacific Utilities Co. has a contract for 10,000 kilowatts capacity of pooled Hoover-Davis. Said contract includes 9.9191 percent of the total Basic Contractors' contractual obligations.

The present contract obligates the State to deliver all of said power to said Company until May 31, 1966. This answers the legal question presented above.

When the question of renewing the contract of said California Pacific Utilities Co., pursuant to their option, comes before the Commission for the period May 31, 1966 to May 31, 1987, there could possibly be a question as to whether California Pacific's allocated part of Davis would continue to go to them, to the preference customers or to the other Basic Contractors. However, that question is not before you at this time and we express no opinion on that point.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John W. Bonner

Special Assistant Attorney General  
Assigned to Colorado River Commission

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**OPINION NO. 61-219 UNIVERSITY OF NEVADA, PERSONNEL DEPARTMENT**—An employee in the public service has no vested, legal right to sick leave benefits. He may only claim such benefits on a proper showing of illness or disability, and then he is only entitled to same if the relationship of employer-employee exists. Consequently, sick leave benefits are contingent in nature under applicable law, and lapse, or are effectively lost upon separation from, and termination of, employment in state service. Distinction made between accrued sick leave and accrued annual leave in such respect. (Accord: Attorney General's Opinion No. 24, dated March 17, 1955.)

Carson City, March 22, 1961

*Dr. Charles J. Armstrong, President, University of Nevada, Reno, Nevada*

**STATEMENT OF FACTS**

Dear President Armstrong:

We are advised the Perry W. Hayden, former Comptroller of the University of Nevada, has made written request for payment of additional sick leave to April 1, 1961, submitted as the date when his physician has indicated that Mr. Hayden was able to return to work.

It further appears that Mr. Hayden resigned from his position as Comptroller of the University of Nevada with effective date of February 1, 1961, and that on January 31, 1961, the University issued to him two checks as follows: (a) one for the gross amount of \$1,814.40, representing payment for the maximum authorized 30 days of accumulated annual leave; (b) the other, for the gross amount of \$1,312.50, representing the equivalent of one month's salary or pay. The second check was, in substance, in payment of sick leave for the month of January, 1961, since Mr. Hayden had not been in the office, or engaged in the performance of any duties of his position, except for a few hours during said month.

**QUESTION**

May unused, accumulated sick leave of a state (University) employee be projected into the future, and payment therefor granted and allowed for any period subsequent to the date of the employee's separation from, and termination of, state service and employment?

**CONCLUSION**

Sick leave benefits may or may not be required and used; they are, therefore, only contingent in nature, and not a vested right of a state employee. Consequently, sick leave benefits lapse, and are effectively lost, upon separation from, and termination of, employment in state service, and no lump-sum payment may be made for accrued sick leave for any period of time after the date of termination of such employment.

**ANALYSIS**

The foregoing conclusion is based upon the fact that whether or not a state employee may claim, or is entitled to, sick leave, and payment of benefits therefor, is wholly dependent on the period of employment served by him, and his illness or disability while in state service or employment. Moreover, sick leave benefits are subject to, and conditional upon, proper



substantiation of claimed illness or disability in the form of a certificate from a medical doctor or other competent professional individual. ([NRS 284.355](#) and Section 8.03, Rules for State Personnel Administration.)

Sick leave is further predicated upon the reciprocal benefit accruing to the employer (here the state or University) from restoration of the employee's health, and the thus enabled rendition or performance by the employee of the duties or services pertaining to his employment, with maximum efficiency.

The foregoing brief and general observations should suffice to indicate the distinction which must be made between any incidental "rights" in and to accrued *annual leave*, and accrued *sick leave*.

In the case of *annual leave*, the only condition precedent thereto, generally speaking, is merely the passage of time in state employment. In the case of *sick leave*, however, the condition precedent to the conferred benefits is the disability of the employee to perform the duties of his employment "due to sickness or injuries." (Section 8.03, Rules for State Personnel Administration.) Manifestly, if employment has been terminated, there exist no duties to be performed or services to be rendered, and allowance or grant of any conferred and privileged sick leave benefits is improper and unauthorized.

Support for such conclusion may be found in legislative and statutory provisions respecting annual leave and sick leave. Applicable law pertaining to *annual leave* for employees in public service is contained in Section 42, Chapter 351, 1953 Statutes of Nevada ([NRS 284.350](#)) as amended by Chapter 251, 1955 Statutes of Nevada. The 1955 amendment granted to the personal representatives or the heirs of a deceased state employee the right to payment of the money value equivalent of any accrued *annual leave*. It is significant to note that the Legislature did not similarly amend the statutory provision pertaining to *sick and disability leave*. Thus, while the Legislature apparently intended, generally, to constitute accrued *annual leave*, or its equivalent money value, a descendible property right and interest, such status has not been similarly conferred by the Legislature on accrued *sick leave*.

Consequently, sick leave, and payment therefor, is only a privileged, *contingent benefit*, which may or may not be required or used, and is *not* a vested right. Sick leave may only be claimed and allowed in proper circumstances, and for such authorized period only, during and while the relationship of employer-employee exists. That is, sick leave may not be projected into the future, or authorized for any period of time subsequent to the date of separation from, and termination of employment in, state service. (Accord: Attorney General Opinion No. 24, dated March 17, 1955.) Thus, it follows that any and all accumulated sick leave, and incidental benefits relating thereto, lapse and are effectively lost upon an individual's separation from, and termination of employment in, state service.

It is, therefore, our opinion and advice that there exists no legal basis or authority for allowance of any additional sick leave payments to Mr. Perry W. Hayden, former Comptroller of the University of Nevada, for any period of time subsequent to January 31, 1961, the effective date of his resignation, and termination of employment and service with the University. His request should, therefore, be denied. Any further similar claim made by him should, of course, be rejected, since payment of public funds thereon by the University is legally unauthorized.

We trust that the foregoing sufficiently answers your inquiry and proves helpful.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Deputy Attorney General

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**OPINION NO. 61-220 HEALTH, STATE DEPARTMENT OF; DIVISION OF CRIPPLED CHILDREN'S SERVICES; STATE PERSONNEL DEPARTMENT—**  
[NRS 284.140](#)(3) construed. Held not to authorize the unclassifying of a position in state service and the employment therein of a present incumbent, when to do so would constitute preferential selection and appointment in disregard of an available list of eligible persons, certified after competitive examination. Such result would constitute an improper circumvention of the State's merit system of employment, and be violative of legislative policy and intent. (Reference: Attorney General's Opinion No. 102, dated October 12, 1959, in accord.)

Carson City, May 24, 1961

Daniel J. Hurley, M. D., *State Health Officer, Nevada State Department of Health, Carson City, Nevada*

### STATEMENT OF FACTS

Dear Doctor Hurley:

Inquiry has been made concerning the possibility, on the basis of applicable law, of transferring a person provisionally employed as an Administrative Assistant in the classified service to a position bearing the title of "Chief Assistant" in the unclassified service, as authorized by [NRS 284.140](#) (3). It is indicated that said position is one in the Division of Crippled Children's Services of the State of Nevada.

It appears that in November of 1960, due to the resignation of a former employee in said position, and because of the absence of a list of eligible persons therefor on the part of the State Personnel Department, the present incumbent was recruited and approved for the position on a provisional basis. During the five months that she has occupied said position, it is stated that her work has been excellent. It further appears that a competitive examination for the position of Administrative Assistant has since been given by the State Personnel Department. The incumbent employee took said examination but she did not place very high among the thirty-two (32) persons certified as eligible for appointment to the position of Administrative Assistant in the classified service of the State.

In justification of the proposed transfer of the incumbent to the unclassified service under the provisions of [NRS 284.140](#) (3), it is explained that the Director is responsible for policy determinations of the Crippled Children's Services program, and that he directs the diagnostic clinics and makes the medical decisions in the selection of cases for treatment under the program. However, to assist him in the administration of the program, it is necessary to have the services of a person who will be responsible for the day-to-day routine of the program. Such routine is described as involving the keeping of records of all children serviced up-to-date, of making appointments for specialists' examinations and care, arranging for hospital admissions, preparing authorizations for the Director's signature, and checking hospital and doctors' bills against the authorizations for services rendered when such bills are received. A clerk-stenographer to help the Administrative Assistant is also required for the program, and such position is already filled.

Additionally, it is indicated that the last Legislature charged the Director with responsibility to implement two entirely new programs by July 1, 1961, which entail many problems and details of a time-consuming nature, thus making it quite difficult for him to train a new Administrative Assistant. There is, apparently, no other person in the unclassified service in said Division. Inquiry is made as to whether said position may be placed in the unclassified service and whether the incumbent employee may be retained therein at the same salary as established for Administrative Assistants.

In conjunction with said inquiry as to whether such proposed action is legally authorized, we have also received a copy of the letter dated May 15, 1961, from the Division of State Merit System of the U.S. Department of Health, Education and Welfare, wherein it is indicated that the

exemption of the Administrative Assistant position from the State's merit system would not be acceptable under the Federal merit system standards, since said position involved ". . . operating duties in the Crippled Children's program rather than duties of a confidential secretary to the head of the grant-in-aid agency." Certainly, such views are not determinative of a matter of state law solely; however, mention thereof is not without relevancy in respect to the scope of the question submitted to us.

## QUESTIONS

The essential question here involved is of a twofold nature, namely:

A. Is the position of Administrative Assistant for the Crippled Children's Services, based upon the requirements and responsibilities thereof, a position which should be in the unclassified service, rather than in the classified service as at present?

B. Does the incumbent employee, under consideration for transfer to the unclassified service in the same position now held by her, qualify as a "Chief Assistant"?

## CONCLUSIONS

A. On the basis of entailed responsibilities and duties, the position of Administrative Assistant for the Crippled Children's Services must remain in the classified service, where it now is, and may not be placed in the unclassified service.

B. The incumbent employee, proposed for transfer to the unclassified service in her present position, does not legally qualify as a "Chief Assistant."

## ANALYSIS

[NRS 284.010](#) declares legislative purpose of the Personnel Act to be (among other things) the following:

1. (a) To provide all citizens a fair and equal opportunity for public service;
- (b) To establish conditions of service which will attract officers and employees of character and ability;
- (c) To establish uniform job and salary classifications; and
- (d) To increase the efficiency and economy of the governmental departments and agencies by the improvement of methods of personnel administration.

[NRS 284.020](#), entitled "Duties of state officers and employees; construction of chapter," provides as follows:

1. All officers and employees of this state shall:
  - (a) Conform to, comply with and aid in all proper ways in carrying into effect the provisions of this chapter and the rules and regulations prescribed hereunder.
  - (b) Furnish any records or information which the director or the commission may request for any purpose of this chapter.
2. This chapter shall not be construed to limit the power and authority of elective officers and heads of departments to conduct and manage the affairs of their departments as they see fit.

[NRS 284.140](#), entitled "Unclassified service; Composition," insofar as here relevant, provides as follows:

The unclassified service of the State of Nevada shall be comprised of positions held by state officers or employees as follows:

\* \* \*

3. At the discretion of the elective officer or heads of departments, agencies and institutions, one deputy and one chief assistant in such department, agency or institution.

[NRS 284.145](#) further provides that:

Officers authorized by law to make appointments to positions in the unclassified service and appointing officers of departments or institutions whose employees are exempt from the provisions of this chapter shall be permitted to make appointments from appropriate registers of eligible persons maintained by the department without affecting the continuance of the names of the list.

And [NRS 284.147](#) provides:

Unless otherwise provided by law, elective officers and the heads of the several state departments, agencies and institutions are authorized to employ deputies and employees necessary to fill the unclassified positions authorized by law for their departments, and to fix the salaries of such deputies and employees within the limits of appropriations made by law.

The State Health Officer is appointed by the State Board of Health, and, therefore, under [NRS 284.140](#) (4) apart from specific statute to the contrary, could be in the unclassified service. Other employees in said Department, clearly qualifying in the unclassified service, would be medical doctors, under subsection 11, pertaining to professional personnel.

This office has heretofore construed the limitations and restrictions governing elective officers or heads of departments, agencies, or institutions, in placing an employee in the unclassified service under the authority of [NRS 284.140](#) (3). (See Attorney General Opinion No. 102, dated October 12, 1959.)

The conclusion reached in said opinion issued by this office was as follows:

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.

The following excerpts from said opinion are deemed pertinent to the instant question:

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.

\* \* \*

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...

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 the substance and not form.

It is clear that, as executive officer of the Department of Health, the Director is able to satisfy the first requirement relative to existence of legal authority to make appointment of two persons in the unclassified service of the State, as provided in [NRS 284.140](#) (3).

As we have already noted, the Personnel Act (specifically, [NRS 284.020](#) (2)) expressly provides that it shall not be construed to limit the power and authority of elective officers and heads of departments to conduct and manage the affairs of the departments as they see fit. This provision must, however, be considered in the light of other statutory provisions ([NRS 284.010](#); [284.020](#), 1 (a) (b); [284.145](#); [284.147](#)) clearly evidencing legislative intent to be the establishment of a merit system of employment in the state service, with a fair and equal opportunity to all citizens for public service.

Significantly, it is to be noted that the Personnel Act provides that elective officers and heads of departments desiring to employ deputies or chief assistants are authorized and, generally, are morally obligated to fill positions in the unclassified service from appropriate registers of eligible persons, established and maintained by the Personnel Department for just such purpose. In the instant case, even if the position here involved were placed in the unclassified service, appointment thereto should be made from an appropriate list of eligible persons as established by the Personnel Department, if any is available. Manifestly, where, as here, such appropriate list is available, the present incumbent is not entitled to priority in consideration for employment in the involved position; her preferential selection and appointment would be discriminatory and improper, because violative of legislative intent.

In this connection, we have carefully reviewed the description of the responsibilities and duties connected with the position, as submitted to us, and, based upon such review, it is our considered opinion, that the same are such as would routinely be required of, and performed or rendered by, a person certified to be qualified for employment as an Administrative Assistant in any state department, agency, or institution, with any reasonable period of training and orientation in a specific job assignment. In short, the functions and responsibilities involved in the position here under consideration are in no essential so different or exceptional as to warrant placing such position in the classified service. While it is true that some understanding of medical functions and terms is involved in the job content, no special or professional knowledge thereof is particularly required; general knowledge or understanding concerning such medical functions and terms is all that is necessary, and same may readily be acquired from available reference material, if not already possessed.

It is also our considered opinion that the incumbent, or any other person, performing or rendering the described responsibilities and services, does not properly qualify for the designation of “Chief Assistant,” as a matter of substantive requirement.

The Crippled Children’s Service program is substantially and administratively a program entailing exercise of professional, medical knowledge and judgment, calling for diagnoses, decisions, and services of a professional nature. These are made by the Division head, and carried

through or implemented by other medical doctors or professional personnel retained therefor on a contractual basis.

It is no part of the function or responsibility of the Administrative Assistant to participate in the making of such medical diagnoses or decisions or of performing or rendering any professional function or services. In the instant case, unclassification of the position of Administrative Assistant, and employment of a "Chief Assistant" in the unclassified service, as an exception to the requirements of the merit system, could only be justified and be deemed proper if the responsibilities and duties to be performed and rendered were of a professional nature. In our opinion, such is not the case on the basis of the job description submitted to us, and we do not believe that it would be seriously argued that any competency of a professional nature is an essential prerequisite for the position.

Regretfully, therefore, we are of the considered opinion, and must so advise you, that the position of Administrative Assistant in the Division of Crippled Children's Services may not be placed in the unclassified service, and that the present incumbent therein may not be transferred to the unclassified service and preferentially appointed thereto on a selective basis in complete disregard of a list of eligible persons certified by the Personnel Department as qualified to perform and discharge the functions of the involved position.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Deputy Attorney General

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**OPINION NO. 61-221 GOVERNOR, STATE OF NEVADA; STATE PERSONNEL DEPARTMENT; STATUS AND RIGHTS OF STATE EMPLOYEES IN THE CLASSIFIED SERVICE DEFINED**—Chapter 375, 1961 Statutes of Nevada and Personnel Act ([NRS 284](#)) construed. Held, that Chapter 375, 1961 Statutes of Nevada may only be applied prospectively, and has no retrospective effect on status and rights of incumbent Director of the State Welfare Department, as acquired by her in the State's classified service prior to said 1961 enactment. Dismissal of incumbent from her said position is regulated by, and may only be effected in accordance with, the provisions of the State Personnel Act (Chapter 284 of NRS and "Rules for State Personnel Administration"). The 1961 enactment, if construed to effect an automatic vacancy in the position of Director of the State Welfare Department, would deprive her of vested rights respecting status and tenure; this would be violative of "due process" requirements of both Federal and State Constitutions, because any such removal would not be based on "just" or "legal" cause.

Carson City, June 1, 1961

Honorable Grant Sawyer, Governor, State of Nevada, Carson City, Nevada

### STATEMENT OF FACTS

Dear Governor Sawyer

The incumbent Director, Nevada State Welfare Department, has held the said position without interruption from October 5, 1949 to the present date.

She was certified as qualified therefor after satisfactorily competing in both an oral and written examination meeting the standards of the then existing Nevada State Merit Board and of

the federal agency concerned with proper qualifications of the appointee who might be selected for the position, because of the involvement of federal funds in various welfare programs placed under the administration of the Nevada State Welfare Department.

The present Personnel Act (Chapter 351, 1953 Statutes of Nevada) was approved and became effective on March 30, 1953 and, therefore, was not applicable at the time of certification and appointment of the incumbent Director of the Nevada State Welfare Department.

The Nevada State Welfare Department was established pursuant to Chapter 327, 1949 Statutes of Nevada, and Section 8 of said act provided for appointment of the Director by the State Welfare Board, subject to the approval of the Governor, in accordance with the then existing State Merit System. There was no legislative qualification in said act that the Director was to be in the classified service "except for the purpose of removal."

Section 58 of the Personnel Act (Chapter 351, 1953 Statutes of Nevada; [NRS 284.275](#)) made provision that employees who had held positions in the classified service for two (2) years prior to the effective date of the Personnel Act were entitled to retain without impairment or diminution, all rights and status acquired under the Merit System theretofore applicable to them. (*See also* "Rules for State Personnel Department," Section 3.04(b), (c).) It is proper to note that the 1953 Personnel Act also omitted to qualify or otherwise limit the status or tenure rights of the Director of the State Welfare Department by any provision that he should be in the classified service "except for purposes of removal."

Finally, by Chapter 375, 1961 Statutes of Nevada (S.B. No. 25), enacted on April 7, 1961, with effective date of July 1, 1961 ([NRS 218.530](#)), the Legislature further amended the law to confer upon the Governor, instead of the State Welfare Board (as had been the case theretofore) the power of appointment and removal of the Director of the State Welfare Department. [NRS 422.150](#), as specifically amended by said act, provides as follows:

The governor shall appoint a state welfare director. The state welfare director shall:

1. Be appointed on the basis of merit under the provisions of chapter 284 of NRS.
2. Be in the classified service, except for the purposes of removal.
3. Be responsible to the governor.
4. Serve at the pleasure of the governor.

## QUESTIONS

1. Does the language of Chapter 375, 1961 Statutes of Nevada, automatically create a vacancy in the position of Director, State Welfare Department, on July 1, 1961?
2. What is the employment status of the current incumbent in the position of Director, State Welfare Department, on July 1, 1961?

## CONCLUSIONS

1. Chapter 375, 1961 Statutes of Nevada, has neither abolished the office or position of Director of the State Welfare Department, and does not effectually and automatically create any vacancy in said position on July 1, 1961.
2. The present Director of the State Welfare Department, as a state employee in the classified service, will, on July 1, 1961, have such employment status and rights as are afforded her under the provisions of the Personnel Act. (Chapter 284 of Nevada Revised Statutes and "Rules for State Personnel Department.")

## ANALYSIS

Admittedly, the office or position of Director of the State Welfare Department is not a constitutional office, but one created by statute (Chapter 327, 1949 Statutes of Nevada). The

Legislature could, therefore, modify the nature or duties of the position, consolidate it with another, or abolish it entirely; in other words, the Legislature has the power to enact any law not prohibited by the Constitution. (*Shamberger v. Ferrari*, [73 Nev. 201](#), 314 P.2d 384.)

However, chapter 249, 1960 Statutes of Nevada, and Chapter 375, 1961 Statutes of Nevada, have not, in any manner, either modified the nature or duties of the position, consolidated it with any other, or abolished it. The position, in substance and legal effect, is precisely the same as when first created in 1949. (*See* 10 AmJur. 931-934.)

We may, therefore, properly address ourselves to the essential question as to the effect of both these laws upon the status and rights of the incumbent Director of the State Welfare Department who has held the position continuously since October 5, 1949, prior to passage of the Personnel Act itself (1953).

We have already indicated herein that the Personnel Act confirmed all the rights and status possessed by state employees prior thereto “without impairment or diminution,” as acquired under the Merit System administered by the previously existing State Merit Board. The incumbent Director of the State Welfare Department, as a state employee under the Merit System antedating the Personnel Act of 1953, therefore, had a certain status and certain rights. The nature of such status and rights are substantially those of all state employees in the classified service, under both the previously existing Merit System and under the Personnel Act of 1953. “Rules for State Personnel Administration” provide as follows:

*Section 3.02—Classified Service.* The classified service of the State of Nevada shall comprise all positions in the public service now existing or hereafter created which are not included in the unclassified service, and which provide services for any office, department, board, commission, bureau, agency, or institution operating by authority of the constitution or law, and supported in whole or in part by any public funds, whether said public funds are funds received from the government of the United States or any brance or agency thereof, or from private or any other sources. (Section 19, Personnel Act of 1953) \* \* \*

*Section 3.04—Application and Interpretation of Classification Plan.*

(a) *Allocation of Existing Positions:* The positions in the classified service are hereby allocated to the appropriate classes in accordance with the schedules which are attached hereto: “Classification Plan.” (Section 22, Personnel Act of 1953.)

(b) *Status of Present Employees:* Each employee shall be notified of the allocation of his position, and *each employee having served for two years or more immediately prior to the effective date of the Personnel Act of 1953, is hereby given status in such position, and shall be continued without examination until separated from the position according to law and these rules.* \* \* \* (Section 58, Personnel Act of 1953.) (Emphasis supplied.)

(c) *Status of Nevada Merit System Employees:* When the Personnel Act of 1953 has met the standards required for a merit system of personnel administration by interested federal agencies; and a transfer has been made that will place such agencies within the jurisdiction of the Nevada State Personnel Department; the provisions of these rules shall then become applicable to the employees of the Nevada Employment Security Department, the Nevada State Department of Health, *the Nevada State Welfare Department*, and the Nevada State Merit Agency. *The above employees shall retain without impairment or diminution all rights and status acquired under the merit system now applicable to them. Employees of these departments who have permanent positions shall retain their respective positions and status.* \* \* \* (Section 62, Personnel Act of 1953.) (Emphasis supplied.)

Rule 10 of “Rules for State Personnel Administration” relates to *Tenure, Seniority, Layoff and Formula, changes in Status, Resignations, Disciplinary Actions, Appeals and Hearings.*



*Section 10.01—Tenure of Classified Employees.* Every employee who is legally employed in the classified service in accordance with the provisions of the Personnel Act and amendments thereto and these rules, and who successfully completes his probation period, shall have indefinite tenure of employment in the public service so long as his service is satisfactory and his conduct and character are above reproach. (Emphasis supplied.)

*Section 10.05—Disciplinary Action.* Employees in the classified service may be dismissed, demoted, or suspended without pay for just cause.

\* \* \* (Emphasis supplied.)

*Section 10.06—Procedure in Disciplinary Actions.*

Any reduction in pay, demotion, suspension, or dismissal shall be reported to the director (Ed., Personnel Director) in writing and copy of such notice shall be given to the employee and shall include notice of his right of appeal to the commission (Ed., State Personnel Advisory Commission) in writing within thirty days after notification. Such appeal shall be heard within forty-five days after receipt of written appeal. (Section 50, Personnel Act of 1953.) (Emphasis supplied.)

*Section 10.10—Causes for Dismissal and Filing of charges.* Any of the following shall be sufficient cause for dismissal of an employee from the public service, though removal may be made for causes other than those enumerated.

(Ed. Note: Sixteen possible grounds for charges are then listed. Generally, they pertain to matters of a substantial nature, directly affecting the rights and interests of the public. None of them contemplate, or could reasonably infer any support for, automatic removal of an employee in the classified service from his position, even on the basis of legislative fiat.)

This section further provides as follows:

The appointing authority, the commission or the director may file written charges asking for the removal of any employee in the classified service. A copy of such written charges shall be sent to the employee affected, and if the employee requests a hearing the commission shall conduct a hearing and make recommendations to the appointing authority concerned as to the action to be taken.

The foregoing references must suffice to show that the incumbent Director of the State Welfare Department, as a state employee in the classified service, has certain vested rights, which include:

- (a) the right to indefinite state employment in the public service,
- (b) that she shall not be dismissed from her position as Director of the State Welfare Department, so long as such position exists, except for just cause, and then only after notice and hearing on any of the enumerated grounds for dismissal.

Such status and rights of the incumbent Director of the State Welfare Department are protected by, and can only be divested in accordance with, existing law as contained in the Personnel Act, not repealed by the Legislature and, therefore, as equally applicable to her as to any other state employee in the classified service.

Our own Nevada Supreme Court, in the case of *State of Nevada ex. Rel. Whalen v. Wheeler*, 252 App.Div. 267, 299 N.Y.S. 466, at page 472), defined “cause,” “just cause,” or “sufficient cause” as meaning *legal cause*,

\* \* \* and not any cause which the officer authorized to make such removal may deem sufficient. It is implied that an officer cannot be removed at the mere will of the official vested with the power of removal, or without any cause. The cause must be one which relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the

officer or his performance of his duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power and equivalent to an arbitrary removal.

In *State v. Board of Regents*, [70 Nev. 144](#), 148 et seq., 261 P.2d 515, the Nevada Supreme Court held that:

(W)here resolutions adopted by (the) board of regents of (the) State university authorized removal of (a) staff member under tenure only for “cause,” removal of (a) staff member under tenure was an act judicial in its nature for review of which certiorari would lie. (To the same effect *see also Oliver v. Spitz*, No. 4250, Nevada Supreme Court, filed January 7, 1960.)

In the case of *State v. Board of Regents*, *supra*, the Nevada Supreme Court further held as follows:

Constitutional separation of power does not prevent judicial review of judicial or quasi judicial acts of (the) board of regents of (the) State university when an excess of jurisdiction is in question.

In our considered opinion, any excess of jurisdiction, even by the Legislature, in respect of judicial or quasi judicial acts on its part, effecting the removal of a state employee in the classified service without “just” or “legal cause,” substantially satisfying all the requirements of “due process,” is equally open to question and similarly subject to judicial review.

The foregoing is addressed to the proposition that, while the Legislature has the power to enact any law not prohibited by the Constitution, this does not mean that the only limitations and restrictions on the Legislature’s said power are solely confined to express prohibitions.

\* \* \* Negative words are not indispensable in the creation of limitations to legislative power, and if the constitution prescribes one method of filling an office, the legislature cannot adopt another. From its nature, a constitution cannot specify in detail and in terms, every minor limitation obviously intended. It follows that implied as well as express restrictions must be regarded, *and that neither the legislature nor any other department of the government can perform any act that is prohibited, either expressly or by fair implication.* (Emphasis supplied.) (*State v. Arrington*, [18 Nev. 412](#), 415, citing *People v. Draper*, 15 N.Y. 543; *Lowrey v. Gridley*, 30 Conn. 458; *People v. Hurlbut*, 24 Mich. 98.)

In this connection, it is submitted that dismissal of a public servant, in total disregard of the lack of any evidence or basis for such dismissal, even though intended by the Legislature to be final and conclusive, can only be deemed arbitrary and capricious, *and unconstitutional because violative of due process.*

Citing the case of *Adler and the United Public Workers v. Mitchell*, 1947, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754, the United States Supreme Court, in the case of *Wieman v. Updegraf*, 73 S.Ct. 215, 344 U.S. 183, 97 L.Ed. 216, observed:

\* \* \* that Congress could not “enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.” \* \* \* We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. (97 L.Ed. 222.)

*Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1316:

Frankfurter, J. (concurring in part and dissenting in part):

The Constitution does not guarantee public employment. City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. \* \* \*

But it does not at all follow that because the Constitution does not guarantee a right to public employment, that a City or a State may resort to any scheme for keeping people out of such employment. Law cannot reach every discrimination in practice. But doubtless unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge. Surely, a government could not exclude from public employment members of a minority group merely because they are odious to the majority, nor restrict such employment, say, to native-born citizens. To describe public employment as a privilege does not meet the problem. (95 L.Ed 1325.)

The above cases dealt with instances of due process challenge based on initial exclusion from public employment. In the following case, the due process challenge was directed to allegedly unconstitutional dismissal from employment.

*Slochower v. Board of Education of New York*, 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637, Court (at 100 L.Ed. 699):

\* \* \* To state that a person does not have a constitutional right to governmental employment is only to say that he must comply with reasonable, lawful and nondiscriminatory terms laid down by the proper authorities (cases cited).

At 100 L.Ed. 699:

But in each of these cases (Ed., Adler and Garner) it was emphasized that the State must conform to requirements of due process. \* \* \* This case rests squarely on the proposition that “constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.” 344 U.S. at 192.

And, at 100 L.Ed. 700, 701:

\* \* \* There has not been the “protection of the individual against arbitrary action” which Mr. Justice Cardozo characterized as the very essence of due process. (cases cited) \* \* \* The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show \* \* \* continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal \* \* \* violates due process of law.

There is, therefore, on the basis of such case law, a “common law” protection of both state and federal employees. (In respect of such protection of state employees *see State v. Board of Regents and Oliver v. Spitz*, supra.) Their positions in government as public servants may be deemed “property” within the 14th Amendment of the Constitution of the United States. In the light of such legal principle and rulings, they are entitled to the protection of the due process clause (under both State and Federal Constitutions) in situations where their “exclusion pursuant to a statute is patently arbitrary or discriminatory.”

Chapter 375, 1961 Statutes of Nevada can be sustained to be valid, only if construed to have prospective effect. It may not be applied with retrospective effect to divest and deprive the

incumbent Director of the State Welfare Department of the status and right to tenure possessed by her equally and to the same extent as all other state employees in the classified service, under applicable provisions of the Personnel Act. Any such retrospective application would be violative of "due process" requirements under both United States and Nevada Constitutions.

It is, therefore, our considered opinion that Chapter 375, 1961 Statutes of Nevada, does not automatically and legally create any vacancy in the position of Director of the State Welfare Department, nor is said Act effective, in any manner whatsoever, legally to "impair" and "diminish" such status and rights which the incumbent in said position possesses as a state employee in the classified service under the Personnel Act. Her separation or dismissal from the position of Director of the State Welfare Department may only be effected as provided in the Personnel Act and other applicable law.

Because the State Welfare Department utilizes federal funds in connection with various programs which it administers, and because eligibility for such federal funds entail compliance with federal merit system requirements, we deem it proper to include herein certain pertinent excerpts from a letter dated April 5, 1961 addressed to the Director of the State Personnel Department by the Regional Representative, Division of State Merit Systems, United States Department of Health, Welfare and Education:

\* \* \* With respect to Section 4 (422.150) it is noted that the provision specifying that the State welfare director be in the classified service has been amended to provide that the State welfare director shall be appointed on the basis of merit and shall be in the classified service except for purposes of removal.

The amendment to Section 4 raises a question concerning the tenure rights of the incumbent State welfare director appointed under this section prior to the amendment. Under State law there might be a question as to whether the incumbent who accepted the position of State welfare director as a position with tenure might not have legal rights to such tenure. This would have to be decided under Nevada law.

The removal of a position from merit system coverage should not affect the merit system status of an individual which was acquired when the position was covered.

We also desire to note, without elaboration, the serious policy considerations involved in any "whittling away" of the State's Merit System, even on the part of the Legislature itself, by such means as that provided in Chapter 375, 1961 Statutes of Nevada. In view of the decision rendered by our Nevada Supreme Court in the case of *Oliver v. Spitz*, supra, wherein the Personnel Act was confirmed to afford full protection to state employees in the classified service with respect to their status and rights, we are satisfied that Chapter 375, 1961 Statutes of Nevada would not be sustained if applied with retrospective effect as legislatively excepting the incumbent Director of the State Welfare Department from the State's Merit System, in the absence of any finding of "just cause."

We trust that our foregoing observations sufficiently contemplate and define the nature and seriousness of the problem inherent in the application of Chapter 375, 1961 Statutes of Nevada. We further trust that our opinion herein sufficiently answers your inquiry and proves helpful.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Deputy Attorney General

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**OPINION NO. 61-222 ARCHITECTURE, STATE BOARD OF**—The State Board of Architecture has the authority to charge an examination fee, for the correction of thesis on lateral force design, submitted in lieu of a formal conventional type of examination.

Carson City, June 6, 1961

Mr. Raymond Hellmann, A.I.A., Secretary-Treasurer, State Board of Architecture, 421 Hill Street, Reno, Nevada

### **STATEMENT OF FACTS**

Dear Mr. Hellmann:

Under the provisions of [NRS 623.310](#), the State Board of Architecture of Nevada is authorized and required to charge an applicant for licensing, “for an examination for a certificate—\$35.”

The State Board of Architecture of Nevada desires to require architects duly licensed in other states, who apply for licensing in other state, who apply for licensing under the laws of the State of Nevada, to (1) either take an examination in lateral force design, or (2) to write and submit a treatise on lateral force design. The exception to this requirement would be those cases in which the applicant for a Nevada license has formerly (in the state in which licensed), passed an examination including lateral force design. In cases in which the applicant elects to write the treatise, the Board would require proof of the existence of a currently valid license issued by a sister state, and if the content of the treatise merited a passing grade, the license would be issued.

Only California and Nevada require an examination in lateral force design.

### **QUESTION**

Is the State Board of Architecture of Nevada authorized to charge the examination fee provided by law, for correction of a thesis submitted in lieu of a formal examination, upon subject matter required by the Board, pursuant to its duly adopted rules and regulations, in the certification of applicants?

### **CONCLUSION**

It is. The statutory fee provided “for an examination for a certificate” is \$35. The acceptance and correction of the thesis, in lieu of a formal conventional type of examination, would constitute the examination and require the charge provided by statute.

### **ANALYSIS**

[NRS 623.050](#) provides for and creates the State Board of Architecture, the membership of the Board, the terms of office and also provides for removal.

[NRS 623.140](#) confers upon the Board a rule-making power and authorizes the Board to “adopt a code of rules and regulations for its government in the examination of applicants for certificates to practice architecture in this state.”

Under the provisions of [NRS 623.210](#), the Board is granted permission to license architects who are duly licensed in another state, without examination. Subsection 2 thereof provides as follows:

2. Any architect who has lawfully practiced architecture for a period of 10 or more years outside this state, except as provided in paragraph (b) of subsection 1,

shall be required to take only a practical examination, the nature of which shall be determined by the board.

Paragraph (b) of subsection 1, above referred to, permits licensing without examination, if the qualifications required in such other licensing state are equal to those required in Nevada at the date of application. It would appear, therefore, that applicants duly licensed in California, if able to show ten years or more of lawful practice there, could be required to take only a practical examination. If, however, such applicants have less than ten years of lawful practice in California, they may be examined in the same manner as may lawfully be provided for any other applicants from other states.

[NRS 623.310](#) provides:

623.310 Fees. The following fees shall be paid to the board:		
For an examination for a certificate	\$35	
For rewriting an examination or a part of parts failed	25	
For a certificate of registration	25	
For an annual renewal of a certificate, not exceeding	25	
For the restoration of an expired certificate	25	
For the restoration of a certificate which has been revoked		100

Under the provisions of [NRS 623.310](#), the fee provided to be paid by the applicant for examination is \$35. As we have construed the statute and the powers of the Board, the thesis may be required in lieu of examination (with the exception above noted) and the fee for correcting the same would be that provided for the giving of an examination. If the thesis warrants the award of a passing grade, and other requirements of the law are met, the certificate of registration would be issued, for the fee of \$25, as provided by [NRS 623.310](#). The sole exception to the authority of the Board to require such thesis, is the case of an applicant duly licensed in California, with more than ten years of lawful practice in that state. In such case the examination, if required, shall be only a "practical examination."

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-223 BUDGET, DIRECTOR OF THE; PERSONNEL, STATE DEPARTMENT OF**—Chapter 353, Statutes 1961, provides that no pro rata costs of the service of the Personnel Department shall be paid by using agencies on July 1 of each year, for the year, in advance of receipt of the services. The laws and regulations of the United States Bureau of Employment Security permit such contributions to be made only one month in advance. The money may be so received from the U.S. Bureau. [NRS 284.110-284.115](#) construed.

Carson City, June 7, 1961

Mr. Howard E. Barrett, *Director of the Budget, Carson City, Nevada*

**STATEMENT OF FACTS**

Dear Mr. Barrett:

Chapter 353 of the Statutes of 1961 (A.B. 362) amends [NRS 284.110](#) and [284.115](#) in such a manner as to require all departments of the State Government (with employees in the classified service of the State) to pay, for personnel services, the assessments made by the Director of the Personnel Department on July 1 of each year and for the fiscal year then commencing; i.e., under the amendments, the personnel assessments for all using agencies and departments are paid for a year in advance of the receipt of such services.

This statute does not contemplate that there be any exception to the rule of payment in advance for the personnel services to be rendered during the year. However, the Employment Security Department of the State Government, upon notifying the Administrative Officer of the U.S. Bureau of Employment Security with headquarters in San Francisco, of the content of this statute has been informed that under the federal laws and regulations federal funds cannot be so advanced and can be paid only one month in advance.

### QUESTION

May the statute as amended (Chapter 353, Statutes 1961) be construed (insofar as contributions by the United States Bureau of Employment Security to the State Department of Personnel are concerned) in such a manner as to permit the contribution by such Bureau to be paid monthly in advance, rather than on July 1, 1961, for the entire fiscal year?

### CONCLUSION

We conclude that the statute may be so construed and administered.

### ANALYSIS

Without quoting the sections as amended, we observe that the purpose of the amendment is to require the departments, agencies or institutions receiving the services of the State Department of Personnel, to pay annually, in advance, for the service, in accordance with their budgets, rather than quarterly upon a billing by the department. The amendment permits closer scrutiny of the departments' financial affairs by the Legislature in its appropriations to the using agencies, and reduces the work of the department by eliminating the necessity of quarterly billing. This is all well and good, as regards the departments of the State Government which are not affected by federal laws, and as to such departments said act is effective in accord with legislative intent.

However, the Legislature of Nevada was, and is, powerless to change the federal statutes, rules and regulations, prescribing that funds of the United States Bureau of Employment Security for this purpose be dispensed monthly in advance.

To receive the moneys in this manner, as authorized by the laws of the United States, will not constitute a substantial hardship upon the State Personnel Department. Its budgetary planning will not be adversely affected, nor will the net result of the amendment be affected thereby. The State Personnel Department will receive from the United States Bureau of Employment Security, for the Nevada Employment Security Department, during the fiscal year beginning July 1, 1961, neither more nor less than it would have received had the federal agency been operating under the statutes, rules and regulations provided for the using state agencies and departments.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-224 BUDGET DIRECTOR; STATE PERSONNEL DEPARTMENT;  
OVERTIME COMPENSATION TO STATE OFFICERS OR EMPLOYEES—**

Applicable statutes and regulations construed, and found not to authorize payment for overtime to a state officer or employee, when such payment would exceed the maximum salary or compensation fixed or permitted by law, and if such “overtime” services or work performed arises from, or pertains to, duties and responsibilities which are germane to the office or position of employment. Any exception to the foregoing general rule, in respect of state personnel in both the classified and unclassified services, must be based on sufficient statutory authority. References: Attorney General’s Opinion No. B-68, December 6, 1941; Attorney General’s Opinion No. 72, July 16, 1959; Attorney General’s Opinion No. 23, March 17, 1959.

Carson City, June 8, 1961

Mr. Howard E. Barrett, Budget Director, Office of the Budget Director, State of Nevada, Carson City, Nevada

**STATEMENT OF FACTS**

Dear Mr. Barrett:

It appears that Mr. M. George Bissell, heretofore Secretary-Manager of the State Planning Board, resigned such position with effective date of June 1, 1961. In connection with said resignation, Mr. Bissell made request for 15 days of overtime payment, which claim was presented to the Board of Examiners for appropriate action at the meeting of said Board on May 23, 1961.

The memorandum request for such overtime payment, in part, states as follows:

Beginning with my appointment as Manager (unclassified position) of the State Planning Board on July 1, 1955, it has been necessary for me to work considerable overtime.

A case at hand is my overtime from Jan. 1, 1961 to May 17, 1961 has been a total of 1,168 hours, with the following detail:

Jan. 1961—235 hrs.  
Feb. 1961—259 hrs.  
Mar. 1961—286 hrs.  
Apr. 1961—243 hrs.  
May 1961 (to 17th)—143 hrs.

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1961 Total—1,168 hrs. (Ed.: Total should be 1,666 hrs.)

Should the Board of Examiners find favor in my request, there are funds in the State Planning Board budget 1960-1961 fiscal to pay for same.

Our attention has been called to the fact that [NRS 341.100](#) establishes the salary for the position of Manager of the State Planning Board at “not more than \$12,600 as determined by the board.” In this connection it is stated that Mr. Bissell will have received his regular pay to “June 1, plus accrued annual leave of 30 days, making a total of \$1,600.”

The referral of the question to this office is based on the fact that in another similar case, though the Board of Examiners approved an overtime claim, “the warrant for the amount of such



approved claim was canceled by the Budget Director because the overtime payment would exceed the salary for the position as set by statute.”

### QUESTION

May a state employee in the unclassified service whose salary is fixed by statute be paid for “overtime”?

### CONCLUSION

Except as specifically qualified herein, a state employee in the unclassified service with salary fixed by statute, may not be paid for “overtime.”

### ANALYSIS

[NRS 341.100](#) (Employees, assistants: Appointment; salaries) as amended by Chapter 327, 1961 Statutes of Nevada, provides as follows:

1. The board (Ed.: State Planning Board) may appoint a manager and technical supervisor, and such other technical and clerical assistants as may be necessary to carry into effect the purposes of its acts.
2. The manager and technical supervisor of the board shall receive:
  - (a) Until July 1, 1962, an annual salary of not more than \$12,600 as determined by the board.
  - (b) From and after July 1, 1962, an annual salary of not more than \$13,225 as determined by the board.

Prior to said 1961 amendment, the corresponding statutory provision authorized the manager to receive “an annual salary of not more than \$12,600 as determined by the board.”

The position of Manager of the State Planning Board is not included in the list of “Elected and appointed officers” of the State ([NRS 281.010](#)), and, for the particular purposes herein, the appointee thereto may properly be considered as an “employee” of the State in the unclassified service. (Note, 5 A.L.R.2d 415, 35 seq.)

Article XV, Section 9 of the Nevada Constitution is inapplicable herein because it provides as follows:

The legislature may, at any time, provide by law for increasing or diminishing the salaries or compensation of any of the officers whose salaries or compensation is fixed in this constitution; *provided*, no such change in salary or compensation shall apply to any officer during the term for which he may have been *elected*. (Emphasis supplied.)

Pertinent statutory provisions are:

(A) [NRS 281.127](#) (State officers, employees paid one salary for all services rendered; ex officio duties excepted) provides as follows:

Unless otherwise provided by law, no public officer or employee whose salary is set by law, whether or not he serves the state in more than one capacity, may be paid more than one salary for all services rendered, to the state, except for salaries for any ex officio duties he may be required by law to perform.

(B) [NRS 281.125](#) (Restrictions upon payment of salary of appointive officer or employee when salary determined by law) as here pertinent, partly provides:

1. In cases where the salary of an appointive officer or employee is determined by law, such salary shall not be paid unless a specific legislative appropriation of a sum of money or a specific legislative authorization for the expenditure of a sum of money is made or enacted for the department or agency. \* \* \*

(C) [NRS 281.100](#) (1) legislatively restricts the services and employment of all state personnel “to not more than 8 hours in any one calendar day and not more than 56 hours in any 1 week.” Paragraph 3 of said section, however, expressly provides:

Nothing in this section shall apply to:

(a) *Officials* of the State of Nevada or of any county, city, town, township or other political subdivision thereof.

(D) [NRS 281.100](#) (State offices to maintain 40-hour workweek; office hours) as here relevant, in part provides:

1. The offices of all state officers, departments, boards, commissions and agencies shall:

(a) Maintain not less than a 40-hour workweek.

(b) Be open for the transaction of business at least from 8 a. m. until 12 m. and from 1 p. m. until 5 p. m. every day of the year, with the exception of Saturdays, Sundays and public holidays. \* \* \*

[NRS 281.150](#) is inapplicable herein, making provisions for payment of educational leave stipends in certain exceptional situations; the same is true of [NRS 281.160](#) which authorizes payment to state officers and employees of their traveling expenses and subsistence allowances.

Chapter 284 of Nevada Revised Statutes (Personnel Act) makes provision for *annual leave* of employees or accumulated leave of deceased employees ([NRS 284.350](#)), *sick and disability leave* ([NRS 284.360](#)), *military leaves of absence* ([NRS 284.365](#)), *military leaves of absence* ([NRS 284.365](#)), and *leaves of absence for military training duty* ([NRS 284.370](#)).

In neither Chapter 281 nor Chapter 284 of NRS is there any *statutory* authorization for “overtime” payment. However, [NRS 284.055](#)(2) and [NRS 284.060](#) provide statutory authority and power for the Advisory Personnel Commission to adopt rules and regulations for State Personnel Administration. Section 4.03 (Overtime Work), “Rules for State Personnel Administration,” must be deemed as adopted under such authority and power, and as relevant hereto, in part, provides:

(a) *Overtime Requirements by Department*: In emergencies a department head may prescribe reasonable periods of overtime work to meet operational needs. Such overtime shall be reported and justified as required by the director. (Ed.: Director, State Department of Personnel.)

(b) *Compensation for Overtime Work*: Hourly paid employees shall be compensated for authorized overtime at the rate of time and one half in cash. *Salaried employees, in positions below class grade 21 other than those excepted in Section 4.03(c), shall be compensated for authorized overtime by equal time off or by payment in cash at straight time rate as determined by the respective department head, commission or board.* Only such hours shall be compensated as are worked in excess of the regular prescribed normal hours per week for the class set forth in Section 3.08. Complete records of overtime of specified salaried employees shall be maintained by each department head and no additional overtime will be allowed when accrual for time off purposes has reached fifteen (15) working days until such accrual shall have been reduced by time off.

With the recommendation of the appointing power and the approval by the commission (Ed.: State Personnel Commission), employees in class grade 21 and above may be paid for overtime work when evidence is presented showing such payment is essential to the efficient operation of the department. \* \* \*

The questions suggested by the foregoing background of relevant material are:

(1) In view of the statutory prohibition on payment of more than one salary for services rendered to the State by an employee "whose salary is set by law" ([NRS 281.127](#)), and in the absence of a specific legislative appropriation or authorization therefor ([NRS 281.125](#)), is such regulation for payment of overtime valid?

(2) Assuming the validity of such regulation as a matter of law, is the same applicable to state employees in the unclassified service?

Question No. 1:

We have previously noted the absence of *statutory* authorization for the payment of overtime to state employees, whether in the classified or unclassified services. (Chapters 281 and 284 of NRS). This office in Attorney General's Opinion No. B-68, dated December 6, 1941 (*preceding enactment of the 1953 Personnel Act*), issued a ruling as follows:

Payment for overtime of state employees on monthly salaries cannot be lawfully made, as there is no law authorizing it.

Subsequent to the Personnel Act, this office again, in Attorney General's Opinion No. 72 dated July 16, 1959, ruled on the question of overtime work on the part of state employees, either on the basis of payment in cash therefor, or through allowance of compensating time off. Some excerpts therefrom, deemed relevant to the matter herein, are the following:

\* \* \* 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 the 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 safe-guard to possible abuses of overtime compensation. \* \* \* (Emphasis supplied.)

Note: The syllabus annotation for this portion of said opinion states as follows:

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. \* \* \*

Obviously, to the extent that Attorney General Opinion No. 72, dated July 16, 1959, reached the conclusion that the absence of *statutory* authorization for payment of “overtime” work on the part of state employees (or equivalent compensatory time off” was no bar to allowance thereof, the earlier opinion (Attorney General’s Opinion No. B-68, dated December 6, 1941, which antedates the 1953 Personnel Act and Regulation, Section 4.03 thereunder) must be deemed to have been overruled.

Such conclusion is, admittedly, in apparent conflict with statutory limitations, restrictions, and prohibitions as above noted ([NRS 281.125](#), [281.127](#), 341.100, *supra*), and also contrary to general authority and the rule that:

In the absence of legislation, if a statute or ordinance increases the duties of an officer by the admission of other duties germane to his office, he must perform them without extra compensation. (Note, L.R.A. 1918 E 761, *et seq.*; 21 A.L.R. 256, *set seq.*; 23 A.L.R. 612, *et seq.*; 5 A.L.R.2d 1182, *et seq.*; *see also* Am.Jur. 150-152)

In support of the conclusion reached in Attorney General’s Opinion No. 72 (*supra*), however, the following considerations may properly be noted:

Section 4.03 (“Rules for State Personnel Administration”) cannot be said to be an invalid regulation, as a matter of law, since said regulation is consistent with, and in implementation of, [NRS 284.010](#) (Legislative declaration of purpose), which provides as follows:

1. (a) To provide all citizens a fair and equal opportunity for public service;
- (b) *To establish conditions of service which will attract officers and employees of character and ability;*
- (c) *To establish uniform job and salary classifications; and*
- (d) To increase the efficiency and economy of the governmental departments and agencies by the improvement of methods of personnel administration. (Emphasis supplied.)

Such “(L)egislative declaration of purpose” is no less law than any other statutory provision. It, therefore, constitutes legal authority for promulgation of Section 4.03 of “Rules for State Personnel Administration.” [NRS 284.010](#), in substance and legal effect, authorizes the establishment and maintenance of “fair and equal opportunity for public service”; “conditions of service which will attract \* \* \* employees of character and ability” (inferentially, conditions comparable to those which prevail in private industry); and, “uniform (Ed., nondiscriminatory) job and salary classifications,” (inclusive of requirements and equal compensation for work performed).

We are, therefore, in accord with the conclusion reached in Attorney General’s Opinion No. 72, *supra*, that, *if a valid regulation*, Section 4.03 of “Rules for State Personnel Administration” must be deemed equally as applicable to state employees in the *unclassified* service as to those in the *classified* service. To hold otherwise would result in different and discriminatory treatment of state employees, in respect of the measure of compensation paid, even though the work performed by employees in the unclassified service was equal to, or greater than, that performed

by employees in the classified service. In our considered opinion, such discriminatory and arbitrary treatment would be violative of legislative intent and purpose as provided in [NRS 284.010](#).

*See also* Attorney General Opinion No. 23, dated March 17, 1959, wherein this office ruled that: “Statutory salary considerations do not preclude employees (including officers) from receiving ‘fringe benefits’.” In said opinion, it was stated that:

\* \* \* The term “employee” \* \* \* 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 to 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. \* \* \*

(On this question generally, *see* Note, 5 A.L.R.2d 415, “Constitutional or statutory provision referring to ‘employees’ as including public officers.”)

Question No. 2:

Our foregoing observations, in support of expressly declared legislative intent and objective to secure the establishment and maintenance of “uniform,” “fair” and “attractive conditions of employment” in the State’s service must, however, be construed in the light of the definite and specific restrictions and limitations contained in [NRS 281.125](#), [281.127](#), and 341.100, *supra*.

As indicated therein, there may be no payment of salary or compensation to any appointive officer or employee “unless a specific legislative appropriation or legislative authorization” exists therefor, and, *in no event*, could the Manager of the State Planning Board receive an annual salary or compensation” \* \* \* more than \$12,600 as determined by the board.”

It is undisputed that such maximum amount of compensation has been paid and received, or will be paid and received, by the claimant. Under such circumstances, therefore, we are bound by the specific restriction and limitation which the Legislature has prescribed by statute.

But for his resignation and separation from state service, we are of the opinion that the claimant would certainly have been entitled to compensatory time off for overtime devoted to performance and discharge of responsibilities for” \* \* \* efficient operation of (Ed., his) department.” In the circumstances, however, any such compensatory time off must be deemed forfeited, and effectively lost, with claimant’s resignation and separation from state service and employment.

Though of incidental interest only, it should also be noted that the claimant received a salary in an amount which would have ranked him above grade 21 in the classified service. It follows, therefore, that any payment to him for overtime is expressly regulated as follows:

*With the recommendation of the appointing power and the approval of the (Ed., Advisory Personnel) commission*, employees in class grade 21 and above may be paid for overtime work when evidence is presented showing such payment is essential to the efficient operation of the department. (Section 4.03(b)) “Rules for State Personnel Administration.” (Emphasis supplied.)

Both the recommendation of the State Planning Board (Appointing Authority) and the approval of the Advisory Personnel Commission are *conditions precedent*, under the Personnel Regulation (Section 4.03), for any *payment* of overtime to claimant. Insofar as the submitted facts disclose, such conditions precedent have not been complied with, or been satisfied.

Meritorious though the case may be, therefore, we are of the considered opinion that, in the particular circumstances here involved, claimant, as a state employee in the unclassified service, and with salary or compensation fixed by statute admittedly fully paid and received, may not be paid for overtime, as requested by him. Such claim or request for overtime payment made by Mr.

Bissell, resigned Manager of the State Planning Board, should, therefore, be disapproved by the Board of Examiners.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

BY: John A. Porter  
Deputy Attorney General

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**OPINION NO. 61-225 REAL ESTATE COMMISSION**—The sale of real property by a person, unlicensed either as salesman or broker under Chapter 645 of NRS, and not the owner of such property, is violative of law unless said person effecting the sale is an “employee,” as distinguished from an “independent contractor.” The distinguishing characteristics of “employee” and “independent contractor” outlined. [NRS 645.240](#), subsection 1, construed. (Reference: Attorney General’s Opinion No. 160, dated April 13, 1956, in accord.)

Carson City, June 9, 1961

Mr. Gerald J. McBride, Executive Secretary, Nevada Real Estate Commission, Carson City, Nevada

### STATEMENT OF FACTS

Dear Mr. McBride:

[NRS 645.020](#) defines “real estate,” for the purposes of the regulations contained in the chapter. [NRS 645.030](#) defines “real estate broker.” [NRS 645.040](#) defines “real estate salesman.”

[NRS 645.230](#) provides that it is unlawful for any person to act in the capacity of real estate salesman or real estate broker, without first being licensed by the Commission under the provisions of the chapter.

Under the provisions of [NRS 645.260](#) it is provided that a single act or transaction will constitute one a real estate broker or real estate salesman.

[NRS 645.240](#) enumerates certain exceptions to the strict rule that persons dealing in real estate as broker or salesman, must be licensed. In part this section provides:

645.240 1. The provisions of this chapter shall not apply to, and the terms “real estate broker” and “real estate salesman” as defined in [NRS 645.030](#) and [645.040](#) shall not include, any person, copartnership, association or corporation who, as owner or lessor, shall perform any of the acts mentioned in [NRS 645.020](#), [645.030](#), [645.040](#), [645.230](#) and [645.260](#), with reference to property owned or leased by them, or to the *regular employees thereof* with respect to the property so owned or leased, where such acts are performed in the regular course of or as an incident to the management of such property and investment therein. (Emphasis supplied.)

### QUESTION

Which ones, if any, of the following situations are operations authorized by law:

A. A builder-owner of dwellings who hires a “regular” staff of employees on a regular payroll or pay period basis to sell the dwellings, reimbursing fixed and substantial amounts of wages.

B. A builder-owner of dwellings who “employs” persons on a straight commission or percentage basis to sell the dwellings.

C. An owner of cemetery lots who hires regular employees on a payroll or pay period basis to “sell” the cemetery lots, reimbursing fixed and substantial wages.

D. An owner of cemetery lots who “employs” persons on a commission or percentage basis to “sell” the lots.

E. An owner of real property who intends to employ an auctioneer to sell the real property, at auction, reimbursing him with a “salary.” The auctioneer is free to offer his services to other persons, since such auctions will not occur on a regular basis, or will occur only occasionally.

## CONCLUSION

A. It is doubtful that the staff are “employees” within the meaning of [NRS 645.240](#), subsection 1; and, if not, the operation is unlawful.

B. It is clear that this operation would not be lawful, unless the sales staff are licensed under the provisions of NRS 645.

C. Same as concluded in situation A, above.

D. Same as concluded in situation B, above.

E. Same as concluded in situations B, and D, above.

## ANALYSIS

Without doubt, all of the instances enumerated constitute a sale of real estate within the meaning of [NRS 645.020](#). The instances hereinabove set out are not sales by licensees under the provisions of Chapter 645 of NRS. Such sales are therefore not according to law, unless they fall within the exception contained in subsection 1 of [NRS 645.240](#), other portions of 645.240 being not relevant to the facts here considered. To obtain the true meaning we have paraphrased this subsection insofar as here pertinent, viz:

The provisions of this chapter, in respect to the requirement of licensing under this chapter, shall not apply to any person who as owner shall sell real property owned by him, or to a regular employee of such person, where the acts in respect to such property are performed in the regular course of management, or as incident to the management of such property and the investment therein.

In seeking the true meaning, as intended by the Legislature for the language “regular employees,” we first observe that the language is far from clear when aided by the pertinent sections of the entire chapter. However, it is certain that the word “regular” is a limiting adjective, and that all of the employees of such owner are not included, but only the “regular employees.” Fewer persons qualify under the language “regular employees” than if the term employed were merely “employees.”

Many questions present themselves with reference to the proper construction to be placed upon the term “regular” as limiting the term “employees.” Does the term “regular” have reference to the length of the employment, requiring that the relationship of employer and employee shall have existed prior to the assignment to sell real property; or does the term carry the requirement that the employee shall have other assignments from the employer, than (or prior to the directive) that he sell real property. The statute, as to clarity of meaning, leaves a great deal to be desired. But in any event, the employer-employee relationship must exist, in each of the instant cases, in order that the person authorized to sell the real property, be relieved from the requirement of compliance with the provisions of Chapter 645 of NRS. To state it otherwise: If the person authorized to sell the real property is an independent contractor and not an employee, he is not legally authorized to sell real property, for compensation, unless duly licensed by the Commission pursuant to Chapter 645 of NRS.

Facts and plans of operation in the performance of work will vary, as the ingenuity and imagination of men vary, and in order that this opinion may be useful as a guide, under varying facts, it is deemed proper (and we trust helpful) that the normal and usual distinctions be elucidated, for future reference. We quote from 2 C.J.S., p. 1027, under the heading "Employer and Independent Contractor."

An independent contractor and an agent are not always easy to distinguish, and there is no uniform criterion by which they may be differentiated. Generally, however, the relations are distinguished by the extent of the control which the employer exercises over the employee in the manner in which he performs his work. Where the will of the employer is represented only in the result, and not in the means by which it is accomplished, and the employer retains no control over the employee as to the manner or means of accomplishing the desired result, the employee is an independent contractor, \* \* \* .

*See also* 2 Am.Jur. p. 17, Art. 8, to the same effect. Also 14 Words and Phrases, p. 521, at 703, under title "Employee," sub-independent contractor, \* \* \* .

In *California Employment Stabilization Commission v. Lund* (Cal. 1946), 173 P.2d 379, (the appellant is the counterpart of the Nevada Employment Security Department) the issue was whether or not unemployment insurance contributions, penalties and interest, should be collected. This question presented the question of whether the tenants of Lund were independent contractors or his employees. The Court said:

In determining whether one who performs services for another is an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. *California Emp. Comm. v. Bates*, 150 P.2d 192.

Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, Sect. 220; Cal. Ann. Sect. 220.)

To the above enumeration of distinguishing characteristics of the relationships of employee or independent contractor, we would add that of whether or not contributions are made to the Employment Security Department of the State of Nevada, pursuant to the provisions of [NRS 612.535](#) et seq., and whether or not income tax has been withheld by the employer, pursuant to the provisions of Title 26, Section 1622 U.S.C.A.

In making the above distinctions, in respect to the construction of [NRS 645.240](#), subsection 1, we have not overlooked the language to the effect that the acts performed by the employee must be "in the regular course of or as incident to the management of such property and the investment therein." It might be questioned if sale of real property could be regarded as "management." The distinction, however, if made, is not clear, and we believe not warranted. For purposes of this interpretation the management of the property is construed to include a sale thereof.



In the light of the distinctions hereinabove set out, and the limited information provided respecting the manner of operation, it is far from certain that the situation of A, above, would qualify the sales staff as “employees” within the meaning of [NRS 645.240](#), subsection 1. However, under the provisions of [NRS 645.610](#) the Commission is empowered to conduct hearings to determine facts, by which compliance or noncompliance with the law may be established. This the Commission should reflect upon in the light of the law hereinabove enunciated.

It appears clear that the situation described in B, above, creates a relationship of an independent contractor, and not an employer-employee relationship.

From the information supplied as to the manner of operation of C, above, it is doubtful that the sales staff are “employees” within the meaning of the statute. The commission should reflect upon the desirability of gaining further information by a hearing (hearings) as recommended for situation A, above.

It appears clear that the situations described in D and E, above, create the relationship of independent contractor. (Attorney General’s Opinion No. 160, dated April 13, 1956 in accord.)

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-226 HEALTH, STATE BOARD OF**—The State Board of Health is authorized to adopt and enforce rules and regulations governing the location, materials and construction of mausoleums, vaults and crypts or other similar structures for the interment of deceased human beings, both above and below the surface of the earth. [NRS 452.210](#) construed.

Carson City, June 12, 1961

Mr. W. W. White, Director, Bureau of Environmental Health, Nevada State Department of Health, 755 Ryland Street, Reno, Nevada

### STATEMENT OF FACTS

Dear Mr. White:

A new method of burial of deceased human beings requires the construction of underground concrete vaults, in which a number of human bodies are interred within one vault.

The office of the Bureau of Environmental Health of the State Department of Health has received a request for the approval of a great number of subterranean crypts, of the type previously mentioned. This proposal would also contain a similar number of mausolea units above ground. We understand this proposal for the interment both below and above the surface of the ground, would be contained within one edifice.

### QUESTION

Is the State Board of Health authorized by law to adopt and enforce rules and regulations governing the location, materials and construction of mausoleums, vaults, crypts or other similar

structures, for the deposit or interment of deceased human beings, both above and below the surface of the earth?

## CONCLUSION

It is.

## ANALYSIS

[NRS 452.210](#) provides:

452.210 1. No person, firm or corporation shall build, construct or erect any mausoleum, vault, crypt or structure intended to hold or contain dead human bodies, *which shall be wholly or partially above the surface of the ground*, except in compliance with the rules and regulations of the state board of health governing their location, materials and construction. (Emphasis supplied.)

2. The state board of health is authorized and empowered to adopt and enforce such rules and regulations governing the location, materials and construction of mausoleums, vaults, crypts or other similar structures; but the proper local officials of any incorporated city shall have the authority to make and enforce such additional ordinances, bylaws, rules and regulations as they may deem necessary not inconsistent with [NRS 452.210](#) to [452.270](#), inclusive, or with any rule or regulation adopted by the state board of health.

3. Before commencing the building, construction or erection of the same, full detailed plans and specifications of such structure shall be presented to the state board of health for its examination and approval. The approval of the plans and specifications of such structure shall be evidenced by a certificate in writing signed by the executive officer of the state board of health.

It will be observed that there appears to be a conflict between the provisions of subsections 1 and 2 of [NRS 452.210](#), in that subsection 1 designates structures that are “wholly or partially above the surface of the ground,” and subsection 2 contains no such limitation. However, subsection 1 constitutes a prohibition as to construction and subsection 2 constitutes a grant of power and authority. The apparent conflict is unfortunate and might be explained by the concern of the Legislature in avoiding any interference with the conventional type of burial below the surface of the earth. In any event, it is clear that the provisions of subsection 2 do effectually authorize the regulation of construction of such structures by the State Board of Health for the interment of human bodies, both above and below the surface of the earth.

Health and welfare statutes are to be liberally construed to effect their purposes.

Since a very early time the courts have been committed to the doctrine of giving statutes which are enacted for the protection and preservation of public health an extremely liberal construction for the accomplishment of their objectives. (3 Sutherland Statutory Construction, Art. 7202, p. 397.)

Any other construction of the statute would create the anomalous situation in which the State Board of Health would have jurisdiction to regulate the construction of that portion of the building in which human bodies are to be retained or interred above the surface of the earth, but would have no jurisdiction as to the construction of that portion of the building in which human bodies are to be retained and deposited below the surface of the earth, although the health hazard is as great for the one as the other. It appears reasonable that the Legislature intended, with the language employed in subsection 1, to distinguish between that type of interment in which a number of feet of earth lies above the body, and the interment in which there is no such protection from contamination.

It follows from the distinctions above set out that the State Board of Health is authorized to adopt and enforce rules and regulations governing the location, materials and construction of mausoleums, vaults, crypts or other similar structures for the interment of deceased human beings, both above and below the surface of the earth.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-227 GAMING**—Regulation 5.012 of the Regulations of Nevada Gaming Commission prohibits licensee, who actively participates in management of establishment, from engaging in play in licensed poker game on his premises.

Carson City, June 13, 1961

State Gaming Control Board, Carson City, Nevada

### **STATEMENT OF FACTS**

Gentlemen:

A state gaming licensee operating two poker and one pan game frequently takes part in his own poker games as a player. His wife, who is not a licensee, also participates in the poker games.

The licensee actively participates in the management of the games and the establishment.

### **QUESTION**

Are the licensee and his wife prohibited from playing in these games by Regulation 5.012 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board?

### **CONCLUSION**

Regulation 5.012 prohibits the licensee from engaging in the poker and pan games on the licensed premises.

The licensee's wife may engage in play at said tables so long as she does not use community property funds and does not act as an agent of the husband.

Regulation 5.012 reads as follows:

*5.012 Gaming by owners.* No person who owns any interest of any sort whatever in or to any nonrestricted licensed gaming operation and who also actively participates in the management of conduct of the licensed games or establishment shall play or be permitted to play, either in person or through an agent, at any table in such establishment.

We think it is clear from Regulation 5.012 that if the licensee holds a nonrestricted gaming license and actively participates in the management of the games or establishment, he is prohibited from playing in his own games.

The licensee referred to above holds a nonrestricted gaming license and admits he is actively engaged in the management of the games and establishment. The only conclusion that could be reached is that said regulation prohibits the licensee from playing in the poker and pan games on his licensed premises.

He has contended that Regulation 5.012 should not apply to poker games where he and his wife are playing against other individuals and not against the house bankroll. He further contends said regulation should apply only to “21” games, roulette, craps, etc. His contentions possibly are sound arguments for changing the regulation, but we are unable to read the implied meaning into the regulation that he does. We think the regulation squarely applies to him.

We now turn to the question of his wife engaging in play in the poker games. The fact the parties in question are married does not mean that every act of the wife is done as the agent of her husband. The mere relation of husband and wife does not create the wife an agent of the husband. Whether or not an agency relationship exists is a question of fact.

We think the term “agent” as used in Regulation 5.012 means a person representing a licensee personally and who by playing in the game stands to win or lose the personal funds of that licensee. Such an agent while able to exercise personal judgment and discretion is nevertheless under the control and direction of the principal.

The licensee further argues that a “shill” is an agent and therefore Regulation 5.012 prohibits the employment of “shills.”

A “shill,” in the general sense, is an agent, but is also an employee of the gaming establishment rather than one of its licensees personally. A “shill” plays with the establishment’s money rather than a licensee’s personal funds, and stands neither to win or lose any money whatsoever.

One further point requires discussion. Nevada is a community property state with the husband having the entire management and control of the community property ([NRS 123.230](#)). For the wife to engage in the poker game with community funds would result in the wife acting as agent for the community interest insofar as Regulation 5.012 is concerned.

As a general rule, there is the presumption that all property in the possession of either spouse during the marriage is community property.

Therefore, in the instant case, if the wife engages in play in the poker game, it should be presumed that the funds used for that purpose are community property funds. For the reasons expressed, this would be contrary to Regulation 5.012.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Michael J. Wendell  
Special Deputy Attorney General

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**OPINION NO. 61-228 PAROLE COMMISSIONERS, BOARD OF; POWERS AND DISCRETION OF BOARD; PROCEDURE IN GRANTING AND REVOKING PAROLES**—Section 176.150 Nevada Revised Statutes construed. There is no conflict in the language or between the subsections of [NRS 176.150](#). Unless otherwise expressly ordered by the sentencing court, all sentences on convictions for criminal offenses charged in a single information or indictment run concurrently. Upon conviction of an independent crime, prisoner must serve sentence imposed as provided by law after completion of all prior terms. Prisons: minimum term to be served by prisoner before release on parole. Maximum term to be served by parole violator. Escaped prisoners: minimum and maximum terms to be served by escaped prisoner; mandatory provisions of statute; discretion of Board. Due process of law: law of the State of Nevada governs.

Carson City, June 14, 1961

Mr. Jack Fogliani, Warden, Nevada State Penitentiary, Carson City, Nevada

Dear Mr. Fogliani:

You have requested us to interpret the statutes of this State on matters relating to parole of prisoners, escapes, violation of parole and the terminal points of sentences pronounced upon persons convicted of crime. We have also been asked to chart a suggested course of procedure indicating the legal aspects to be considered in dealing with paroled prisoners, escapes, violations of parole and recommitment to the Nevada State Prison. Particular attention has been directed to the proper construction to be placed upon [NRS 176.150](#) and its subsections.

In this connection you have turned over to us the files and records of various prisoners with the request that these files be carefully reviewed by this office with a view to determining eligibility for parole, recommitment upon violation of parole and penalties, both mandatory and discretionary, to be imposed by the Board of Parole Commissioners, which are to be observed by you as Warden of the Nevada State Prison.

The facts developed by examination of the papers and records submitted to this office by you involve several different problems. In some cases prisoners released on parole under the supervision of the Board of Parole Commissioners have been recommitted for violation of the conditions of their parole. In others, prisoners have escaped from the Prison Farm and have committed another felony while thus at large. Still other cases involve commission of additional criminal offenses while a prisoner is outside the enclosures of the penitentiary upon parole duly issued by the Board. In all of these cases and other suggested situations which have arisen in the past and may well be repeated in the future you have asked us to indicate the proper legal procedure to be followed in dealing with prisoners who fall in the different categories, their eligibility for parole, the minimum and maximum terms to be served in each instance and the power of the Board of Parole Commissioners whose orders would be binding upon you.

We shall attempt to give a short summary and outline of the required legal procedure to be observed in matters of parole in accordance with the statutes which we have been called upon to construe and interpret and of the decided cases treating the subject matter involved.

Nothing in this opinion should be deemed to indicate policy of the Board within the limits described and outlined herein or to suggest the manner in which the discretion of the Board should be exercised in a given case. It should be unnecessary to add that this opinion while mentioning, in many instances, certain similarities between "paroles" in the strict legal sense and "conditional pardons" should not be construed as any attempt to set forth rules applicable to the exercise of the powers or discretion vested in the Governor and the Board of Pardons Commissioners by the Constitution (Article 5, Sections 13 and 14). Those matters are entirely outside the scope of this opinion. We turn now to the specific questions posed.

### QUESTIONS

1. Are subsections 1 and 2 of [NRS 176.150](#) in conflict with each other in that they make different provisions for the running of sentences of a party convicted of two or more separate criminal offenses?
2. Is the second clause of subsection 2 of [NRS 176.150](#) applicable to sentences imposed for two or more violations of the criminal law as charged in a single information or indictment filed or found against one accused of crime and upon which he is regularly convicted at one trial or time?

### CONCLUSIONS

Question No. 1: No.

Question No. 2: No.

## ANALYSIS

Section 176.150 Nevada Revised Statutes reads as follows:

176.150 Conviction of two or more offenses: Concurrent and consecutive sentences.

1. Whenever a person shall be convicted of two or more offenses, and sentence has been pronounced for one offense, the court in imposing any subsequent sentence may, in its discretion, provide that the sentences subsequently pronounced shall run either concurrently or consecutively with the sentence first imposed.

2. If the court shall make no order with reference thereto, all sentences shall run concurrently; but whenever a person under sentence of imprisonment shall commit another crime and be sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms.

Fair reading of the language of the foregoing statute makes it abundantly plain that the Legislature, in dealing with the subject of concurrent and consecutive sentences pronounced by the trial court after a person is convicted of two or more crimes, intended by enactment of subsection 1 of [NRS 176.160](#), to include only such crimes of which a person may have been convicted at a *single trial* either on his plea of guilty or by verdict of a jury. Any other construction would, it seems to us, render superfluous and meaningless the second clause of subsection 2 of [NRS 176.150](#). The use of the word “subsequent” in subsection 1 of this statute is perhaps unfortunate, although when read in its context and in conjunction with subsection 2, the meaning is perfectly clear. The trial judge having pronounced sentence on one charge or “count” of the information or indictment upon which the accused was convicted, then proceeds to pronounce sentence on the second or any other, i.e., “subsequent” charge or charges upon which conviction was had at that time and trial, and states whether the sentences thus imposed shall run concurrently or consecutively. No reference is here made, or intended, to any sentence theretofore pronounced against the same offender as the result of conviction at any other trial. The method of disposing of this latter situation is adequately covered by the second clause of subsection 2 of [NRS 176.150](#).

That this must have been the intent of the law-making body is apparent from the language of the second clause of subsection 2 of [NRS 176.150](#) which deals with convictions and sentences for commission of another or other crimes committed by one already under sentence of imprisonment. Sentence on the later conviction *cannot run concurrently with prior sentences* but must begin after “expiration of all prior terms.”

Read in the manner suggested, there is no conflict between the two subsections of [NRS 176.150](#). On the contrary, these statutory enactments supplement each other.

## PROCEDURE IN PAROLE CASES

A. *Power of the Board of Parole Commissioners.* In outlining procedure in parole cases, including releases on parole, revocation of parole, rearrest and recommitment for violation of conditions of parole, and punishment for escape, it should be borne in mind that this opinion treats only the legal aspects of the problems involved, and is not intended to interfere in any way with the exercise of the discretionary powers vested in the Board of Parole Commissioners by the Legislature of the State of Nevada.

[NRS 213.108](#) creates the State Board of Parole Commissioners. [NRS 213.110](#) delimits the sphere of activities of the Board, defines its powers relating to the release of prisoners on parole, and confers upon the Board the power to establish rules and regulations relating to parole.

Such grant of power is clearly within the constitutional scope of the Legislature as the branch of government authorized to define crimes and prescribe punishments therefor. Constitution, Article 4, Section 1; *Pinana v. State* (1960), [76 Nev. 274](#), 352 P.2d 824, 829.

*B. Minimum Term to Be Served Before Parole.* [NRS 176.190](#) and [213.110](#) set out in express language the minimum term to be served by one convicted of crime before becoming eligible for parole, and is generally applicable to all crimes with certain specific exceptions, such as those relating to sentences of life imprisonment without possibility of parole ([NRS 213.120](#), subsection 1) and life imprisonment with parole possibility ([NRS 213.120](#), subsection 2). Execution of the prison sentence commences with the date of sentence ([NRS 176.410](#), subsection 3).

The minimum term to be served before eligibility for parole is one (1) calendar year less good time credits computed in accordance with the table set forth in [NRS 209.280](#). Although no adjudication has been found in the Supreme Court of the State of Nevada, courts of other states have uniformly construed similar statutes to mean that credits for good behavior under the rules and regulations established by parole boards and prison authorities, or "good time credits," are to be read into the statute fixing the minimum term of imprisonment for the particular infraction of the criminal law.

Hence eligibility for parole is determined by deducting from the minimum term of the sentence in each case the time allowed by statute to be deducted for good behavior as determined and allowed by the Board. *Crooks v. Sanders* (1922), 123 S.C. 28, 115 S.E. 760; *State ex rel. Davis v. Hunter* (1904), 124 Iowa 569, 100 N.W. 510.

Except for the specified allowances and deductions for good time credits, no release on parole may be ordered or permitted by the Board until the minimum statutory term of imprisonment has been served. The warden of the penitentiary releasing a prisoner before service of the minimum term of the sentence of the court computed as above set forth, even on order of the State Board of Parole Commissioners, might be held in contempt of court for such action by the committing and sentencing court. *State ex rel. Murphy v. Superior Court* (1926), 30 Ariz. 332, 246 P. 1033.

After service of the minimum term of imprisonment by a convict, the matter of parole lies within the discretion of the Board which has virtually unlimited power regarding the release of a prisoner, short of service of the maximum term of the sentence.

This naturally leads us to consideration of another problem and question. Would a prisoner regularly convicted of a criminal offense and legally under sentence of imprisonment of not less than two (2) not more than five (5) years (as for instance [NRS 200.450](#), subsections 1 and 2) be eligible for release on parole at the end of 10 calendar months of imprisonment?

Certainly the language of [NRS 213.110](#) would seem so to indicate. Diligent search of the authorities has failed to yield any case in point in the State of Nevada which would throw any light on the matter. Authorities in other states are not particularly helpful because of different language of the applicable statutes. In the State of California there is no conflict in the provisions of the statutes on this subject. The situation is clearly defined in the California Criminal Code. After making specific provision for the minimum term to be served for specific offenses before parole may be granted by the Adult Authority of the State of California, the law sets forth the minimum term to be served "in all other cases." (Deering's Penal Code Annotated (1961) Sec. 3049.) The California Adult Authority has merely to read the commitment papers of the sentencing court in each instance in order to ascertain when it is legally possible to consider parole in any given case.

Careful consideration has been accorded the problem arising from the language of [NRS 213.110](#) when read in conjunction with sections of Nevada law providing minimum terms of more than one (1) year for designated criminal offenses.

Does that portion of the statute ([NRS 213.110](#)) which states that

\* \* \* any prisoner who is now or hereafter may be imprisoned in the state prison and who shall have served 1 calendar year, less good time credits, \* \* \* may be allowed to go upon parole outside of the buildings or inclosures \* \* \*.

apply to prisoners who have been sentenced to a minimum term of two or more years?

We feel that the answer to this question should be in the negative. A fair reading of the statutes applicable to such situations convinces us that a person convicted of crime and confined to a penal institution in this State would not be eligible for release on parole *until he had served*

the minimum sentence prescribed by law for the particular offense (less proper deductions allowed by the Board for good behavior credits), and that [NRS 213.110](#) does not apply to such cases. Any other interpretation would have the effect of nullifying the statutory provisions fixing minimum terms of more than one year for certain offenses.

Accordingly we are inclined to the view that a sentence of not less than two (2) years of imprisonment precludes possibility of release on parole until service of one (1) year and eight (8) months of the prison term taking all allowable good time credits into account.

C. *Violation of Parole; Arrest and Recommitment.* We now proceed to matters of procedure involving the status of paroled prisoners and their rearrest and recommitment upon violation of the conditions upon which they are permitted by the Board of Parole Commissioners to go outside the enclosures of the penitentiary. Necessarily coupled with this is the important consideration of the term to be served by a parole violator in the event of simple violation of the conditions of his parole as contradistinguished from a conviction on another separate criminal offense while out on parole.

It has been pointed out in decided cases in many states as well as in legal treatises and digests that parole is not a constitutional right but a matter of grace and favor. That is certainly the law of the State of Nevada. *Pinana V. State* (1960), [76 Nev. 274](#), 352 P.2d 824.

Acceptance of parole by the prisoner is absolutely essential to the validity thereof. *Ex parte Davenport* (1927), 110 Tex. Crim. Rep. 326, 7 S.W.2d 589, 591; *Ex parte Hawkins* (1913), 10 Okla. Crim. 396, 136 P. 991; *Fuller v. State* (1899), 122 Ala. 32, 26 So. 146, 147; *Ex parte Prout* (1906), 12 Idaho 494, 86 P. 275, 277; 39 Am.Jur. 576, Sec. 89; Attorney General Opinion No. 599, April 7, 1948, page 375.

Paroles have sometimes been treated as though they were conditional pardons and vice versa, and there are many similarities between them. However, whether a parole or conditional pardon is involved in the release of a prisoner, the cases hold without exception that acceptance of the parole or conditional pardon carries with it acceptance of the conditions upon which same is granted. *Pope v. Wiggins* (1954) 220 Miss. 11, 69 So.2d 913, 917; *Ex parte Houghton* (1907) 49 Ore. 232, 89 P. 801; *State v. Horne* (1906) 52 Fla. 125, 42 So. 388; *Arthur v. Craig* (1878) 48 Iowa 264, citing Blackstone's Commentaries, Volume 4, page 401; *In re Conditional Discharge of Convicts* (1901) 73 Vt. 414, 51 A. 10, 12; *Ex parte Davenport* (1927) 110 Tex. Crim. Rep. 326, 7 S.W.2d 589, 591.

D. *Same; Notice to Prisoner; Judicial Hearing.* May a parole violator be summarily rearrested and recommitted to prison without notice and without hearing or judicial determination of the fact amounting to breach of the conditions of parole?

Answer to this question depends on circumstances. Cases holding that it is necessary to have a judicial hearing and determination of breach of the conditions of the parole or conditional pardon prove, on close examination, to be instances where the right of the granting authority to revoke the parole or conditional pardon, as the case may be, without hearing or notice, and thereupon to order the summary arrest and imprisonment of the offender, were not expressly reserved in the paper granting clemency, or spelled out in the applicable statute. *State v. Horne* (1906) 52 Fla. 125, 42 So. 388; *Ex parte Alvarez* (1905) 50 Fla. 24, 39 So. 481.

This conclusion is well borne out by the language of the Supreme Court of the State of Florida in the latter case, where the Court expressed itself as follows (page 484, col. 1):

Where a convict has been released under a conditional pardon, his rearrest and recommitment to his original sentence cannot be had upon the mere order of the Governor (or board of pardons) alone, *unless such a course is provided by statute or by the express terms of the pardon.* (Emphasis supplied.)

To the same effect see *State ex rel. O'Connor v. Wolfers* (1893) 53 Minn. 135, 54 N.W. 1065.

But where there is express statutory provision for the recommitment of a prisoner released on parole or conditional pardon, the terms of the statute govern as do the stipulations in the parole or conditional pardon. These may include the right of a parole board to make a determination of



violation of the conditions of the parole or of the conditional pardon without notice to the parolee and to order his summary arrest and confinement without any hearing or judicial determination of violation of the conditions of the parole or conditional pardon. *Ex parte Anderson* (1951) 191 Ord. 409, 229 P.2d 633; *In re McLain* (1960) \_\_\_\_\_ Cal.2d \_\_\_\_\_, 357 P.2d 1080; *In re Charizio* (1958) 120 Vt. 212 138 A.2d 430.

*E. Due Process Determined by State Law.* Interpretation of state statutes and of the law applicable to such cases is a matter of determination by the state courts (preferably the court of last resort of the particular state) and the decisions of state courts are final and binding on the federal courts. *Minnesota ex rel Pearson v. Probate Court* (1940) 309 U.S. 270.

In that case the Supreme Court of the United States expressed itself as follows through Chief Justice Hughes (p. 273):

The construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it. (Citing cases.)

Further, no question of federal due process of law under the Fourteenth Amendment to the Constitution of the United States or of equal protection of the laws is involved. *Morgan v. Horall* (9th Circuit, 1949) 175 R.2d 404; *Green v. Teets* (9th Circuit, 1957) 244 F.2d 401.

It is our understanding that the State Board of Parole Commissioners has uniformly included in the paroles granted to prisoners, express provisions empowering the Board to determine violations of the conditions upon which paroles are granted in this State, without the necessity of any notice or hearing, and thereupon to order the summary arrest and recommitment of parolees upon its finding that the conditions of the parole have been violated. Statutory sanction for this procedure is found in [NRS 213.150](#). This obviates any necessity for judicial hearings on the question of violations of conditions of parole.

*F. Maximum Term To Be Served by Parole Violator.* The next subject which presents itself for discussion is the matter of the maximum length of the term to be served by a parole violator upon his rearrest and recommitment to the penitentiary after determination by the Board that there was a violation of the conditions of his parole.

Absent any express statute on the subject, the cases are in conflict. Most of the decisions hold that where a prisoner is released on parole or conditional pardon he is not "free" in the ordinary sense of that word, but is still a prisoner under the supervision and control of the board of paroles or similar board or body. Using this proposition as a starting point, courts have held that the prisoner may be recommitted for violation of the conditions of his parole *only for such period as would fall within the time limits of the original sentence as though the prisoner had actually remained within the confines of the prison enclosures at all times since he started service of the sentence imposed by the court.* *Scott v. Chichester* (1908) 107 Va. 933, 60 S.E. 95; *Crooks v. Sanders* (1922) 123 S.C. 28, 115 S.E. 760; *State ex rel. Davis v. Hunter* (1904) 124 Iowa 569, 100 N.W. 510; *Ex parte Prout* (1906) 12 Idaho 494, 86 P. 275.

Other decisions hold that in such instances *the prisoner may be remanded to serve all or such portion of the remaining term of imprisonment to which he was originally sentenced as if the time when he was legally outside the prison walls had never elapsed.* According to this view, a party sentenced to serve a term of imprisonment of not less than 2 nor more than 5 years, could be released on parole after 2 years and rearrested for violation of parole 2 years later and recommitted to serve 3 more years in prison. He would then be compelled to serve a prison term 2 years beyond the maximum sentence of the court, had he elected to remain in prison instead of accepting parole. *Ex parte Kelly* (1908) 155 Cal. 39, 99 P. 368; *State v. Horne* (1906) 52 Fla. 125, 42 So. 388.

The rationale of these cases is well summed up in the case last above cited. The Supreme Court of the State of Florida held that the time during which sentence is executed is no part of the sentence itself. Execution may be delayed by appeal, stay of execution, reprieve, or other circumstances affecting execution. According to this view, reference in a conditional pardon (or

parole) to return of the prisoner to the penitentiary “to serve out the remainder of his term” refers only to the length of imprisonment and not to the period during which it would normally have been served. Consequently, the prisoner upon recommitment would serve a sentence expiring beyond the calendar limit of the sentence originally fixed by the court.

With the above conflict of authority in mind, what is the proper rule to be applied by the State Board of Parole Commissioners?

Where a prisoner released on parole is arrested on order of the Board for violation of the conditions of his parole and returned to the penitentiary to serve out the “balance of the term to which he was sentenced” in the first instance, it is our opinion that the convict *cannot be compelled to serve any portion of the term beyond the maximum fixed by the Court with execution of the sentence commencing with the time of his delivery to the Warden of the State Prison and including the time when he was outside the walls of the prison on parole.*

Obviously this conclusion does not apply to cases of escape, or release on bail, or stay of execution pending appeal, for then the prisoner is not under supervision of the Board but is at large by virtue of his own illegal or criminal act, on the one hand, or by reason of legal procedure instituted by him or on his behalf to delay execution of sentence on the other.

Escapes are in a different category than violations of parole. The cases are legion to the effect that an escaped prisoner may be recaptured and compelled to serve out the balance of his term without any allowance or deduction for the time he was outside the enclosures of the prison, and in fact may be guilty of another criminal offense in addition. See, for example, *Scott v. Chichester* (1908) 107 Va. 935, 60 S.E. 95, 96.

*G. Maximum Term for Escaped Prisoners; Penalties.* On the subject of escaped prisoners the statutes of Nevada are clear. [NRS 212.090](#), subsection 1, provides that a prisoner confined in a prison who shall escape or attempt to escape shall be guilty of a felony, if held on conviction of a felony. [NRS 212.090](#), subsection 2, provides that escape or attempted escape where the prisoner is held on conviction of a gross misdemeanor or misdemeanor shall be a misdemeanor. Provision is made for the recapture of escaped prisoners ([NRS 212.030](#)). a paroled prisoner leaving the State without permission is treated as an escaped prisoner under the law. ([NRS 213.160.](#)) This statute set forth penalties, both mandatory and discretionary with the Board, which may be imposed upon the prisoner.

[NRS 213.160](#), subsection 1, provides that a parole leaving the State without permission and thereby becoming an “escaped” prisoner shall forfeit all credits for good behavior previously earned. This is clearly mandatory. This subsection then goes on to state that the prisoner shall serve such part of the unexpired term of his original sentence as may be determined by the Board. This portion of the statute is intended by the Legislature to vest discretion in the Board and the language used undoubtedly accomplishes that result. The prisoner might, in the discretion of the Board, be released after service of the minimum term of his sentence *without benefit, however, of the forfeited good time credits*, or might be ordered held for the total maximum term of his sentence, depending on controlling circumstances as determined by the Board. Between those limits the discretion of the Board is controlling and unfettered.

[NRS 213.160](#), subsection 2, provides that no good time credits are to be allowed to an escaped prisoner who shall be recaptured, for at least one calendar year following his capture and return to prison. Again we find a provision of the statute which is mandatory. The statute then goes on to state that the prisoner shall serve such portion of his original sentence as may be determined by the Board. Here once more, the Board has discretionary power to decree how much of the original sentence shall be served in the aggregate by the recaptured prisoner without benefit of good time credits either previously earned or which might otherwise accrue for one year subsequent to recapture.

As a simple illustration of the foregoing: A prisoner released on parole after serving ten months of a sentence of not less than one year and not more than five years, who leaves the State and is recaptured, *must* serve at least two months in prison, and if the Board decided that he should serve six months more of the original sentence, he *must* serve a total of eight months in the aggregate, before he can again be released, since he cannot have the benefit of any credits for good behavior for one year following his recapture, or of the previously earned good time credits.

In closing, we reiterate that this opinion is intended merely to indicate the legal limits within which the Board of Parole Commissioners may operate in the exercise of its sound discretion. Nothing herein contained should be construed to express any preference are inadvertent and should be disregarded.

The discretionary powers vested in the Board by the Legislature are not subject to review.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Norman H. Samuelson  
Deputy Attorney General

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**OPINION NO. 61-229 EMPLOYMENT SECURITY DEPARTMENT**—Validity of specific Lease-Purchase Agreement relating to construction and rental of Department's new office building, in light of constitutional limitation of State's indebtedness, reviewed and reaffirmed. Obligations under Lease-Purchase Agreement, and remedies for recovery thereon in the event of breach or default on the part of state agency, reviewed, both where state legislative appropriation has, and has not, been made. Other related matters also considered. References: Attorney General's Opinion No. 704, November 29, 1948; Attorney General's Opinion No. 3, January 29, 1959; Attorney General's Opinion No. 200, January 11, 1961; Attorney General's Opinion No. 206, February 2, 1961; Ltr. Opinion, Assembly Ways and Means Committee, February 10, 1961.

Carson City, June 21, 1961

Mr. Richard Ham, Executive Director, Nevada Employment Security Department, Carson City, Nevada

### STATEMENT OF FACTS

Dear Mr. Ham:

It is indicated that certain questions still persist concerning the nature and extent of the obligation and liability of both the Nevada Employment Security Department and the State of Nevada itself, if any, as same are contemplated and provided for, in the Lease-Purchase Agreement dated September 16, 1960, as amended, which Agreement was entered into and executed by Nevada Employment Security Department, as Lessee, and Brunzell Construction Co., Inc., of Nevada, as Lessor.

It has been further indicated orally that the Trustees of the General Electric Pension Trust (the lending agency which has agreed to finance the construction of the new office building as provided for in the aforementioned Lease-Purchase Agreement) is considering the suspension of further payment of scheduled installments of funds essential to continuance and completion of construction work on said building project, unless they are furnished with acceptable assurance that the investment made by said Trust is sufficiently secured to permit legal recovery in any event, should there be any breach of contract on the part of the Nevada Employment Security Department, as Lessee, under the above mentioned Lease-Purchase Agreement.

The lending agency, through its attorney, has requested an opinion from this office on certain specific questions, hereinafter stated. In view of its concern and possible action to suspend further allocation of funds required for continuance and completion of construction work on the projected new building, counsel for Brunzell Construction Co., Inc., of Nevada, is also desirous

of having the definitive opinion of this office on said specific questions. Finally, as Executive Director of the Employment Security Department (the using agency directly concerned with the completion of said office building), you indicate that you, too, believe that a definitive opinion from this office might, perhaps, be helpful.

## QUESTIONS

1. In view of the exception held to be applicable under the “special fund” doctrine, is the State of Nevada’s general fund in any way committed to the obligation assumed by the Nevada Employment Security Department, as Lessee, to Brunzell Construction Co., Inc., of Nevada, as Lessor, in the Lease-Purchase Agreement dated September 16, 1960, as amended?

2. In the absence of any appropriation by the Nevada State Legislature, can recovery, in any event, be had by Brunzell Construction Co., Inc., of Nevada, as Lessor, on the contractual obligations assumed by the Nevada Employment Security Department, as Lessee, under the provisions of the Lease-Purchase Agreement dated September 16, 1960, as amended?

## CONCLUSIONS

Question No. 1: As statutorily qualified, yes.

Question No. 2: Yes.

## ANALYSIS

The Nevada State Legislature, by enactment of Chapter 191, 1960 Statutes of Nevada ([NRS 612.227](#)), expressly authorized and empowered the Executive Director of the Nevada Employment Security Department to enter into lease-purchase agreements for the acquisition of office buildings and the land on which such buildings are located (among other matters) and to pay rentals in connection therewith. ([NRS 612.227](#), as amended by Chapter 11, 1961 Statutes of Nevada.)

The administration of the Employment Security Department’s functions, responsibilities and programs constitute an integral part of the Federal Social Security program and is primarily dependent upon federal funds made available therefor. ([NRS 612.285](#), [612.290](#), 612.605, 612.610, 612.615.)

[NRS 612.605](#) (“Creation of fund; receipt and use of moneys”) expressly provides for the establishment and maintenance in the Nevada State Treasury of a “special fund” to be known as the Unemployment Compensation Administration Fund. Said statute further provides that all moneys which are deposited or paid into said fund are “hereby appropriated and made available to the executive director.” Said fund consists of all moneys appropriated by the State of Nevada; all moneys received from the United States of America or any agency thereof, including the Department of Labor; the Railroad Retirement Board; the United States Employment Service; and all moneys from any other source.

Said statute further makes provision as to the use or application of such funds as follows:

3. All moneys in this fund shall be expended solely for the purpose of defraying the cost of the administration of this chapter (Ed., 612 of NRS), and for no other purpose whatever.

7. All moneys in this fund shall be deposited, administered and disbursed in the same manner and under the same conditions and requirements as are provided by law for other *special funds* in the state treasury. (Emphasis supplied.)

8. Any balances in this fund shall not lapse at any time, but shall be continuously available to the executive director for expenditure consistent with this chapter.

9. Moneys in this fund shall not be commingled with other state funds, but shall be maintained in a separate account on the books of the depository. Such moneys

shall be secured by the depository in which they are held to the same extent and in the same manner as required by the general depository laws of the state, and collateral pledged shall be maintained in a separate custody account.

[NRS 612.610](#) (“Reimbursement of unemployment compensation administration fund”), as here relevant, provides as follows:

1. If any moneys received after June 30, 1941, from the Department of Labor under Title III of the Social Security Act, or any unencumbered balances in the unemployment compensation administration fund as of that date, or any moneys granted after that date to this state \* \* \* are found by the Department of Labor, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of, those found necessary by the Department of Labor for the proper administration of this chapter, *it is the policy of this state that such moneys shall be replaced by moneys appropriated for such purpose from the general fund of this state to the unemployment compensation administration fund for the expenditure as provided in [NRS 612.605](#). Upon receipt of notice of such a finding by the Department of Labor, the executive director shall promptly report the amount required for such replacement to the governor, and the governor shall at the earliest opportunity submit to the legislature a request for the appropriation of such amount.* (Emphasis supplied.)

[NRS 612.615](#) (“Creation of fund; source and use of funds) pertains to another fund, namely, the “Employment Security Fund,” and, as relevant herein, provides as follows:

1. There is hereby created in the state treasury a *special fund* to be known as the employment security fund. (Emphasis supplied.)
3. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the executive director \* \* \*.
5. The moneys in this fund shall be used by the executive director for the payment of costs of administration which are found not to have been properly and validly chargeable against federal grants received for or in the unemployment compensation administration fund.
7. Any balances in this fund shall not lapse at any time, but shall be continuously available to the executive director for expenditure consistent with this chapter.

[NRS 612.220](#) (“General powers and duties of executive director”) provides as follows:

1. The executive director shall administer this chapter as the same now exists or may hereafter be amended.
2. He shall have power and authority to adopt, amend or rescind such rules and regulations, to employ, in accordance with the provisions of this chapter, such persons, make such expenditures, require such reports, make such investigations, and take such other action as he deems necessary or suitable to that end \* \* \*.
3. The executive director shall determine his own organization and methods of procedure in accordance with the provisions of this chapter.

Section 15, Article I, Nevada State Constitution prohibits the State from passing any law impairing the obligation of contracts. The Federal Constitution contains a similar prohibition (Art. 1, Sec. 10).

Rental payments for office facilities required by the Nevada Employment Security Department are an essential item of administrative costs of said Department, authorized by law as services

for which the Executive Director is entitled to contract, and for which, in addition to federal subventions, state appropriation has been made.

In this connection, it should be noted that the Nevada Employment Security Department is an "authorized expenditure" state agency, rather than a state agency supported from the general fund appropriation. (Chapter 313, 1961 Statutes of Nevada) This is due to the fact that all of the operating costs of the Department, including the various federal programs, are paid for out of federal grants, received from the Federal Bureau of Employment Security, from Congressional appropriations. (State of Nevada Executive Budget, Fiscal Years 1961-1962, 1962-1963, page 418.) The said Department's budget request is, therefore, predicated upon, and conformable to, standards of the Federal Bureau of Employment Security, and is not reviewed by the office of the State Budget Director.

[NRS 41.010](#) generally provides for actions against the State of Nevada for services or advances authorized by law, when an appropriation has been made, if the amount has not been fixed by law. Briefly, such statute authorizes commencement of action against the State of Nevada in any court in Ormsby County having jurisdiction of the amount of the claim, or such portion thereof as may have been disallowed by the Board of Examiners or by the State Controller. Any such action against the State is regulated in all respects as other civil actions. [NRS 41.030](#) provides for the State Controller to draw his warrant for any amount awarded by any judgment of the Court, upon presentation of a certified copy of the final judgment. As stated in Attorney General Opinion No. 200, dated January 11, 1961, (page 2 thereof), the foregoing statute requires that the claim be made for services authorized by law. The contract of the Employment Security Department for acquisition of useful office space by Lease-Purchase Agreement is a service authorized by law ([NRS 612.227](#)).

Because the operating and administrative costs are primarily and substantially financed with federal funds, made available therefor through United States Congressional appropriations, we have heretofore held that the Lease-Purchase Agreement here involved is not subject to the constitutional limitation or prohibition respecting any excess on the State's indebtedness. (Art. IX, Section 3, Nevada Constitution; *see* Attorney General's Opinion No. 206, February 2, 1961, page 6 thereof; Letter Opinion to Nevada Assembly Ways and Means Committee, dated February 10, 1961.)

*See also,*

*Boe v. Foss*, 77 N.W.2d 1; *Garrett v. Swanton*, 13 P.2d 725; *State v. O'Brien*, 82 S.E.2d 903 (1954), wherein are cited many cases in other jurisdictions as well, to the same effect.

*In Re City of Philadelphia*, 21 A.2d 876, 882, indicating that reasonable certainty as to the sufficiency of the Special Fund constitutes adequate justification for reliance thereon.

49 AmJur. 277-284, and footnote citations therein.

Note: 100 A.L.R. 900, and cases cited therein.

*State of West Virginia v. O'Brien*, 94 S.E.2d 446 (1956), holding that constitutional prohibition against creation of state indebtedness was intended to prohibit creation of debts, by the State, required to be repaid by a public tax.

In our considered opinion, the Lease-Purchase Agreement here involved is terminable in certain contingencies and , therefore, is not absolute, so as to create any immediate or present obligation for the total amount of the rental payments agreed upon for the entire term of the Agreement.

In this connection, the Nevada Supreme Court, in the case of *Ash v. Parkinson*, [5 Nev. 15](#), 26, has held that claims against the State *which are paid when due*, are not "debts" within the constitutional limitation respecting state indebtedness. Since, under said Lease-Purchase Agreement, rental payments thereunder are paid only on an accrual basis, no "debt" within the purview of the constitutional prohibition can be deemed to exist. (*See also* 3 Tiffany, Landlord and Tenant, 3d Ed., 1939, Sec. 879, wherein it is indicated that, at common law, future rent was not considered a presently existing debt or liability.)

It has been urged in some jurisdictions that a bona fide lease with option to purchase is "\*\*\* a palpable scheme or device to evade the constitutional limitation of indebtedness \*\*\*." (Note, "Lease-Financing By Municipal Corporations As A Way Around Debt Limitations," George

Washington Law Review, 1957, Vol. 25, p. 377.) The simple answer to any such contention or argument has been stated as follows:

(W)hile this arrangement is designed to avoid the effect of such a constitutional provision, it is intended to do so lawfully, by keeping out of prohibited territory altogether, rather than by attempting to cross the territory in disguise; that this plan is not designed to accomplish indirectly that which could not be done directly, but rather to accomplish legally that which could not be done in an unlawful manner. For it must be kept in mind that the purpose of a debt limitation is not to prevent the municipality (Ed., State) from acquiring buildings or public works, but to place a limitation on the extent to which it may pledge its credit and hence burden the taxpayers. And if it can acquire such property without becoming indebted therefor or exceeding the constitutional limitation, neither the spirit nor the letter of the provision has been violated. There is, in the typical case, an intention to acquire the leased property, but no obligation to do so.

The force of this argument was recognized in *Cochrane v. Middleton* (1924) 14 Del. Ch. 295, 125 Atl. 450, in which the court said: "The complainants insist that the agreement which has been made with Fairbanks, Morse & Company is but a clever scheme to circumvent the debt limit provisions of the town charter. If the 'scheme' creates no forbidden indebtedness, it is difficult to discover wherein it may be said to be a circumvention of the charter." (Note, 71 A.L.R. 1318, 1326, and other cases cited therein.)

Before leaving this fundamental portion of our analysis, we deem it proper to make reference to the provisions of [NRS 612.605](#) and [612.615](#) hereinbefore cited, providing for two additional "special funds," in our opinion, also available to the Executive Director of the Nevada Employment Security Department for payment of administrative and operating costs of said Department, if and to the extent authorized and necessary.

We now consider specifically the first of the two submitted questions, namely:

Is the State of Nevada's general fund in any way committed to the obligation assumed by the Nevada Employment Security Department, as Lessee, under the herein-considered Lease-Purchase Agreement?

For sufficient answer to this question, reference is made to [NRS 612.610](#), hereinbefore quoted. As indicated therein, it is declared legislative policy *and law* to make reimbursement of the unemployment compensation administration fund, *out of the general fund*, in the *remote* event that federal funds therefrom prove to be insufficient because lost "or expended for purposes other than, or in amounts in excess of, those found necessary \* \* \* for proper administration \* \* \*." (See also [NRS 612.605](#), [612](#), 615, herein quoted insofar as relevant hereto; Attorney General's Opinion No. 200, January 11, 1961.)

The remedy and procedure for recovery on any claim against the State of Nevada (arising from the obligation assumed by the Nevada Employment Security Department, as Lessee, under the Lease-Purchase Agreement here under consideration) has been fully discussed in the last-mentioned Attorney General's Opinion, when legislatively appropriated funds are involved, and there appears to be no need for further elaboration thereon. The conclusions therein stated are substantially adopted as to legal validity for our present purpose.

The second submitted question may now be considered, namely:

In the absence of legislative appropriation, can Brunzell construction Co., Inc., of Nevada, as Lessor, have recovery, in any event, against the State of Nevada, by reason of the breach or default of the Nevada Employment Security Department, as Lessee, under the Lease-Purchase Agreement here under consideration?

Again assuming the *remote* possibility of the failure of federal funds, and the failure of the State Legislature to make appropriation of funds requisite for payment of rental, by the Nevada Employment Security Department, as Lessee, what recourse, if any, is available for recovery by the Lessor, under the Lease-Purchase Agreement indicated?

Apart from recourse to possessory actions (available to a lessor in connection with default or breach on the part of a lessee), and generally applicable law relating to mitigation of damages chargeable by a lessor against a lessee, requiring exercise of reasonable efforts by the lessor to

lease premises to other persons, it would appear that [NRS 353.085](#) and [353.095](#) provide a sufficient answer to this second question.

[NRS 353.085](#) (“Payment of claims when no legislative appropriation has been made: Procedure”) provides as follows:

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.

[NRS 353.095](#) (“Limitation on alleged claim: When barred”) provides as follows:

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, 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.* (Emphasis supplied.)

In other words, *even if the Legislature* refused to approve the claim as submitted by the Board of Examiners or *failed to make appropriation of funds requisite for satisfaction of any just obligation predicated on the Lease-Purchase Agreement here under consideration*, the Lessor therein named is expressly afforded a remedy by court action, as provided in [NRS 41.030](#), to reduce his claim to judgment and to have recovery thereon. Such remedy and recovery, in our considered opinion, is available in both State and Federal courts and protected by both State and Federal Constitutions. (Art. I, Sec. 15, Nev. Const.; Art. I, Sec. 10, U.S. Const.)

Respecting necessary services, such as required office facilities essential to proper administration of public functions and responsibilities, it is our considered opinion that any attack on the involved Lease-Purchase Agreement on constitutional grounds would have little legal merit. In this connection, the following is noteworthy:

A state, or a municipal corporation, may lawfully contract for necessary services (Ed., a state office building) over a period of years and agree to pay therefor in periodic installments as the services are furnished, and in such cases, the aggregate of the amounts to be paid as the services are rendered under such contracts are not considered as an indebtedness of the state, or of the municipal corporation, and such contracts are not rendered invalid by the fact that the aggregate of the installments exceeds constitutional debt limitation. *Book v. State Office Building Commission*, 149 N.E.2d 273 (1958). *See also* Application of Oklahoma Capitol Improvement Authority, 355 P.2d 1028 (1960).

We are also of the considered opinion that a taxpayer has no right to maintain an action to enjoin the allegedly wrongful expenditure of public funds, where such funds (as in the instant case) are funds received from the Federal Government rather than the State of Nevada, and, therefore, not raised by state taxation. (Note, 131 A.L.R. 1230; *State v. Florida State Improvement Commission*, 30 So.2d 97 (1947).)

We think it in order to state that, but for the question concerning the validity of the involved Lease-Purchase Agreement raised since the close of the legislative session, we would have



declined any further comment on this matter and rejected the request for our further opinion on the legal questions submitted. Such action on our part would have been justified because (1) we had already released our official opinion on the matter, and (2) the legal rights and obligations of the respective parties are, in any event, already fixed by executed written agreements by the concerned parties.

However, some confusion and concern undoubtedly have been fostered by newspaper and other comments relating to possible invalidity of the Lease-Purchase Agreement involved. While the views and conclusions herein stated may, therefore, be somewhat repetitive of those included in previous opinions released by this office, such repetition was unavoidable herein, in view of the request for additional clarification by all interested parties, in the interest of preventing unnecessary and unwarranted interruption and delay in the completion of construction of the "new" Employment Security Department office building.

Unless this office finds it necessary hereafter to protect the legal rights of the Nevada Employment Security Department or of the State of Nevada, as provided in the executed agreements relating to the involved construction project, we believe that the matter herewith has been sufficiently considered and commented upon.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-230 GAMING**—Pinball machines are slot machines as defined in Gaming Act if owner or lessee may remove free games won and exchange same for cash, premiums, merchandise, tokens or anything of value.

Carson City, June 27, 1961

Nevada Gaming Commission, Carson City, Nevada

### STATEMENT OF FACTS

Gentlemen:

In 1961 the Nevada Legislature, by Assembly Bill 200 effective April 6, 1961, amended Chapter 463, Nevada Revised Statutes.

The portion of that amendment that we are concerned with at this time relates to the definition of a "slot machine."

[NRS 463.020](#), subsection 1(x) defines a slot machine as follows:

x. "Slot Machine" means any mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, tokens or any thing of value whatsoever, whether the payoff is made automatically from the machine or in any other manner whatsoever.

Prior to the 1961 amendment a slot machine was defined under [NRS 463.020](#), subsection 1(x):

x. "Slot Machine" means any mechanical device, contrivance or machine played for money for checks or tokens redeemable in money or property.

### QUESTION

Are the so-called pinball machines which offer an award in free games only within the definition of slot machine as amended in 1961?

### CONCLUSION

Pinball machines that pay out in free games only are within the definition of "slot machine" as amended in 1961 provided the number of free games awarded are registered on the machine for all to see and the owner or lessee of the machine may, in some manner, remove the free games without playing the games.

### ANALYSIS

The so-called pinball machines in question may, in general, be described as a machine or mechanical device operated electrically, mounted on four legs and stands about 3 1/2 feet off the floor. It has an inclined horizontal playing field covered by a plate glass. The playing field is dotted with various assortments of pegs, lights, bumpers and holes. There is a vertical scoreboard at the inclined rear of the machine which reflects the scores and the free games that have been awarded to the player.

Upon insertion of a coin metal balls are placed in a position that the player may release the balls one at a time by pulling and releasing a plunger which strikes the ball causing it to be propelled onto the playing field. By striking certain bumpers and pegs or coming to rest in a hole on the playing field the player compiles a score. Upon attaining a certain score or combinations, free games are awarded. Thereafter the player may play the machine by working the coin chute without the necessity of using a coin until all the free games have been used.

The question of whether or not pinball machines are gaming devices has been the subject of much litigation in the various states. An examination of those cases reveals that even in states having virtually identical language in their laws defining gaming devices there is no uniformity of decisions.

In *State v. One "Jack and Jill" Pinball Machine* (Mo. 1949), 224 S.W.2d 854, the prosecuting attorney sought to have a pinball machine condemned and destroyed as a gambling device. The machine in question did not, in the language of the statute, give "tokens, slugs, tickets, money, prizes, merchandise or anything of that character."

The court said after a lengthy discussion of what constitutes a thing of value:

To be allowed to do a useless thing free does not make that privilege property or a "thing of value" because one has previously paid for doing another such useless thing. There is a vast difference between cost and value. Permission to use a useless thing is not property or a "thing of value" although the device would cost money to construct.

In Arkansas the statute condemned betting on a gambling device "any representative of anything that is esteemed of value." The Arkansas court in the case of *Rankin v. Mills Novelty Co.*, 32 S.W.2d 161, held that anything that contributed to the amusement of the public was a thing of value and therefore pinball machines which paid out in free games were gambling devices.

In the case of *Steely v. Commonwealth (Ky.)*, 154 S.W.2d 977, that statute made it a criminal offense to operate a “machine or contrivance used in betting whereby money or other thing may be won or lost.” That court held a free game was included within the phrase “or other thing.”

In *Giomi v. Chase (N.M.)*, 132 P.2d 715, the statute made it unlawful to operate a gambling device “for money or anything of value.” It was held that a pinball machine giving free games was a gambling device.

An opposite view was taken by a Pennsylvania court in *Commonwealth v. Kling*, 13 A.2d 104, wherein the court said free games or the lure to play them on a pinball machine was not a “thing of value.”

In *Gayer v. Whelan (Cal.)*, 138 P.2d 763, the court held a free game on a pinball machine was not a “thing of value.”

In *People v. Gravenhorst (N.Y.)*, 32 N.Y.S.2d 760, the court held that free games given by the machine, after the money had been deposited in it was a “thing of value” and the statute had been violated.

The court in *State v. Pual (N.J.)* (1957), 128 A.2d 737, in holding free games registered on a pinball machine were a “valuable thing” within the meaning of the statute, quoted with approval from *Hunter v. Mayor of Teaneck Township (N.J.)*, 24 A.2d 556:

The pinball machines involved are nothing but ingeniously designed and purposefully constructed mechanical gaming devices to appeal to, induce, lure and encourage the gaming instinct in the public generally and children particularly.

*Washington Coin Machine Co. v. Callahan (U.S. Court of Appeals D.C.)* (1944), 142 F.2d 97, illustrates a completely opposite view. There the penal statute made it unlawful to operate a gaming device designed for the purpose of playing any game of chance for “money or property.”

The court said a free game on a pinball machine was not a thing of material value hence not property. That court said:

Whatever inducing motive may actuate the restless, the idle, or the curious to spend their time in this silly form of amusement it certainly is not the gambling instinct, nor is it the incitement to gain by chance, anymore than is a game of solitaire. In the one case no more than in the other is there the hope or chance of a reward which is either money or property.

To cite further cases, and there are many, would only further illustrate the lack of uniformity in the decisions.

After reading the many cases on this question, we are inclined to the view that the better reasoned cases are those holding a free game awarded by a pinball machine, of itself, is not a “thing of value.”

In our opinion “thing of value” as used in our statute defining “game” or “gambling game” should be interpreted as a thing of monetary value. To say a free game awarded by the machine is a thing of value would be tantamount to saying free amusement in playing the machine is a thing of value. It would then follow that if free amusement is a thing of value, then the amusement derived from playing a machine for the original coin would be a thing of value. Such a conclusion would mean that every coin-operated machine that delivers or entitles the player to amusement would become a slot machine.

We recognize that the pinball machines we are concerned with here not only register the number of free games awarded the player, but the owner or lessee of that machine, in various ways, may remove those free games in a way other than working the coin chute. On some machines there is an attachment, generally out of sight from the player, which by working it all the free games are removed immediately. Sometimes the free games are removed by a device that is placed in a location that is convenient to the proprietor, e.g., behind the counter or next to the cash register.

In our opinion the only good reason for registering the free games on the machine and permitting the owner or lessee of the machine to be able to remove them is so that both the player and owner or lessee can quickly calculate the payoff for those free games. The payoff may be in money or merchandise.

We think, by their very nature, these pinball machines that register free games and permit those free games to be removed in a manner other than by working the coin chute, have made the registered free games a “thing of value” within the meaning of the statute, since free games won can be exchanged for cash, premiums, merchandise, tokens or thing of value. If said machines are used strictly for amusement, there is no necessity of clearing the machine of unplayed free games.

It is our conclusion that pinball machines which show in some manner the free games registered thereon and permit the owner or lessee of that machine to remove those free games in a manner other than by playing off the free games, fall within the definition of a “slot machine.”

Under [NRS 463.350](#) persons under 21 years of age are prohibited from playing said machines or from loitering on or about the premises where these machines are located. Said machines are required to be licensed in the same manner as other slot machines.

Respectfully submitted,

ROGER D. FOLE  
Attorney General

By: Michael J. Wendell  
Special Deputy Attorney General

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**OPINION NO. 61-231 STATUTE REVISION COMMISSION; BOARD OF EXAMINERS; BUDGET DIRECTORS; PERSONNEL DEPARTMENT**—Chapter 205, 1961 Statutes, amending [NRS 220.050](#) construed and held to exempt employees of Statute Revision Commission, other than Director, from Personnel System. Chapters 220 of NRS and 353 of NRS construed and held to regulate salaries of Statute Revision employees at amounts specified in budget request of Commission upon which Legislature made appropriation. Statue Revision Commission must comply with rules and regulations of Board of Examiners and Budget Director, including presentation and preaudit of claims and similar matters.

Carson City, July 12, 1961

Honorable Howard E. Barrett, Director of the Budget, Carson City, Nevada

Dear Mr. Barrett:

You have asked for our interpretation of recent legislation affecting the Statute Revision Commission and the status of its employees. You have likewise requested a construction of the law in relation to the Personnel System of the State of Nevada, Chapter 284 of NRS and the State Budget Act, Chapter 353 of NRS, including rules and regulations of the State Board of Examiners, forms, preaudit of claims, and kindred matters. We shall attempt to outline the legal aspects of the questions involved.

**FACTS**

Prior to the 1961 Session of the Legislature of the State of Nevada, the employees of the Statute Revision Commission were subject to the provisions of the Personnel Act of the State of Nevada (Chapter 284 of NRS). The Director was in the unclassified service of the State and the other employees, professional and clerical, were in the classified service ([NRS 284.140](#), subsection 2; 220.040; 220.050). The Commission, consisting of the three Justices of the Supreme Court of the State of Nevada ([NRS 220.020](#), subsection 2), then had the authority to appoint four assistants in the unclassified service of the State ([NRS 220.050](#), subsection 3), but the clerical and stenographic help were in the classified service ([NRS 220.050](#), subsection 2).

A substantial change was brought about by enactment of Chapter 205 of the Statutes of Nevada 1961, page 346, approved and effective March 29, 1961:

Section 1. [NRS 220.050](#) is hereby amended to read as follows:

220.050 1. The commission is authorized to employ:

(a) Necessary clerical assistants.

(b) Necessary assistants in drafting and research who shall be familiar with methods of compilation and drafting of laws.

2. The compensation of necessary assistants shall be fixed by the commission.

3. *All necessary assistants employed by the commission shall be exempt from the provisions of chapter 284 of NRS.*

Section 2. This act shall become effective upon passage and approval. (Emphasis supplied.)

The portion of the act emphasized above is the part which is necessary to be considered in answering the questions posed with regard to applicability of the Personnel Act of the State of Nevada.

## QUESTIONS

1. Are employees of the Statute Revision Commission in the classified service of the State of Nevada?

2. Are employees of the Statute Revision Commission in the unclassified service of the State of Nevada?

3. Are employees of the Statute Revisions Commission entirely outside of the provisions of Chapter 284 of NRS?

4. Are the claims of the employees of the Statute Revision Commission subject to the rules and regulations of the State Board of Examiners, including presentation and preaudit of claims for:

(a) Salaries; accrued annual leave, terminal leave, and monetary payment and compensation for overtime;

(b) Travel expenses and regulations;

(c) Proper, standard reporting and accounting forms;

(d) Justifiable state expenses?

## CONCLUSIONS

Question No. 1: No.

Question No. 2: No, except as herein qualified.

Question No. 3: Yes, except as herein qualified.

Question No. 4: Yes.

## ANALYSIS

Chapter 284 of NRS created the State Department of Personnel of the State of Nevada and is the so-called "merit system." The purpose of the statute is, among other things, to provide *all citizens a fair and equal opportunity for public service in a system of uniform job and salary*

*classifications* ([NRS 284.010](#)). The Legislature, which devised and established the entire system, has the power to determine to what extent the statutory provisions shall be applicable in any given case. As long as classification and differentiation as between departments and the employees thereof are based on reason and are not arbitrary or discriminatory, such determination would be constitutional and binding. Further, except as to accrued rights under the system, the Legislature, if it saw fit, could even abolish the entire scheme at its next session. The remedy for action of that type would then be political, resting with the people, rather than executive or judicial.

Under the “merit system” the elective or appointive head of each department, agency, commission or institution is usually in the unclassified service of the State ([NRS 284.140](#), subsections 1 and 2). *See*, however, [NRS 284.090](#) (Personnel Director) and [NRS 422.150](#), subsection 2 (Welfare Director) for instances of departmental heads in the classified service. The elective or appointive head of each department, agency, commission or institution, in turn, has the express legal power to appoint one deputy and one chief assistant in the unclassified service ([NRS 284.140](#), subsection 3). Certain other enumerated classes of employees (not necessary here to be considered) are likewise in the unclassified service as may be observed by reading the various subsections of [NRS 284.140](#).

The Statute Revision Commission is doubtless subject to the same pressures, stresses and strains, both economic and viable, as constantly confront other departments and agencies of government and institutions of State. The need for specially trained professional and clerical help cannot always be met.

Chapter 205, Statutes of Nevada 1961, page 346, granted to the Statute Revision Commission complete exemption for all its employees from the provisions of the “merit system,” with but one exception, treated below. This immunity, not granted to other departments, applied to all alike, including clerks and stenographers performing tasks comparable to those performed in other agencies and departments.

Enactment of this kind cannot help but bring about erosion of the “merit system” and cause dissatisfaction among state employees not similarly favored. Nonetheless, the answers to questions involving applicability of the Personnel Act to employees of the Statute Revision Commission (except the director himself) must be resolved by stating that all employees are completely exempted from the operation of Chapter 284 of NRS by reason of the 1961 amendment above referred to (Chapter 205, Statutes of 1961, page 346).

As to the director, either designedly or by oversight, the 1961 amendment applied only to [NRS 220.050](#) and not to [NRS 220.040](#). Accordingly, he is still in the unclassified service of the State ([NRS 284.140](#), subsection 2).

This brings us to consideration of Chapter 353 of NRS and the controls established by the Legislature over the finances and business operations of the Statute Revision Commission, along with other agencies, departments and commissions of the State of Nevada. The problems involved pertain to finances and budgeting and are not peculiar to the personnel system or the Statute Revision Commission.

The State Board of Examiners is created and established by [NRS 353.010](#). Its powers and duties are outlined in the succeeding sections and, particularly, include examination of the books and records of the State Controller and State Treasurer and of the accounts and vouchers in their respective offices ([NRS 353.055](#)). This is to safeguard the State against improper expenditure of government funds.

Claims against the State are presented to the Board by petition and must be examined by the Board before they can be paid. In cases where no appropriation has been made by the Legislature, the claim and report of the board thereon are transmitted to the Legislature on the first day of its next ensuing session ([NRS 353.085](#)). Where claims based on services or advances for which an appropriation has been made by law and which have been authorized by law, are presented to the board, they are examined and allowed or rejected. If allowed, they are passed on to the State Controller for preparation of his warrant and payment by the State Treasurer ([NRS 353.090](#); 227.170, subsection 1; 227.200, subsection 2; 226.110, subsection 3).

The position of Director of the Budget is created by [NRS 353.160](#) and he is ex officio clerk of the State Board of Examiners ([NRS 353.190](#).) As such clerk he is charged with many duties including assistance in the examination of claims by the State Board of Examiners and in the classification and audit of all claims required to be presented to the Board ([NRS 353.190](#), subsection 1(b)).

The Director of the Budget must devise and prescribe “forms of operation reports to be required periodically from the several departments and agencies, and to require the several departments and agencies to make such reports.” ([NRS 353.185](#), subsection 4.) These duties and the correlative powers of the Director are in no way dependent upon or limited by any provision of the Personnel Act (Chapter 284 of NRS) or of the Statute Revision Commission Act (Chapter 220 of NRS). Whether the employees of an agency or department are in the classified service, the unclassified service or neither, does not alter the duties of the Budget Director with reference to that department or agency or abridge his statutory powers.

Turning now to another important function of the Budget Director, we find that he is charged by law with the duty of preparing the annual executive budget report for the Governor’s approval and submission to the Legislature ([NRS 353.185](#), subsection 5) and the further task of preparing a state budget for the ensuing fiscal year in abundant detail ([NRS 353.185](#), subsection 6 and its various subdivisions).

Finally, for the purposes of this discussion, the Director of the Budget is obligated by law to examine and approve work programs and quarterly allotments to the several departments and proposed changes in work programs ([NRS 353.185](#), subsection 7). In scanning the provisions of law relating to the duties and powers of the State Board of Examiners and the Budget Director, both as ex officio clerk of the Board and as an independent official of government, one cannot avoid being impressed with the elaborate system which a cautious legislative branch of the government has erected to safeguard the finances of the State.

Each department, agency, commission and institution of government is required to submit to the Director its proposed budget for the ensuing fiscal year on or before the 1st day of September of each year ([NRS 353.210](#), subsection 1). The proposed budget of each department is required to be detailed and broken down into various categories such as salaries, travel expenses, operating funds and necessary equipment ([NRS 353.210](#), subsection 2) and the different classes of expense are again subdivided into subclassifications with considerable detail so that the Governor can make his budget report to the Legislature on a comprehensive and meaningful basis ([NRS 353.185](#), subsections 5 and 6; [353.205](#)).

In reporting to the Legislature and in delivering his “budget message” the Chief Executive generally reviews the proposed budget requests of the departments and agencies of government, which are listed in a column of the budget report entitled “Agency Requests” and then in another column, next to the figures requested by the agency and headed “Governor Recommends” he lists figures which he requests the Legislature to include in its appropriation bills. These may or may not differ from those submitted by the agency, but they are listed item by item in the executive budget report.

The procedure above outlined is not followed in the case of requested appropriations for legislative agencies or commissions or for the judicial branch of government or any of its commissions or agencies. The Legislature itself, of course, submits no proposed budget to the Governor or anyone else with reference to its operations during the legislative session, but simply appropriates the funds necessary properly to conduct the session. (*See*, for example, 1961 Laws of Nevada, Chapter 1, page 1; Chapter 115, page 155; Chapter 315, page 601.)

In the budget report of the governor for the Statute Revision Commission, the column entitled “Governor Recommends” is left blank since the Commission is a department of the judicial branch of government, at least insofar as its duties of revising statutes are concerned ([NRS 220.010](#) to [220.050](#), inclusive). It may also be a special department or commission of the legislative branch of government in the preparation and amendment of legislative measures ([NRS 218.240](#), [218.260](#)). In either event, the Governor would not review or pass upon the proposed request for funds but would merely present the requested budget to the Legislature for action.

The procedure outlined has in fact been followed with respect to the Statute Revision Commission since its formation and inception.

In appropriating funds for the budget of the Statute Revision Commission, the Legislature, at its session in 1961, voted the sum of \$234,156 for the fiscal year 1961-1962 and \$203,313 for the fiscal year 1962-1963 (Statutes of Nevada 1961, Chapter 316, page 603, item 18). This was precisely the amount requested by the Commission and was supported by a detailed breakdown of the specific categories, classifications and items required by law ([NRS 353.210](#), subsection 2). The request of the Commission was prepared on blanks furnished by the Director of the Budget and submitted to him for the report of the Governor to the Legislature ([NRS 353.210](#), subsection 1).

Among the categories or classifications listed in the commission estimate of expenditure requirements was one for salaries of the employees, including the Director of the Commission and his clerical, drafting and research assistants. Under the heading of salaries a total number of positions was listed, with each separate position identified and a specific amount of remuneration set opposite each such position. As a matter of determining legislative intent, we must conclude from all these facts, that where the Legislature had before it the detailed estimate of the Commission as appeared in the budget report of the Governor and thereupon appropriated funds for the expenses of the Commission in the exact amount requested, the appropriation was designed to meet such expenses precisely as set forth in the budget request submitted. For that reason, if no other, it is our opinion that the individual salaries and number of positions listed in the budget of the commission, were then, and now are, binding upon the Commission, except for possible change in work program adverted to hereinbelow.

It must be presumed, in the absence of a very cogent showing to the contrary, that the total appropriation for the uses of the Statute Revision Commission was made up of the individual items contained in the figures submitted, and entered into and necessarily affected by result. Any other conclusion would render entirely meaningless and a complete waste of time and energy, the entire procedure whereby budget requirements are presented to and acted upon by the Legislature. Nor do we find any basis, statutory or otherwise, in arriving at a different result by reason of the fact that the Commission, consisting of the three Justices of the Supreme Court of the State of Nevada ([NRS 220.020](#), subsection 2), has power to appoint the Director of the Statute Revision Commission and fix his salary ([NRS 220.040](#), subsection 2). In fact, we are quite confident that the Commission would not wish any different rule applied to this Commission than is used with reference to other agencies of government, without good cause shown for such difference.

As a necessary corollary of the conclusion above expressed, it follows that the claims of the employees of the Statute Revision Commission are subject to the rules and regulations of the Board of Examiners, including preaudit of claims for salaries, accrued annual leave, terminal leave and monetary payment and compensation for overtime. The contention that claims for salaries, in amounts other than those listed in the budget, must be honored and approved by the Budget Director as long as there is money available generally to the Commission within the total limit of the appropriation granted would, in our opinion, be violative of legislative intent and on that ground must be rejected. If this were not true, the agency could list a number of positions at a fixed salary in the budget and then cut the number of jobs in half immediately upon adjournment of the Legislature and pay each of the remaining employees double the salary listed in the budget for that position. We are certain that the Legislature would not look with favor upon any such practice or procedure.

This view is also reflected in [NRS 353.255](#), subsection 1, which provides that sums appropriated "*shall be applied solely to the objects for which they are respectively made, and for no others.*" (Emphasis supplied.)

The views herein expressed are fortified by consideration of the statutory provisions regarding work programs of the agencies and departments, and approval, revision, alteration or changes by the Governor with the assistance of the Director of the Budget ([NRS 353.215](#)). Here again we have unmistakable evidence of legislative intent to vest in the Governor and Director of the Budget the legal power to require the agency or department to keep its expenditures not only



within the total yearly appropriation for that agency or department and within the quarterly allotments, but also to adhere to the breakdown of categories and classifications within the budget ([NRS 353.215](#), subsection 1(b); subsection 2).

In other words, the quarterly allotments, within the appropriations for the entire fiscal year, are determined on the basis of the work program submitted by the department and reviewed by the Governor and Budget Director, and each allotment is subdivided into the constituent elements, such as salaries, operating expenses, stationery, travel, etc., all based on the budget request as finally approved. This is one point however, at which relief may be granted to a department or agency, if found necessary and proper by the Chief Executive.

Revision of work programs and allotments may be permitted when the head of a department or agency is confronted by changed conditions ([NRS 353.220](#), subsection 1). What those changed conditions must be and the extent to which revision of work programs may be allowed are not spelled out in the statute and are apparently intended to be left to the sound discretion of the Governor upon the basis of the facts submitted and the report and recommendations of the Director of the Budget. It should be unnecessary to add that nothing in this opinion should in any way influence the decision of the Director or Governor should such an application for change of work program be presented for their consideration and determination.

The procedure laid down by statute is for the head of department to submit a proposed revised work program to the Governor through the Budget Director ([NRS 353.220](#), subsection 1). This must be done at least 15 days prior to the quarter when the proposed revision is scheduled to take effect if approved ([NRS 353.220](#), subsection 2). The Budget Director then submits the request to the Governor with his recommendations in writing and the Governor approves or disapproves the proposed change in work program in writing ([NRS 353.220](#), subsections 2 and 3), with notice in writing to the head of department involved and to the State Controller and Director of the Budget.

We repeat that the fact that there is sufficient money in the departmental budget in the hands of the fiscal officers of the State to satisfy the request of the head of department does not relieve him of the duty of complying with statutory measures and budgetary controls designed to prevent waste in government and misapplication of funds appropriated by the lawmaking body for specific purposes ([NRS 353.255](#), subsection 1).

What has been written with reference to salaries applies with even greater force to travel expenses and other routine matters in the operation of an agency or department. The Budget Director may properly require compliance with the rules and regulations of the Board of Examiners and of the Director of the Budget as to standard reporting and accounting forms, justifiable state expenses and similar matters. We do not understand that any greater burden is placed upon the Statute Revision Commission in these matters than on any other agency, and the Commission should not expect to carry any lighter burden than is borne by other agencies and departments of State. It might be well to observe that the rules and regulations relating to travel expenses, for instance, have been, and are, punctually fulfilled by member of the judiciary.

Aside from the relief which might possibly be obtained by the Statute Revision Commission by way of application for revision of work program addressed to the discretion of the Governor, the only other method of approach to the problem, so far as we can see, is direct application to the Legislature at its next session.

We are irresistibly impelled to the conclusion, that quite independently of the provisions of the Personnel Act or "merit system" of the State of Nevada, the Director of the Budget not only may, but is under direct mandate of the Legislature to, exact compliance with the requirements of the Budget Act of the State of Nevada ([NRS 353.150](#) to [353.245](#), inclusive), including, but not limited to, [NRS 353.185](#), subsection 4 (forms), subsection 7 (work programs), [NRS 353.210](#) (budget estimates), and [NRS 353.215](#) and [353.220](#) (annual work programs, allotments and revisions).

*See* Attorney General Opinion No. 15, June 10, 1960, generally in accord.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Norman H. Samuelson  
Deputy Attorney General

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**OPINION NO. 61-232 NEVADA TAX COMMISSION, SALES AND USE TAX DIVISION**—Nevada Sales and Use Tax Act (Chapter 372 of NRS) construed and held not to authorize any allowance of exemption from the use tax in respect of tangible personal property purchased out-of-state, because not readily obtainable, or not obtainable, in Nevada, apart from other statutory provision in the act authorizing such tax exemption or exception. (Reference: attorney General Opinion No. 163, dated June 7, 1960, clarified on this point, and held to be limited specifically to bottles utilized as returnable “containers,” a commodity expressly exempted from the use tax in certain indicated circumstances.)

CARSON CITY, July 14, 1961

Mr. R. E. Cahill, Secretary, Nevada State Tax Commission, Carson City, Nevada

Attention: Mr. Jack W. Williams, Administrator, Sales and Use Tax Division.

#### STATEMENT OF FACTS

Dear Mr. Cahill:

Attorney General Opinion No. 163, dated June 7, 1960, issued by this office, stated the following conclusion:

State Sales and Use Tax Act reviewed and construed as excepting from collection of the use tax bottles purchased by Nevada bottling firms in other states, and utilized by them as returnable “containers.”

In the course of our analysis of that particular problem the following general observations were made in said opinion:

Regarding possible application of the *use* tax, it may parenthetically be noted that 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 the sales tax, the *use*, consumption, distribution, and 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. The rationale of “*use taxes*” is two-fold: (1) to prevent evasion of the sales tax, through out-of-state purchase in states where there are no sales taxes, where the benefit of an exemption from the sales tax can be secured, 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, therefore, is that they shall apply to tangible personal property coming from another state, whether or not a *sales* tax be in effect there. (Citing authorities.)

In the situation before us, however, the rationale for application of the *use* tax is totally absent; that is, since bottles are not manufactured in Nevada and not available for purchase therein, purchase of same in another state is in no manner an *evasion* of the Nevada Sales Tax, nor (except as the state may be deprived of tax

revenues thereon) can local merchants, or the economy of the state, be adversely affected by such out-of-state purchases.

It now appears that the foregoing observations, *taken out of context*, have given rise to the following:

### QUESTION

Is the storage, use, or other consumption in Nevada of tangible personalty purchased from a retailer not registered with the Nevada Tax Commission and located outside Nevada, subject to Nevada's use tax when the personalty so purchased is either not obtainable, or not readily obtainable, in Nevada?

### CONCLUSION

Yes.

### ANALYSIS

As heretofore intimated, the observations included in Attorney General Opinion No. 163, dated June 7, 1960, relative to the rationale, *in general*, of use taxes, must be considered in the context of said opinion; it certainly cannot be deemed applicable in every instance of purchases made out of the State of Nevada, *and apart from the particular and express statutory provisions of the Nevada Sales and Use Tax Act* (Chapter 372 of NRS). Moreover, the rationale of use taxes, *in general*, as stated in such portion of our prior opinion, were expressly indicated to be merely parenthetical in nature, and were not necessary to the conclusion reached by us in respect to the specific question considered in said prior opinion. Said conclusion was based on other cogent and sufficient grounds, specifically pertaining to bottles utilized as returnable "containers," *an item expressly exempted in the Nevada Sales and use Tax Act* ([NRS 372.290](#)).

There is, therefore, no proper legal justification for any person, on the basis of such general and parenthetical observations, to make claim for exemption or exception from applicability of, and liability for, the use tax of the State of Nevada in connection with the storage, use, or other consumption in Nevada of tangible personal property purchased from a retailer located in some other state, merely because the involved tangible personal property was either not obtainable, or not readily obtainable, in Nevada.

We have heretofore noted (Attorney General Opinion No. 163, *supra*) that it is well-settled law that tax exemption provisions must be strictly construed against those claiming any such benefit, even though such exemption provisions should not be given a distorted or unreasonable construction (17 A.L.R. 1027, 1029; 108 A.L.R. 284,286 and footnote citations). In practical effect, this generally means that one claiming exemption from taxes or excises must be able to claim such immunity either on the basis of express statutory provision therefor, or at least reasonable legislative intentment thereof. Neither of these alternative conditions can properly be satisfied except on the basis of applicable statutory provisions of the Nevada Sales and Use Tax Act (Chapter 372 of NRS).

[NRS 372.185](#) (Imposition and rate of use tax) provides as follows:

An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this state at the rate of 2 percent of the sales price of the property.

[NRS 372.190](#) (Liability for tax; extinguishment of liability) provides as follows:

Every person storing, using or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this state, except that a receipt from a retailer maintaining a place of business in this state or from the retailer who is authorized by the tax commission, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this chapter relating to the use tax, regarded as a retailer maintaining a place of business, in this state, given to the purchaser pursuant to [NRS 372.195](#) is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

[NRS 372.195](#) relates to the receipt given to the purchaser evidencing that the retailer has already collected the tax.

[NRS 372.250](#) (Presumption of purchase from retailer) provides as follows:

It shall be further presumed that tangible personal property shipped or brought to this state by the purchaser after July 1, 1955, was purchased from a retailer on or after July 1, 1955, for storage, use or other consumption in this state.

[NRS 372.260-372.350](#) inclusive, makes provisions for all the exemptions from both the sales and use tax which are statutorily authorized. Nowhere in any of these statutory provisions, or elsewhere in the Nevada Sales and Use Tax Act, is exemption from the use tax authorized because the involved tangible personal property is either not obtainable, or not readily obtainable, in Nevada. In this respect, the Nevada Sales and Use Tax Act differs from the corresponding use tax provisions in effect in some other states. (For example Missouri, Iowa, and Arizona.)

For purposes of this opinion and the particular question under consideration, it should be helpful to review the matter in the light of the Iowa use tax law. The Iowa use tax law, enacted in 1937, and now Chapter 423, Code of Iowa, 1946, in Section 423.2 thereof (amended 1949 by Chapter 193, Acts of the 43rd General Assembly), provides in part as follows:

An excise tax is hereby imposed in this state of tangible personal property purchased \* \* \* for use in the state, at the rate of two per cent of the purchase price.

Section 423.1 (Iowa Code), entitled "Definitions," restricts the scope of the foregoing section by exemptions and exceptions, including the definition that "use" means and includes the exercise of any right over tangible personal property, incident to ownership, "except that it shall not include processing \* \* \*." "Property used in 'processing' \* \* \* shall mean and include \* \* \* (c) industrial materials and equipment, which are not readily obtainable in Iowa, and which are directly used in the actual fabricating, compounding, manufacturing, or servicing of tangible personal property intended to be sold ultimately at retail." The Iowa Tax Commission, by Rule 172A, construed "Readily obtainable in Iowa," in part, as follows:

- (a) When normally carried as a stock item in Iowa for sale, irrespective of quantities, or
- (b) When the item is manufactured in Iowa for sale, irrespective of quantities, or
- (c) When an item acquired outside of Iowa, but not stocked or manufactured in Iowa, is fairly and reasonably competitive to an item which is stocked in Iowa for sale or manufactured in Iowa for sale.

The foregoing statutory provisions and regulation were judicially construed in the case of *Peoples' Gas & Electric Co. v. State Tax Commission*, 238 Iowa 1369, 28 N.W.2d 799 (1947). Expressly taking note of the rationale of the use tax hereinabove stated, the Court in this case nevertheless held the Iowa use tax applicable to purchases of the company made out of the state of poles, wires, and transformers which the company maintained had not been, nor were, readily obtainable in Iowa.

In reaching said decision, the Court very carefully distinguished between manufacturing and servicing on the one hand and distribution on the other, and held that manufacturing and servicing would, under applicable law, exempt involved tangible personal property from the use tax, but that mere distribution of tangible personal property in Iowa, though purchased in another state being “not readily obtainable” in Iowa, did not fall within the purview of the statutory exemption. (See also *Dain Mfg. Co. v. Iowa State Tax Commission*, 22 N.W.2d 786 (1946); *Bay Bottled Gas Co. v. Michigan Department of Rev.*, 344 Mich. 326, 74 N.W.2d 37 (1955); *City of Ames v. State Tax Commission*, 71 N.W.2d 15 (1955); *Morrison-Knudsen Co. v. State Tax Commission*, 44 N.W.2d 449 (Iowa, 1950); *Allis-Chalmers Mfg. Co. v. Iowa State Tax Commission*, 92 N.W.2d 129 (1958); *Northern Natural Gas Company v. Lauterbach*, 100 N.W.2d 908 (1960); *Interstate Oil Pipe Line Co. v. Stone*, 36 So.2d 143 (1948); *Continental Supply Co. v. People*, 88 P.2d 488 (Wyoming, 1939); *Union Portland Cement Co. v. State Tax Commission*, 176 P.2d 879 (Utah, 1947); *Zoller Brewing Co. v. State Tax Commission*, 5 N.W.2d 643 (Iowa, 1942); *Maryland Glass Corp. v. Comptroller of Treasury*, 217 Md. 231, 142 A.2d 570 (1958); *Niagara Mohawk Power Corp. v. Wanamaker*, 286 App. Div. 446, 144 N.Y.S.2d 458 (1955).)

This case, therefore, constitutes authority for the proposition that even where the statute expressly provides an exemption from the use tax of tangible personal property purchased in another state because such personalty is “not readily obtainable” in the state (expressly based upon the rationale of use taxes) such rationale is construed most restrictively and the exemption is confined to the precise limits prescribed in the statute.

Manifestly, where, as in the Nevada Use Tax Law, the statute makes no express provision for an exemption from the tax of tangible personal property purchased in another state because “not readily obtainable” in Nevada, the argument of legislative intent wholly fails, and the well-established rule of strict construction of tax exemption statutes is decisively controlling. (*Peoples’ Gas & Electric Co. v. State Tax Commission*, *supra*, 28 N.W.2d at page 803, citing *Hale v. Iowa State Board of Assessment and Review*, 223 Iowa 321, 271 N.W. 168; *Id.*, 302 U.S. 95, 58 S.Ct. 102, 82 L.Ed. 72.)

Any contention that the rationale of the use tax, as hereinbefore stated, is inherent in the Nevada law, even without express exemption provision, must, therefore, fail for the same reason.

In this connection, it may properly be noted that if the Nevada Legislature, which had before it a thorough-going study “Survey of Sales Taxes Applicable to Nevada,” Bulletin No. 3, Nevada Legislative Counsel Bureau, May 1948, when it enacted the Sales and Use Tax Act (Chapter 372 of NRS) had intended to provide an exemption on purchases of tangible personal property made out of the State, because the personalty was not readily obtainable in the State, it certainly could have done so. The omission of any such exemption is, therefore, certainly significant and must be deemed to preclude any contention that the rationale for use taxes is generally inherent in the Nevada act and no express exemption provision is statutorily required. (See, however, corresponding laws of Missouri, Iowa, and Arizona, where such exemption is expressly provided in the statutes.)

The untenability of any claim for exemption from the Nevada use tax on the grounds of “not readily obtainable” finds complete legal confirmation and support in the case of *Missouri Pacific Railroad Co. v. Morris*, 345 S.W.2d 52 (Mo. 1961), involving the construction of the Missouri Use Tax Law. The decision in this case reversed a lower court ruling which had held that the entire law was unconstitutional because of certain invalid provisions.

Upholding the validity of the Missouri use tax, the Missouri Supreme Court nevertheless struck down three of the provisions in the 1959 Statute which exempted from the use tax certain items *when not readily obtainable in Missouri*. In doing so, the Court said that it could conceive of no reasonable construction or interpretation of the words “not readily obtainable in Missouri” as used in the exemption provisions, by which either a taxpayer or the state revenue department could determine applicability of any of the exemptions at any particular date with any degree of certainty in innumerable instances. Determination of tax liability at any particular time (under such proviso) would impose an impossible and an undue burden on any purchaser or enforcing officer, the Court said. The Court found that it was the plain legislative intent (as expressed in a

severability clause included in the act) that if any exemption was found unconstitutional, then the use tax should be imposed on any items that had been unconstitutionally exempted. Accordingly, the Court ruled that after the invalid exemptions were removed the balance of the act remained valid. (*Cf. also Southwestern Bell Telephone Company v. Morris*, 345 S.W.2d 62 (1961).

In other words, an express statutory provision for exemption from the use tax of tangible personal property purchased in another state, "when not readily obtainable" within the taxing state, has been held to be unconstitutional because not susceptible of precise or intelligible application in circumstances under which it was intended to operate; and, upon its invalidation, the use tax was held to be properly imposed. The following are some pertinent excerpts from the Court's opinion in said Missouri case:

We can conceive of no reasonable construction or interpretation of the words "not readily obtainable in Missouri" \* \* \* by which either a taxpayer, or a State officer charged with the enforcement of the Act or the collection of the tax, could determine applicability \* \* \* to the mentioned property at any particular date or on any succeeding date with any degree of certainty in innumerable instances. Determination of tax liability at any particular time would impose an impossible and an undue burden on any purchaser or enforcing officer. The interpretation of the words "not readily obtainable in Missouri" as sought to be made by appellants does not aid us. How would either a taxpayer or an official of the State go about determining the "combined capacity of Missouri suppliers and manufacturers" as to the specific quantity of any particular article obtainable on any day or succeeding day? How would a taxpayer determine whether or not the "combined capacity of Missouri suppliers and manufacturers" as to quantity had not been exhausted within the hour prior to his purchase of a commodity from without the State? To what extent would a purchaser have to canvass suppliers and manufacturers within the State in order to determine whether a *desired quantity* of an item could be purchased out of the State and free from the use tax? \* \* \* How would any of these purchasers or the tax officials determine which of the outstate small purchasers were subject to tax, or exempt therefrom? In many instances if we assume that a prospective purchaser could at any time and place in the State in fact determine whether or not any of the items mentioned \* \* \* was readily obtainable in Missouri in the quantity desired, nevertheless liability for the tax would be avoidable by a purchaser by merely buying a larger quantity than the quantity then readily obtainable at the particular time, and so avoidance of the tax would be at the election of the purchaser.

\* \* \*

The Use Tax Law is, of course, intended to be uniform and applicable throughout the entire State \* \* \*. The Use Tax Law must further comply with the constitutional provisions as to equal protection, due process and uniformity of taxation upon the same class of subjects. While the mentioned words of the proviso, "not readily obtainable in Missouri," is in language that on its face appears to have a meaning, we think it impossible to give it any precise or intelligent meaning or application in the circumstances under which the Act was intended to operate. This Court cannot supply the deficiency, remedy the uncertainty and give the exception or proviso a precise and definite meaning so that all to whom it was intended to apply would be able at any particular time and place to determine its application. *See State ex rel. Reorganized School Dist. No. 4 of Jackson County v. Holmes*, 360 Mo. 904, 231 S.W.2d 185, 192. The words used cannot be construed to meet the constitutional objections levelled against them. In such circumstances the mentioned words must be considered void because vague, indefinite and uncertain in meaning and application, unworkable and arbitrary. They would impose an impossible burden on taxpayers and officials to determine applicability at any particular time and place. 345 S.W.2d, pages 58-60.

On the basis of the foregoing judicial authorities, therefore, we feel it proper to observe that, while Courts, generally, are cognizant of the rationale of use taxes, they nevertheless will not extend the application of such rationale beyond expressed statutory limitations. Moreover, that even when a use tax statute expressly provides for the exemption from the use tax of tangible personal property purchased out-of-state because not readily obtainable within the State, *thus expressly incorporating the rationale of the use tax in the statute*—it is constitutionally objectionable because indefinite, uncertain, unworkable, arbitrary, and incapable of uniform application.

Finally, we cannot help but conclude that where, as in the case of the Nevada Use Tax Law, there is no express statutory exemption provision relative to tangible personal property purchased out-of-state and “stored, used or otherwise consumed” in Nevada, there exists no proper legal basis whatsoever for any claim for exemption from the use tax, merely on the ground of nonobtainability within the State of Nevada, *and apart from any other statutory provisions for allowance of an exemption or exception.*

It is our considered advice, therefore, that the Nevada Tax Commission apply and enforce the use tax provisions of the Nevada Sales and Use Tax Act in accordance with the foregoing views and as heretofore administratively construed, and only as specifically qualified by previous interpretations of said act provided by this office.

As already stated by us herein, Attorney General Opinion No. 163, *supra*, does not constitute or provide legal warrant for any claim for exemption from the Nevada use tax, except as therein specifically indicated in respect of bottles utilized as returnable “containers,” a commodity expressly exempted in the Nevada act, in certain indicated circumstances.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-233 COLLECTION AGENCIES; SUPERINTENDENT OF BANKS—**

A corporation may be licensed as a collection agency, solely in the corporate name.  
Chapter 649 NRS construed.

Carson City, July 20, 1961

Honorable Grant L. Robison, Superintendent of Banks, Carson City, Nevada

Dear Mr. Robison:

Your letter of July 18, 1961, requesting an official opinion from this Department, presents a question of law and statutory interpretation.

**QUESTION**

Is it permissible under the provisions of Chapter 649 of the Nevada Revised Statutes for the Banking Department to issue a license to a corporation as a collection agency in the following manner:

“John Doe and Richard Roe, doing business as American Collection Agency, Inc.”?

## CONCLUSION

The question is answered in the negative.

## ANALYSIS

Chapter 237, Statutes 1931, was an act to provide for the licensing, regulation and bonding of collection agencies by the Secretary of State. Section 4 of this act provided for a bond of \$1,000, and designated the coverage and conditions of liability. Under Section 3 thereof, clearly a corporation could be licensed.

Chapter 105, Statutes 1935, amended Section 4 of the act in such a manner as to broaden the conditions of bond liability.

Chapter 465, Statutes 1959, amended Chapter 649 NRS, in such a manner as to transfer the licensing and supervisory authority from the Secretary of state to the Superintendent of Banks, and to change the bonding requirement from a bond of \$1,000 to a bond of \$10,000.

Under [NRS 649.050](#) it is provided that no "person" shall conduct a collection agency, unless duly licensed under the provisions of the chapter. Under [NRS 649.040](#) the term "person" is defined to include a corporation. Under [NRS 649.060](#) it is provided that the application to the Superintendent of Banks for a license, shall be in writing and shall state:

- (a) The name of the applicant together with the name under which the applicant does business or expects to do business.
- (b) The full business address and residence, including street and number.  
\* \* \*
- (f) In the case of a corporation or voluntary association, the name and residence address of each of the directors and officers.

Under [NRS 649.070](#) it is provided that the applicant for license shall file with the Superintendent of Banks with the application for license, the bond in the sum of \$10,000, and that the applicant for the license shall be the principal on the bond.

All of these statutes are compatible with the conclusion that the license may run to the corporation, as inferred by [NRS 649.050](#), [2\(f\)](#).

The principal reason for the conclusion, however, is that a private corporation is a legal entity, and as a legal entity it has ownership of property and liability for its contractual and other obligations. As a legal person a corporation contracts, it sues and is sued in its own name, by its duly authorized officers. Such being fundamental legal principles of corporate existence, it becomes clear at a glance that the proposed manner of licensing would not be proper.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-234 EDUCATION, STATE DEPARTMENT OF; SCHOOL DISTRICTS; UNIVERSITY OF NEVADA; STATE PLANNING BOARD; DISTRICT ATTORNEYS; CITY ATTORNEYS**—Applicable Nevada law as to jurisdiction and power of State, respecting public construction work of direct concern or interest to the State, reviewed and construed. Held: Assertion and exercise by sovereign state of such jurisdiction and power preemptively supersedes and excludes any



encroachment by counties or cities, which would subject any such state construction to local building code requirements or regulations, or the exaction, from contractors engaged thereon, of any building permit fees. Reference: Attorney General Opinion No. 201, dated January 19, 1961, generally in accord herewith, further clarified as to such state exemption from local building code requirements and regulations.

Carson City, July 21, 1961.

Mr. Byron F. Stetler, *Superintendent of Public Instruction, Department of Education, State of Nevada, Carson City, Nevada*

### STATEMENT OF FACTS

Dear Mr. Stetler:

Some question has recently been raised concerning the right of a county or municipality to require compliance by the other, the State, or other political subdivision, with their building code regulations and requirement of construction permit fees in connection with building projects undertaken within their respective jurisdictions.

This office has on several other occasions found it necessary to rule, on the basis of authority hereinafter set forth, that, in respect of the construction by the State Planning Board of any building for the University of Nevada, or any other state institution, agency, board, department, or commission, the State, acting through said Planning Board, has complete and plenary jurisdiction and powers. Therefore, we have further held that state public construction projects are *not* subject to the building regulations of a municipal corporation or county within the State with respect to any buildings which are constructed therein, and that such state preemption extends to and includes any requirement of building permits or exaction of permit fees by the appropriate city or county officers charged with the enforcement of local laws regulating building construction within their respective jurisdictions.

Attorney General Opinion No. 201, dated January 19, 1961, released by this office, dealt with the question as it pertained to the right of a municipality of the State to require compliance of a county with the municipality's building code regulations and prescribed construction permit fees. Said Attorney General Opinion reached the conclusion that Washoe County is subject to the Building Code regulations and fees prescribed by the city of Reno with respect to such construction as Washoe County might undertake within the limits of the city of Reno. After reviewing various judicial determinations pertaining to the specific question under consideration, the writer of said opinion reached the following rationale for his conclusion:

It is apparent from reading the foregoing cases that the mere fact that a political body is a subdivision of the State is not sufficient to exempt that body from local building regulations. In addition the applicable statutory framework must show an intent on the part of the legislature to endow the affected subdivision with authority to regulate the mode of construction which it is authorized to undertake. [NRS 244.285](#) \* \* \* generally authorizes Washoe County to construct public buildings. It does not, however, contemplate regulating the nature of such construction. The legislature has seen fit to confer this police function upon the City of Reno by virtue of the provisions of [NRS 278.580](#) and the cited charter provisions . \* \* \*

The situation presented by the County of Washoe when it undertakes to construct public buildings within the City of Reno can be contrasted with a similar undertaking on the part of a duly authorized department or commission of the State of Nevada.

(Ed: The writer then quotes the provisions of [NRS 341.150](#) pertaining to the functions, responsibilities, and powers of the Nevada State Planning Board in respect to state public works construction.)

Expressly referring to said Attorney General Opinion No. 201, dated January 19, 1961, the following statement appears in a memorandum prepared by the City Attorney of Reno for the benefit of the City's Building Department:

\* \* \*

N.R.S. 393.110 provides that before School Districts may construct a school building the plans must be submitted to the State Planning Board and the written approval of the State Planning Board first obtained. This section does not, however, prescribe or provide for any standards of construction as to the Ordinances of the City of Reno—it merely provides that the plans be approved by the State Planning Board. It does not call for detailed plans and specifications, as does N.R.S. 341.150.

For these reasons it does not appear that the State has preempted the field of regulating the construction of schools within municipalities. In the absence of such preemption by the State, and in accordance with Attorney General's Opinion No. 201, other political subdivisions constructing buildings within the City of Reno must comply with the building regulations as set forth in the Ordinances of the City of Reno.

Conclusion:

Therefore, contractors desiring to construct buildings for the Washoe County School District, must submit plans, pay for and obtain a building permit from the City of Reno.

On the basis of the foregoing Statement of Facts, and the serious issues inherent therein (as to which additional clarification has been requested from this office), we deem it proper to consider and render our opinion and advice on the following questions:

### QUESTIONS

1. Are state public construction projects subject to municipal or county building regulations within their jurisdictions, and are contractors engaged in the construction of state public works obligated to secure building permits and pay permit fees prescribed by municipality or county, in respect of any state construction project within their respective jurisdictions?

2. Are School Districts legally required to obtain building permits and pay building permit fees prescribed by either a municipality or county within the State, in connection with the construction of new School District buildings?

### CONCLUSIONS

Question No. 1: No

Question No. 2: No.

### ANALYSIS

A

With respect to state construction of public projects, the provisions of [NRS 341.150](#) are pertinent and significant:

341.150 Engineering and architectural services: Costs, powers of board.

1. The state planning board *shall* furnish engineering and architectural services to all state departments, boards or commissions charged with the construction of any state building, the money for which is appropriated by the legislature. *All such departments, boards or commissions are required and authorized to use such services.*

2. *The services shall consist of:*

- (a) Preliminary planning.
- (b) Designing.
- (c) Estimating of costs.
- (d) Preparation of detailed plans and specifications.

The board may submit preliminary plans or designs to qualified architects or engineers for preparation of detailed plans and specifications if the board deems such action desirable. The cost of preparation of preliminary plans or designs, the cost of detailed plans and specifications, and the cost of all architectural and engineering services shall be charges against the appropriations made by the legislature for any and all state buildings or projects, or buildings or projects planned or contemplated by any state agency for which the legislature has appropriated or may appropriate funds. The costs shall not exceed the limitations that are or may be provided by the legislature.

3. The board *shall*:

- (a) *Have final authority for approval as to architecture of all buildings, plans, designs, types of construction, major repairs and designs of landscaping.*
- (b) Solicit bids for an let all contracts for new construction or major repairs to the lowest qualified bidder.
- (c) After the contract is let, *have supervision and inspection of construction or major repairs.* The cost of supervisions and inspection shall be a charge against the appropriation or appropriations made by the legislature for the building or buildings. (Emphasis supplied.)

The foregoing statutory provision amply and explicitly indicates the extent and scope of the complete responsibilities and powers of the State Planning Board, insofar as state construction of public projects is concerned. The State Planning Board has its own building code governing the construction of public buildings. Such code is entirely comprehensive and covers every phase of construction. Local building departments (of county or municipality) are not involved in the approval of any construction plans and specifications for state public buildings, nor are they legally authorized to make inspections and disapprove of actual construction in accordance with such approved plans and specifications, apart from the creation of a nuisance as the result of such construction. Local building departments, therefore, neither render nor perform any necessary or required service of function which would justify the requirement of a permit or the exaction of a building permit charge in connection with any state public construction project.

The legal authorities in support of the foregoing views may be summarized as follows:

1. Unless construction of a state building will result in the creation of a nuisance, the State is not bound by any local law or regulation unless it is expressly statutorily provided that the State is to be bound.

(a) "The State is immune from suit and property purchased or owned by the State on which they are going to build a public building for governmental purposes is not subject to a zoning ordinance or building code of a city or county." *Davidson County v. Harmon*, 292 S.W.2d 777 (Tenn., 1956).

(b) "However, a legislative grant of police power to a municipal corporation will not be deemed a cession of the legislative prerogative to govern for itself the institutions of the state which may be located within such municipality, unless it may be clearly gathered from the latter act that such was the legislative intent." 9 Am.Jur. 202, Sec. 6, citing *Kentucky Inst. v. Louisville*, 123 Ky. 767, 97 S.W. 402.

2. County commissioners have only such powers as have expressly been granted to them and such other powers reasonably inferrible as necessary to effect the powers expressly granted. *State ex rel. King v. Lothrop*, [55 Nev. 405](#), 36 P.2d 355; *First National Bank of San Francisco v. Nye County*, [38 Nev. 123](#), 134, 145 P. 932; *State v. McBride*, [31 Nev. 57](#), 99 P. 705; *State v. Boerlin*, [30 Nev. 473](#), 98 P. 402;

*Office Specialty Manufacturing Co. v. Washoe County*, [24 Nev. 359](#), 55 P. 222; 15 C.J.—Counties—Sect. 103, Statutory Limitations, p. 457.

3. “Most of the courts to which the question has been submitted appear to have decreed that unless a different intention is *clearly* manifested, states, municipalities, the Federal government and other public subdivisions, are *not* to be bound by the requirements of a zoning ordinance, especially where the proposed use is not within a ‘nuisance’ classification and where the buildings are used for ‘Governmental’ and not merely for ‘Proprietary’ uses.” Quoted in *Green County v. City of Monroe*, 3 Wis.2d 196, 87 N.W.2d 827, 829 (1958), citing “The Law of Zoning” by James Metzenbaum, 2d Edition, Vol. 2, at page 1280; *see also*, discussion at pp. 1292-1295 in this authoritative reference relative to the case of *City of Charleston v. Southeastern Construction Co.*, 134 W.Va. 666, 64 S.E.2d 676 (1951), cited hereafter.

4. In the case of the construction of a building by the state board for state purposes under state authority, the matter is wholly the concern of the state and not subject to general state or municipal regulation. *City of Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642 (1909).

5. A city cannot apply its building codes and regulations to the construction and maintenance of the state university, even though the university was located within the city.

A state agency allocated by law the responsibility of performing a governmental function is not subject to the general police powers of a municipal corporation. *Board of Regents of Universities, Etc., v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960). *See also C. J. Kubach Co. v. McGuire*, Pres. of board, 199 Cal. 215, 248 P.676; *Village of Larchmont v. Town of Mamaroneck*, 239 N.Y. 551, 203 N.Y.S. 957, 147 N.E. 191; *Union free School Dist. of Town of Hempstead v. Village of Hewlett Bay Park*, 102 N.Y.S.2d 81, 198 Misc. 932 (1950) *affd.* 103 N.Y.S.2d 831.

6. Constitutional provisions giving any county, city, town or township, power to enforce within its limits all local, police, sanitary, and other regulations not in conflict with general laws, does not confer upon a local unit the power to regulate the construction of public school buildings. *Hall v. City of Taft*, 47 Cal.2d 177, 302 P.2d 574 (1956), *overruling Pasadena School Dist. v. City of Pasadena*, 165 Cal. 7, 134 P. 985.

7. The word “person” in a city building code, providing that no person shall erect or construct any building or structure without first obtaining a building permit therefor, does not include a state agency, such as state office building commission, with respect to the construction of a state office building in the city, in the absence of an express provisions to the contrary. McQuillin, *Municipal Corporations*, 3rd Ed., Vol. 9, Sec. 26.202, citing *Charleston v. Southeastern Const. Co.*, *supra*.

8. Any contention that the requirement of building permits, and exaction of building permit charges, is imposed upon contractors and not the State, is untenable, since such local requirements fundamentally affect the responsibilities, functions, and powers of the State, the actual principals, for whom contractors are merely acting as agents. It must be evident that any payment of building permit fees will be passed on to the state as additional costs.

A subordinate political entity of the sovereign State is not vested with any inherent taxing power against the State, even indirectly, in the form of exaction of building permit charges; such taxing power in the subordinate political entity as against the sovereign State must be express and clearly conferred either by constitutional or statutory authority, and will not be presumed.

“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. 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.

Generally, therefore, insofar as construction of state public works (under the jurisdiction of the State Planning board) is concerned, we are of the opinion and accordingly hold that state authority is plenary and is being exercised preemptively against any encroachment by counties or municipalities, on the basis of their respective local building codes and regulations.

## B

We now consider the second question hereinbefore set forth, namely: “Are School Districts legally required to obtain building permits and pay building permit fees prescribed by either a municipality or county within the State in connection with the construction of new School District buildings?”

On this specific question, it appears that, in the city of Reno at least, School Districts have, in the past, been held exempt from any such requirements and charges. We have been furnished with, and have before us, the opinion of Samuel B. Francovich, Esq., former City Attorney of Reno, and also the opinion of Emile J. Gezelin, Esq., former Washoe County Assistant District Attorney.

The opinion of the former Assistant District Attorney of Washoe County ruled explicitly that the Washoe County School District was not required to pay the city of Reno and the city of Sparks any building permit fee for the construction of new buildings. (Opinion dated June 25, 1957.)

Based upon review of judicial authorities, the former City Attorney of Reno (in an apparently undated opinion addressed to the then City Engineer of the city of Reno) concluded that the city of Reno did not have “the right to oblige the State for the payment of fees usually charged private contractors for permission to build within the City.” It further appears, that in actual practice and, presumably, on the basis of said City Attorney’s opinion, no permit charges have previously been exacted of contractors engaged in School District construction projects.

The ruling of the present City Attorney, therefore (partially cited in our above “Statement of Facts”), presently seeks to reverse the indicated previous practice by elimination of the exemption which the Washoe County School District claims as its legal due. We recognize, of course, that the position of the present Reno City Attorney is evidently predicated upon the above-quoted excerpts of Attorney General Opinion No. 201, *supra*.

Because of its statewide implications as to all School Districts, in connection with any new school construction projects, we deem it proper to review the matter and definitively rule on the specific question, evidently presently in actual issue as between the Washoe county School District and the city of Reno.

It is interesting and pertinent to our consideration of this second specific question that the legal opinion of the former City Attorney of the city of Reno included the following observations:

\* \* \*

In 62 C.J.S. (pp. 319-320) it is stated that:

“Property of the state is exempt from municipal regulation in the absence of waiver on the part of the state of its right to regulate its own property; and such waiver will not be presumed. The municipality cannot regulate or control any property which the state has authorized another body or power to control. Thus it has been held under some statutes that, where the legislature has placed the control of the public schools in boards of education, the municipality has no power to regulate the construction of public school buildings, but under other statutes creating school districts a school building within the municipal territory must comply with the municipal requirements.”

After having read the cases cited as authority for the statement above, this author has concluded that the definite weight of authority is that when the State has vested

its school district with regulatory and supervisory power, the city is without power to regulate or control.

The Court, in *Pasadena School District v. Pasadena*, in considering the present question, had this to say:

“In this controversy, the only question for solution is one of power. Has the city of Pasadena the power to subject the school district erecting a school building within its corporate limits, but which also constitutes territory of the school district to its regulatory building ordinances and building code in the exercise of its police power? Under the constitution of this state (sec. 11, art. 11) power is conferred upon every county, city, town, or township to make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws. Under this constitutional provision the city of Pasadena is vested with authority to make any such reasonable local police regulations as its legislative body may deem advisable, controlled only by the limitation that they must not conflict with any general laws enacted by the legislature on the subject.”

That case was decided in favor of the city on the ground that the State had not vested its school districts with the power to prepare specifications, regulate and supervise its own building programs. The Pasadena case, however, seems to be the only case decided in favor of the city, in controversies of this type, whereas, many cases of such a nature are recorded.

\* \* \*

We are in complete accord with the foregoing observations of the former Reno City Attorney as to the State of California’s applicable law at the time of his writing said opinion. However, as we have hereinbefore noted in Item 6 of our summary of legal authority for state exemption from local building codes and regulations, the Pasadena case was expressly overruled by the California Courts by the decision rendered in *Hall v. City of Taft, supra*, wherein it was held that constitutional provisions giving any county, city, town or township, power to enforce within its limits all local, police, sanitary, and other regulations not in conflict with general laws, does not confer upon a local unit the power to regulate the construction of public school buildings. As additionally observed in Attorney General Opinion No. 201, *supra*, the Court, in the Hall Case, *supra*, properly pointed out that school districts are agencies of the state for the local operation of the state school system and further added:

Moreover, in connection with the foregoing and as an additional ground why the construction of school buildings by school districts are not subject to the building regulations of a municipal corporation in which the building is constructed, is that the state has completely occupied the field by general laws, and such local regulations conflict with such general laws, when we consider the activity involved. (302 P.2d 574 at page 579.)

In reaching this conclusion, the California Court, in the Hall Case, *supra*, exhaustively reviewed applicable California law to prove that the public schools (of California) are a matter of statewide rather than local or municipal concern; and, that their establishment, regulation and operation are covered by the Constitution and the State Legislature is given comprehensive powers in relation thereto (302 P.2d 574, pp. 576-578). The California Court, in said case, also exhaustively reviewed the scope of jurisdiction and powers of subordinate political entities as they impinge upon the public school system, and the jurisdiction and powers of the state and school districts to control the establishment, regulation and operation of the public schools (302 P.2d 574, pp. 576-582). The California Court (302 P.2d 574, at p. 582) then concludes as follows:

There is no necessity for comparing in detail Taft’s building code and the numerous comprehensive building regulations contained in the Education code and

the rules and regulations of the Division of Architecture, for we have seen the state has occupied the field. As said in *In re Means*, *supra*, 14 Cal.2d 254, 258, 260, P.2d 105, 107, 123 A.L.R. 1378, in speaking of the effect of a city ordinance, establishing standards for plumbers, on a state employee in a city, the state civil service system provides a comprehensive plan for the selection of state employees and although the city ordinance does not purport to prescribe the conditions for state employment, 'If one who has been employed by the state may not work on state property within a municipality without the consent of the municipality obtained after examination, the city has, in effect, *added to the requirements for employment by the state, and restricted the rights of sovereignty.* \* \* \*

'Although the legislature has enacted no statute regulating plumbing, if the city's ordinance is a valid exercise of power, then one whom the state has examined and found eligible for employment as a plumber and who has later entered the state civil service, may be unable to work on state property because he cannot pass the examination of a city health officer or licensing board. The result is a direct conflict of authority. Either the local regulation is ineffective or the state must bow to the requirement of its governmental subsidiary. Upon fundamental principles, that conflict must be resolved in favor of the state.' (Emphasis added.) The same comments apply to the references in the instant construction contract and specifications that the building is to be constructed in compliance with local regulations.

In our opinion, the California Hall Case, *supra*, from which the above quotations have been taken, is decisively controlling of the present question.

As in California, the Nevada public schools also are a matter of statewide, rather than local or municipal, concern, and their establishment, regulation and operations are covered by the Constitution of this State, and the State has comprehensive powers in relation thereto (Article XI, Nev. Const., Chapters 385-394 of NRS). Like California, the Nevada public school system, under the State Department of Education (Chapter 385 of NRS), has established School Districts for local operation (Chapter 386 of NRS). By [NRS 393.080-393](#), the Nevada State Legislature has vested Boards of Trustees of School Districts with broad and comprehensive powers with respect to school buildings. Thus, for example, School District Trustees have the power of building, purchasing or renting schoolhouses and other school buildings ([NRS 393.080](#)); to provide for the rental, purchase or erection of suitable dormitories and dining halls for high school students, and their support, maintenance and management ([NRS 393.090](#)); and to keep public school buildings, teacherages, dormitories, dining halls, gymnasiums, stadiums and all other buildings in its charge in proper repair ([NRS 393.100](#)).

[NRS 393.110](#) (Approval of plans for school buildings) provides as follows:

1. Before letting any contract or contracts for the erection of any new school building, *the board of trustees of a school district shall submit plans therefor to and obtain the written approval of the plans by the state planning board.* The state planning board is authorized to charge and collect, and the board of trustees is authorized to pay, a reasonable fee for the payment of any costs incurred by the state planning board in securing the approval of qualified architects or engineers of the plans submitted by the board of trustees in compliance with the provisions of this subsection.

2. Before letting any contract or contracts totaling more than \$5,000 for any addition to or alteration of an existing school building, *the board of trustees of a school district shall submit plans therefor to and obtain the written approval of the plans by the state planning board.* The state planning board is authorized to charge and collect, and the board of trustees is authorized to pay, a reasonable fee for the payment of any costs incurred by the state planning board in securing the approval

of qualified architects or engineers of the plans submitted by the board of trustees in compliance with the provisions of this subsection.

3. *No contract for any of the purposes specified in subsections 1 and 2 made by a board of trustees of a school district contrary to the provisions of this section is valid, nor shall any public money be paid for erecting, adding to or altering any school building in contravention of this section.* (Emphasis supplied.)

We have carefully investigated actual practice with respect to the involvement of the State Planning Board and other state agencies with respect to construction of school buildings by School District Boards of Trustees. Essentially, we have found the following practice in effect:

1. The School District Board of Trustees selects a site for any projected new construction in accordance with requirements of the State Department of Education. Said site is inspected by a consultant specialist of the State Department of Education who reports thereon with recommendations to the State Department of Education.

2. A state-licensed architect is then employed, if the proposed site has the approval of the State Department of Education. Said architect then coordinates with the State Planning Board in respect to all requirements for the proposed construction project.

3. It is uniform and standard requirement of the State Planning Board that construction plans and specifications, at the very least, comply with all local building code standards and regulations.

4. Plans and specifications are submitted to the State Planning Board for written approval in conformity with [NRS 393.110](#), above set forth. The State Planning Board, through a state-licensed engineer, makes a detailed check of plans and specifications in accordance with established standards and procedures of the state Planning Board.

5. In addition to written approval of the submitted plans and specifications of the State Planning Board, approval must also be had and obtained from the State Health Engineer.

6. When all requirements from the state level have been satisfied, the project is then advertised for bids ([NRS 393.120](#)), and the award of the contract is made to the lowest and most acceptable state-licensed contractor, in accordance with [NRS 393.130](#). The contractor has the legal status of agent, acting on behalf of the School District, the principal.

7. Inspections and supervision during the course of actual construction is also made by state qualified personnel.

It is not to be presumed that State Planning Board approval of plans and specifications, in connection with school construction, is a meaningless and empty formality; rather, it is professional, substantial, detailed, thorough, complete, and in accordance with applicable standards and requirements.

The foregoing summary of actual practice relative to School District construction projects entirely refutes the conclusion expressed in the legal opinion of the present Reno City Attorney that [NRS 393.110](#) “\* \* \* does not \* \* \* prescribe or provide for any standards of construction [construction] as to Ordinances of the City of Reno \* \* \*.” Admittedly (as also stated by the present Reno City Attorney), [NRS 391.110](#) is not as detailed in its provisions respecting standards of construction which must be satisfied as [NRS 341.150](#) implies.

In point of actual fact, [NRS 341.150](#), however, also does not prescribe detailed standards of construction in any respect, but only outlines the scope of the State Planning Board’s jurisdiction, functions, responsibilities and powers. The Legislature, however, was concerned with a highly technical field, involving professional education and training, and the discharge of responsibilities of a varying and specialized nature, on the part of state-approved and licensed personnel. To have spelled out in the statute in detailed fashion specific standards of construction for the many and varying matters necessarily involved in any construction work, would have entailed incorporating in the statute all, or a substantial portion, of the provisions of the Uniform Building Code and Regulations. Obviously, the Legislature did not deem such detailed provision of applicable standards to be necessary, properly assuming that detailed standards, as generally accepted or locally adopted and in effect, should apply. Such, in actual practice, is the case, insofar as construction by School Districts of the State of Nevada is concerned.



This is amply established as matter of law ([NRS 393.110](#)) which mandatorily requires written approval of all plans and specifications by the State Planning Board, a statutory requirement which also supports our conclusion that the State has seen fit to assert its sovereign power in respect of school construction and, in consequence, that the State has preempted any and all local regulation thereof, by requirements specifically connected therewith.

Needless to say, such plenary state power does not prohibit exaction of a business license fee as applied to contractors, or others, for the privilege of conducting their business or profession within the limits of a county or municipality.

In our considered opinion the weight of authority, as cogently reviewed and stated in the Hall Case of California, *supra*, amply and decisively supports our conclusion as to the second question herein stated.

The specific rule of *Community Fire Protection District v. Board of Education*, 315 S.W.2d 873 (Mo.) (cited in Attorney General Opinion No. 201, *supra*) is inapplicable herein. To the extent that said prior Attorney General Opinion No. 201, *supra*, may have implied the contrary, and resulted in the conclusion reached by the Reno City Attorney that “\* \* \* contractors desiring to construct buildings for the Washoe county School District, must submit plans, pay for and obtain a building permit from the City of Reno,” we reject such conclusion, merely on the basis of Attorney General Opinion No. 201, *supra*, as unjustified.

We are satisfied that our foregoing conclusions are not only in accord with applicable Nevada constitutional and statutory provisions of law, but are also preponderantly supported by the great weight of judicial authority. Great as may be the need of counties and municipalities for the additional revenue to be derived from the requirement and exaction of construction permit fees, the public interest and concern is, in fact, greater and paramount. Conflicts and confusion would result from divided jurisdiction and powers as between the State (and School Districts) and governmental subsidiaries in respect of any and all state construction, which is of statewide interest and concern. There cannot—there must not—be any such conflict of jurisdictional powers. Where it appears, it should and must be resolved as the California Court ruled in the Hall Case, *supra*:

\* \* \* Upon fundamental principles, that conflict must be resolved in favor of the state. \* \* \* (302 P.2d 574, at p. 582.)

We trust that our foregoing opinion sufficiently answers the specific questions herein considered, and affords satisfactory clarification of the legal issues involved.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-235 AGRICULTURE, DEPARTMENT OF**—Bond under federal law (7 U.S.C. Sec. 204) to protect unpaid sellers of livestock, will not exempt local dealer from requirement of licensing and bonding under Chapter 576 NRS, unless such dealer can show that his purchases are for interstate shipment exclusively. [NRS 576.140](#), subsection 4, construed.

Carson City, July 31, 1961

Dr. John L. O’Harra, Director, Division of Animal Industry, Department of Agriculture, P.O. Box 1209, Reno, Nevada

## STATEMENT OF FACTS

Dear Dr. O’Harra:

Prior to April 6, 1961, under the provisions of [NRS 576.020](#), dealers, brokers and commission merchants in livestock (with certain exceptions hereinafter mentioned) were required to be licensed by the State Board of Stock Commissioners. Under [NRS 576.040](#), a necessary prerequisite to the issuance of license was the filing of a bond with the said Board in the amount of \$5,000, conditioned upon compliance with the provisions of Chapter 576 NRS, and full payment for all livestock and farm produce. Section 576.140 in part provided:

576.140 This chapter shall not apply to:

\* \* \*

3. Any farmer or rancher purchasing or receiving livestock for grazing, pasturing or feeding on his premises and not for immediate resale.

4. Operators of public livestock auctions as defined in [NRS 573.010](#), and all buyers of livestock at such auctions at which the livestock auction licensee does not control title or ownership to the livestock being sold or purchased at such auctions, and any person subject to and operating under a bond required by the United States pursuant to the provisions of the Packers and Stockyards act (7 U.S.C. Sect. 204) and the regulations promulgated thereunder. All persons exempted by the provisions of this subsection shall register annually with the board, giving the location of their place of business, the number of their license and bond and the expiration date thereof. The board may charge a fee sufficient to defray the expense incident to such registration.

\* \* \*

Section 204, 7 U.S.C. provides the following:

204. The Secretary may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant insolvent or has violated and provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. \* \* \*.

Prior to the effective date of Chapter 304, Statutes 1961, p. 493 (approved April 6, 1961), the State Board of Stock Commissioners, under the provisions of [NRS 576.140](#), subsection 3, did not require those persons already bonded under the provisions of 7 U.S.C. Section 204, to be licensed or bonded under the provisions of [NRS 576.020](#).

Chapter 304, Statutes 1961, amended subsections 3 and 4 of [NRS 576.140](#) to provide the following:

3. Any farmer or rancher purchasing or receiving livestock for grazing, pasturing or feeding on is premises *within the State of Nevada* and not for immediate resale.

4. Operators of public livestock auctions as defined in [NRS 573.010](#), and all buyers of livestock at such auctions at which the public livestock auction licensee does not control title or ownership to the livestock being sold or purchased at such auctions, and any person *buying for interstate shipment only*, and subject to and operating under a bond required by the United States pursuant to the provisions of

the Packers and Stockyards Act (7 U.S.C. Sect. 204) and the regulations promulgated thereunder. \* \* \*. (Emphasis supplied to reflect the new material.)

### QUESTION

Is a dealer, broker or commission merchant of Nevada, who is duly bonded pursuant to the provisions of 7 U.S.C. Sect. 204, required to be licensed and bonded under the requirements of [NRS 576.020](#) and [576.040](#), if unable to show to the State Board of Stock Commissioners that the livestock he is buying is for interstate shipment only?

### CONCLUSION

Yes; the burden is upon him to so show, and if unable to do so, he must be licensed and bonded.

### ANALYSIS

Prior to the 1961 amendment, the exemption from the provisions of the chapter, under [NRS 576.140](#), subsection 3, in no respect depended upon whether or not the dealer, broker or commission merchant, intended his purchase when made for interstate shipment only. Under the law then existing, if the broker, dealer or commission merchant, was bonded under the federal law (7 U.S.C. Sect. 204), his right to exemption from state licensing and bonding under the provisions of the statute was clear. This right did not depend upon whether he intended to dispose of the property by interstate commerce or otherwise.

However, under the present provision, if such person is bonded under the federal law, he is not entitled to be exempted from the provisions of Chapter 576, unless he can also show that his buying of livestock is for "interstate shipment only." If the alternative construction were adopted, it would render the language, "buying for interstate shipment only," entirely ineffectual and nugatory.

It is also true that the requirement of licensing and bonding by the State Board of Stock Commissioners, in those cases in which the purchaser cannot show that the purchase is for interstate shipment only (as to which the purchaser is bonded under the federal law), is not limited to those who buy at livestock auctions. It includes those who buy at auctions, as well as those who buy otherwise.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-236 MUSEUM, NEVADA STATE; PUBLIC OFFICERS**—When the salary of a statutory officer is fixed by the Legislature it is beyond the power of the appointive authority to increase or diminish the salary so fixed.

Carson City, August 2, 1961

Honorable Clark J. Guild, Chairman, Board of Trustees, Nevada State Museum, Carson City, Nevada.

## STATEMENT OF FACTS

Dear Judge Guild:

The Nevada State Museum was created by Chapter 159, 1939 Statutes of Nevada, and as amended is regulated by the provisions of Chapter 381 NRS. Prior to February 23, 1961, Section 381.130 provided:

381.130 The director of the Nevada state museum shall receive an annual salary of \$7,260.

The legislative session commencing in January, 1961, received A. B. 10, which if enacted in the original form would only have repealed [NRS 381.130](#). Had this bill in the original form been enacted and approved, the Board of Trustees would have been authorized, pursuant to subsection 1 of [NRS 381.120](#), to fix the salary of the Director. [NRS 381.120](#), subsection 1, prior to the amendment of 1961 provided:

381.120 1. The board of trustees shall have the power to employ and fix the duties, powers, *compensation* and conditions of employment of the director and all curators, assistants, janitors, laborers, guards and employees of the Nevada state museum. (Emphasis supplied.)

The Legislature of 1961 declined to pass A. B. 10 in its original form, but amended it. As amended it was approved into law on February 23, 1961, as Chapter 27, Statutes of Nevada 1961. Said Chapter 27 repeals [NRS 381.130](#), and amends [NRS 381.120](#) to provide, in part, the following:

381.120 1. Except as provided in subsection 2, the board of trustees shall have the power to employ and fix the duties, powers, compensations and conditions of employment of the director and all curators, assistants, janitors, laborers, guards and employees of the Nevada state museum.

2. The annual salary of the director of the Nevada state museum shall be fixed in an amount not to exceed \$7,920.

3. The staff of the Nevada state museum shall be in the unclassified service of the state, but the custodial, clerical and maintenance employees of the museum shall be in the classified service.

\* \* \*

## QUESTION

Is the Board of Trustees of the Nevada State Museum authorized to increase the salary of its Director above the amount provided by [NRS 381.120](#), it being understood that any sum in excess of \$7,920 would be provided from private funds, donated to the Museum for that purpose?

## CONCLUSION

We have concluded that the question must be answered in the negative.

## ANALYSIS

Under the provisions of [NRS 381.150](#), the Board of Trustees of the Nevada State Museum is authorized to accept, in the name of the State, gifts of money or property, and "to accept and apply all sums, donations and property, subject to the terms and conditions of the donor, \* \* \*."

Nonetheless, it is clear that the Board does not have the authority to accept sums of money with the assurance to the donor that they will be spent to augment the statutory salary of the Director.

When one considers the history of A. B. 10, heretofore mentioned, it is clear that the Legislature intended, by the amendements [amendments] made in the bill, not only to fix the salary of the Director, but also to withhold from the Board the authority to pay to the Director a salary in excess of \$7,920.

[NRS 281.127](#) would appear to prevent and preclude a contract by the board with the Director by which a sum in excess of \$7,920 per annum would be paid as salary, even though the excess would not be provided by the State. [NRS 281.127](#) provides:

281.127 Unless otherwise provided by law, no public officer or employee whose salary is set by law, whether or not he serves the state in more than one capacity, may be paid more than one salary for all services rendered to the state, except for salaries for any ex officio duties he may be required by law to perform.

It might be argued that [NRS 281.127](#) does not preclude the expenditure of private funds to increase the salary of a public officer whose salary is fixed by statute. But the cases hold that, except for constitutional officers whose salaries are fixed by the Constitution (*Shamberger v. Ferrari*, [73 Nev. 201](#), 314 P.2d 384), the power of the Legislature in respect to statutory offices is very broad, including the power to fix salaries, which may not be modified either by an increase or decrease on the part of an appointing authority.

When the salary of an official is fixed by law, it is beyond the power of those by whom he has been employed to agree upon some other figure, or to affect it in any way. *People v. Board*, 75 N.Y. 38; *Kehn v. State*, 93 N.Y. 291; *Emmitt v. Mayor, etc.*, 28 N.E. 19.

In *Phillips v. Graham County* (Ariz. 1915), 149 P. 755, the Court said:

The board has no power or authority to pay less or more than the Legislature has provided as compensation to an official.

In *Ballangee v. Board of County Commissioners* (Wyo. 1945), 212 P.2d 71, a county treasurer had been appointed to fill a vacancy in office, and having agreed to accept \$2,000 per year when the statutory salary was \$2,500, accepted the lesser sum for the remainder of the term, and then sued for the unpaid statutory sum. The Court quoted approvingly from *Rothrum v. Darby*, 345 Mo. 1002, 137 S.W.2d 532 at 536, as follows:

An even more vital ground is, that public office, and compensation therefor, is not and must not become a matter of contract. Mechem on Public Offices, secs. 463 and 855. Public offices and positions belong to the people and not to officers upon whom they confer appointive power. 22 R.C.L. 377-379, secs. 9-11. The qualifications, tenure and compensation therefor must be determined by the people or the people will lose control of their government. This must be done by the representatives the people have authorized to act for them, unless the people themselves have determined these matters by writing them into the Constitution.

The reasons given by the Missouri Court would appear to apply with equal force when the effort of the appointive power is to increase the statutory salary, and particularly when the Legislature has, as here, declined to confer upon the appointive power the authority to set the salary of the Director.

We are satisfied that the conclusion is correct from a practical standpoint for if individual boards or commissions (the governing body by any name) could take contributions from the public to augment salaries clearly fixed by the Legislature, the Legislature would lose control, and great confusion and inequities would result.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. PRIEST  
Deputy Attorney General

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**OPINION NO. 61-237 STATE LANDS**—State of Nevada may obligate itself for so long as may be necessary to provide protection to public for low-level radioactive waste disposal operations in Nye County, Nevada.

Carson City, August 14, 1961

Honorable Hugh A. Shamberger, Director, Department of Conservation and Natural Resources,  
State Office Building, Carson City, Nevada.

### STATEMENT OF FACTS

DEAR MR. SHAMBERGER:

Chapter 374 of NRS enacted by the 1961 Nevada Legislature provided that the Director of the State Department of Conservation and Natural Resources may, with the approval of the Governor, obtain and lease certain lands situate in Nye County, Nevada for the purpose of providing areas to dispose of low-level radioactive waste materials by burial, and for related purposes. No such lease or agreement shall extend for more than 99 years. All such lands shall be closed to the public during the term of such lease or agreement and thereafter until all danger to public health arising from such use no longer exists.

Pursuant to said legislation, the Director instituted proceedings to acquire 80 acres, more or less, from the Federal Government, for the purposes set forth in the act.

The Nuclear Engineering Company, a private radioactive waste disposal firm, has made application for a lease for the maximum term of 99 years. Inasmuch as the State of Nevada has not yet obtained the required lands from the Federal Government, the Director of the Department of Conservation and Natural Resources supplied the Nuclear Engineering Company with a letter of intent which letter set forth that subject to regulations of lease terms to be yet worked out, the State of Nevada did intend to enter into a long-term lease with the Nuclear Engineering Company.

Thereafter, the Nuclear Engineering Company through its counsel, Mr. Robert McDonald, proposed certain questions as to the authority of the State of Nevada to enter into such a lease or agreement. Request was made that these questions be answered by the Attorney General's office. The questions and answers thereto are as follows:

Question No. 1.

Assuming a lease, and/or an agreement, in accordance with the statutes, was entered into and the statute was later repealed, or amended, would it in any way affect an existing lease or an agreement?

Answer No. 1.

If the State of Nevada entered into a lease and/or agreement with Nuclear Engineering Company or some other concern for the lease of lands for the disposal of low-level radioactive waste material and the statute authorizing the lease was later repealed, it would have no effect on the existing lease. Any such repealing statute could not impair an existing contract.

Question No. 2.

That in the event there was not enough money in the continuing fund, as set forth in Section 5 of the act, would the money be available from the State's general fund for the purpose of paying the costs of protection of the property?

Answer No. 2.

In the event there was not enough money in the continuing fund, as set forth in Section 5 of the act, money would *not* be available from the State's general fund for the purpose of paying costs of protection of the property. At least such would be the case under present law. However, the state intends to protect itself against this possibility by proper bond or other type of indemnity in the lease agreement.

Question No. 3.

In the event the property was leased, or obligated by an agreement, either to the Nuclear Engineering Company, or some other company, and that particular company defaulted or discontinued its business operations, would the State of Nevada in that event continue to protect the public health arising from radioactive materials until such danger no longer exists?

Answer No. 3.

If the lessee defaulted and discontinued to operate the property, the State of Nevada would continue to protect the public against any danger to health. Again, the State of Nevada intends to protect itself against this possible situation in the lease agreement.

Question No. 4.

There is the possibility that a situation could arise whereby the A.E.C. would have to take the property for the purpose of protecting the public. However, by setting up proper safeguards in the lease, we do not at the moment see how this could happen. It would depend on the type of bond or other indemnity instrument that could be obtained to protect the State and the A.E.C. against this possibility.

Question No. 5.

In reading A. B. 444, do you feel that there is any possibility of the State of Nevada becoming a licensee of the A.E.C. and have them enter into a contract with a private company for the burial of waste material and would the State of Nevada have the authority to sign an agreement with the A.E.C.?

Answer No. 5.

Under A. B. 444 or any other present legislation, we do not believe that there is any possibility of the State of Nevada becoming a licensee of the A.E.C.

Question No. 6.

Are there any other statutes that should be considered before final arrangements have been made with a private contractor that would possibly alter, or conflict with, A. B. 444?

Answer No. 6.

The only statutes that must be considered along with A. B. 444 concerns public health and that is mentioned in A. B. 444.

Thereafter, the Director of the Department of Conservation and Natural Resources requested an official opinion from the Attorney General pertaining to the authority of the State of Nevada, under present legislation to bind itself for so long as may be necessary to protect the public from possible hazards as a result of proposed radioactive waste disposal operations.

## QUESTION

Can the State of Nevada, pursuant to said law, obligate the State of Nevada for so long as it may be necessary with the duty to protect the public from possible dangers from the burial area even though waste disposal operations may cease long before the termination date of the lease? And, even though the lease may expire its terms, can the State of Nevada obligate itself to protect the public from the area thereafter?

## CONCLUSION

The State of Nevada can obligate itself for so long as may be necessary to protect the public from any possible dangers resulting from the disposal of low-level radioactive waste materials even though waste disposal operations may cease prior to the expiration date of any lease or agreement with private waste disposal firms, and can obligate itself for infinity to protect the public after the termination of the lease or agreement.

### ANALYSIS

Chapter 374 of NRS, Section 4, subsection 3, provides:

All such lands used as provided in subsection 1 shall be closed to the public, in such manner as the director of the state department of conservation and natural resources shall prescribe, during the term of such lease or agreement and thereafter until all danger to public health arising from such use no longer exists.

Section 5, subsection 3, provides:

Moneys in the radioactive materials disposal fund shall be used to pay the purchase price, as determined by appraisal, of the lands described in section 2 of this act, and for any other expenses necessarily incurred by the director of the state department of conservation and natural resources in carrying out the provisions of this act, including the costs of providing such protection at the termination of any lease or agreement as may be necessary in the interests of public health and welfare.

Both of the above-quoted sections of the law authorizing the lease or agreement of state lands for the purpose of disposing of low-level radioactive waste materials make specific provisions for and take cognizance of the possibility that any lease or agreement entered into by the State of Nevada with a private individual or firm for waste disposal operations may, for one reason or another, the human element not to be discounted, terminate at any time prior to the expiration of the maximum term of the lease, whether it be for 99 years or a lesser period of time. And, even though the lease or agreement be for the maximum term of 99 years, this specific law contemplates that safeguards for the safety of the public will be necessary thereafter. Our present knowledge of uses and effects of radioactive material and radioactive wastes is somewhat limited, and at present it is thought that a given package of radioactive waste material that might be buried today will dissipate itself in perhaps 100 years. If that were true, a package buried in the 99th year of the lease would not dissipate itself for another 100 years. Therefore, the Legislature, in its wisdom, provided that the Director of the State Department of Conservation and Natural Resources may, in the lease or agreement, provide for such protection at the termination of any lease or agreement as may be necessary in the interest of the public health and welfare.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

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**OPINION NO. 61-238 ARCHITECTURE, NEVADA STATE BOARD OF**—Applicable law construed as rendering invalid and unenforceable in Nevada, contract documents between an out-of-state architect, unregistered in Nevada, and an owner who engages said architect's services for construction work in Nevada. Pending enactment of express legislation therefor, Board held authorized to promulgate an appropriate rule or regulation, under its rulemaking power, requiring the prior qualification and licensing of out-of-state



architects in respect of their professional services relating to construction work which is to be performed in Nevada.

Carson City, August 21, 1961

Mr. Raymond Hellman, Secretary-Treasurer, state Board of Architecture of Nevada, 137 Vassar Street, Reno, Nevada.

### **STATEMENT OF FACTS**

Dear Mr. Hellman:

It is indicated that the Nevada State Board of Architecture (NSBA) has had considerable difficulty during the past several years in connection with the registration of Nevada of registered architects of other states, prior to their acceptance of commissions in the State of Nevada. In many instances, out-of-state registered architects have made no attempt whatsoever to contact the NSBA and have proceeded to draw plans and specifications for construction projects in Nevada.

The NSBA is properly concerned with the matter briefly outlined above, particularly because out-of-state registered architects, in drawing plans and specifications for construction of buildings in the State of Nevada, may not adequately contemplate and make suitable provisions for necessary allowances or tolerances contingent upon the occurrence of earthquakes, and their effect, in the State of Nevada.

We are informed that when the NSBA learns of the employment of such out-of-state registered architects in connections with Nevada construction projects, and notifies them of the licensing requirement for practice of architecture in Nevada, notwithstanding their being licensed in some other state, they usually comply and apply for a Nevada license. However, because there is no assurance that all out-of-state architects make compliance with Nevada law respecting licensing or registration in Nevada, prior to acceptance of commissions for services pertaining to construction work in Nevada, protection of the public interest, as legislatively intended by enactment of Chapter 623 of NRS, is, or may not be, completely or satisfactorily effected.

### **QUESTIONS**

1. Are contract documents between an architect, registered in another state but unlicensed in Nevada, and an owner who engages said architect's services for the construction or erection of a building in the State of Nevada, legal?

2. Is there any present legal basis which would enable the NSBA to prevent or enjoin construction work being performed in the State of Nevada by out-of-state architects until and unless they are in compliance with Nevada licensing requirements for the practice of architecture in this State?

### **CONCLUSIONS**

Question No. 1: Generally, and as herein indicated, No.

Question No. 2: As herein outlined, Yes.

### **ANALYSIS**

[NRS 623.010](#) (Purpose of chapter), as a proper exercise of the State's police power, provides as follows:

The purpose of this chapter is to safeguard life, health and property, and to promote the public welfare.

[NRS 623.020](#) (“Architect” defined) provides as follows:

An architect is defined as a person who is qualified to practice architecture under the provisions of this chapter.

[NRS 623.040](#) (“Practice of architecture” defined) provides as follows:

The practice of architecture is defined as the holding out to the public of services embracing the scientific, aesthetic, and orderly coordination of all the processes which enter into the production of a completed building, performed through the medium of unbiased plans, specifications, supervision of construction, preliminary studies, consultations, evaluations, investigations, contract documents, and oral advice and direction.

[NRS 623.150](#) (Enforcement of chapter provisions; expenses), insofar as here pertinent, provides:

1. The board shall be charged with the duty of enforcing the provisions of this chapter.

\* \* \*

[NRS 623.180](#) (Issuance of certificates; registered architects) provides as follows:

1. No person shall practice architecture in the State of Nevada without having a certificate issued to him under the provisions of this chapter.

2. Whenever the provisions and requirements for registration under the provisions of this chapter have been fully complied with and fulfilled by an applicant, the board shall issue to the successful applicant a certificate as a registered architect.

3. The certificate shall be synonymous with registration with a serial number and seal. Any person who is issued a certificate may practice architecture in this state, subject to the provisions of this chapter and the rules and regulations of the board.

4. The unauthorized use or display of a certificate of registration shall be unlawful.

[NRS 623.190](#) (Qualifications of applicants) provides as follows:

Any person, who is at least 21 years of age and of good moral character, may apply for academic and technical examination for certificate and registration under this chapter, but, before being admitted to the technical examination, shall submit satisfactory evidence of having completed a 4-year course in and graduated from a high school approved by the board, or the equivalent thereof.

[NRS 623.210](#) (Acceptable qualifications in lieu of examination) provides that the board may, in lieu of all examinations, accept satisfactory evidence of one of several alternative qualifications, including:

\* \* \*

(b) Registration and certification as an architect in another state or country where the qualifications required are equal to those required in this chapter at the date of application.

2. Any architect who has lawfully practiced architecture for a period of 10 or more years outside this state, except as provided in paragraph (b) of subsection 1,

shall be required to take only a practical examination, the nature of which shall be determined by the board.

[NRS 623.230](#) (Official register of certificates of registration) provides:

The secretary of the board shall keep an official register of all certificates of registration to practice architecture issued under the provisions of this chapter, and of the renewals of the same as provided of in this chapter. The register shall be properly indexed and shall be open for public inspection and information.

[NRS 623.270-290](#) relate to the procedure and grounds for revocation of certificates. [NRS 623.300](#) makes provisions for the issuance of a new certificate after revocation of a certificate.

[NRS 623.330](#) (Exemptions) provides as follows:

The following shall be exempted from the provisions of this chapter:

1. Engaging in architectural work as an employee of a registered architect; provided, that the work may not include responsible charge of design or supervision.
2. Practice of architecture by any person not a resident of and having no established place of business in this state as a consultant associate of an architect registered under the provisions of this chapter; provided, that such nonresident is qualified for such professional service in his own state.
3. Practice of architecture solely as an officer or as an employee of the United States, or of a licensed contractor in this state.
4. Practice of architecture by any person who is a licensed architect in another state or country whose laws regulating the practice of architecture are recognized by the National Council of Architectural Registration Boards; provided, that all fees required by the provisions of this chapter are paid by such person.
5. A draftsman who does not hold himself out to the public as an architect.
6. A professional engineer registered under the provisions of Chapter 625 of NRS.

[NRS 623.360](#) constitutes violations of any provisions of the chapter misdemeanors subject to fine, and provides for injunctive relief in favor of the Board whenever any person “\* \* \* has engaged or is about to engage in any acts or practices which constitute or will constitute an offense against this chapter \* \* \*.” [NRS 623.370](#) authorizes District Attorneys to prosecute violations of the chapter.

The foregoing most relevant excerpts from applicable law are deemed sufficient evidence of the comprehensive measures which the State, in exercise of its inherent police powers, believed necessary for the safeguarding of life, health and property, and promotion of public welfare and interest. Requirement of a license of any person desiring to offer his professional services as an architect to the public, in respect of the construction of any building in Nevada, manifestly, is essential to fulfillment of the legislative purpose, namely: protection of the public, by preventing incompetent persons from assuming to act in the particular capacity of architects. (A.G.O. No. 781, July 22, 1949.)

The effect on a contract of a failure on the part of an architect to procure a license has been stated as follows:

Statutes requiring a person to secure a license before engaging in a particular business or profession may expressly or by necessary implication render any contract for services void when entered into by one who has not procured the required license. Generally, however, the purpose of the legislature in enacting occupational license statutes is deemed controlling in the determination of the

validity or enforceability of such contracts. The effect of the failure of an architect or one holding himself out as an architect to procure a license to practice his profession on the validity and enforceability of a contract for his services or upon his right to recover for services rendered seems to depend upon the purpose of the legislature in requiring the license. *If the purpose in requiring a license is to furnish protection to the public by preventing incompetent persons from assuming to act in a particular capacity, the contract of an unlicensed person is invalid.* Accordingly, the rule has been laid down that the failure of one holding himself out as an architect to procure a license required for public protection and to bar those lacking in the requisites of learning and skill precludes recovery for professional services rendered in his capacity as an architect. Nor is his contract rendered enforceable by virtue of the fact that his employer was informed that he did not have a license, or that the public authorities had never enforced such requirement, or that the employer had accepted the building as substantially free of defects. *Some courts, however, have taken the view that under a statute making it a misdemeanor to practice without a license or a certificate, a contract made before obtaining such license or certificate is not thereby rendered void, but that it is necessary to obtain the certificate before performing the contract.* In this connection it may be observed that most statutes which require architects to procure licenses make it a misdemeanor for one to practice the profession without first procuring the required license. 3 Am.Jur. 999, Section 4, and footnote citation; Annotations: *See* 30 A.L.R. 851; 42 A.L.R. 1228; 118 A.L.R. 651, et seq. (Emphasis supplied)

Our review of the cases definitely shows that the majority view and weight of judicial authority holds that the failure to procure a required license renders an architect's contract with an owner invalid and unenforceable.

The rationale of the majority rule has been stated as follows:

“Where the law does not contain the prohibition, but imposes a penalty for its violation, it seems to be generally held that the penalty implies the prohibition \* \* \*. It would seem to be somewhat anomalous to have a court exercising criminal jurisdiction pronounce a man a criminal and inflict the penalty of the law on him, and then turn around and, sitting as a civil court, let the same man reap the benefit of the same act for which it had just punished him.” (Quoted in 118 A.L.R. 650, citing *Ronaldson v. Moss & Watkins* (1930) 13 La.App. 350, 127 So. 467.)

The question then arises as to whether, and to what extent, if any, such invalidity of contract would apply to nonresident architects, duly licensed in their own states but not in Nevada, who render architectural services in respect of construction work to be performed in the state of Nevada.

If the contract between the out-of-state architect and the Nevada resident, pertaining to construction work in Nevada, were executed in the State of Nevada, Nevada law would undoubtedly, under contract law, govern the validity of such contract, since this State would be the locus of the making of said contract and the place of its performance.

But what if the contract were entered into in the state of the architect's residence or place of business and where he is duly licensed to practice his profession, even though performance of the contract were in Nevada where the architect is not so licensed? In such case, the contract would undoubtedly be valid in the state where made, and, therefore, enforceable in said state. But it would still be contrary to the public policy of the State of Nevada, and, therefore, invalid and unenforceable in Nevada. Such, briefly, is our view of the right of the parties as between themselves.

We next consider whether the Nevada State Board of Architecture may legally prevent or enjoin construction work in the State of Nevada by out-of-state architects who are unlicensed in Nevada.

[NRS 623.330](#), paragraph 4, is particularly pertinent to such question. Clearly, if the out-of-state architect is licensed in a state which is recognized by the National Council of Architectural Registration Boards, and such architect paid all required fees prescribed by Chapter 623 of NRS, he would be in compliance with Nevada law, and the NSBA could not prevent or enjoin the performance of construction work by said architect in Nevada. In short, the exemption of [NRS 623.330](#) would apply to the out-of-state architect, and the NSBA would be without legal authority to prevent or enjoin his practice of architecture in Nevada.

In our view, and because of the need for provision of necessary allowances and tolerances against contingent earthquakes in Nevada, legislative intent and purpose in prescribing the licensing of architects, would be nullified by allowance of such exemption, merely upon payment of the scheduled fees state in the law. The NSBA must, in the public interest, review, approve, and license out-of-state architects taking commissions for professional services to be performed in Nevada, prior to execution of their work in the design, and plans and specifications for construction work in Nevada.

An explicit provision in Nevada law, so regulating the prior qualification and licensing of out-of-state architects with respect to their preparaton and submission of plans and specifications for the construction of any building in Nevada, would, of course, be most desirable in such connection. However, in the absence of such express statutory provision, it is our considered opinion that the NSBA is not helpless to give effect to manifest legislative intent and purpose of protecting Nevada owners contemplating new construction work in this State.

[NRS 623.140](#) (Election of officers; rulemaking powers of board), insofar as here pertinent, provides as follows:

Within 30 days from and after the date of their appointment, the board shall:

\* \* \*

3. Formulate and adopt such other rules and regulations as may be necessary and proper, not inconsistent with this chapter.

The adoption by the NSBA of a rule or regulation which would subject out-of-state architects to *prior* proper qualification and licensing in Nevada (an earthquake state), before they could undertake any commission for architectural services in connection with any construction work in Nevada, would not be an unreasonable requirement under the State's sovereign police powers. Nor, in our opinion, would such a rule or regulation be inconsistent with the exemption accorded out-of-state architects by [NRS 623.330](#), paragraph 4.

The contingent occurrence of earthquakes in Nevada is an additional factor not contemplated in the accorded exemption. While such exemption is presently absolute, if the condition contained therein is complied with, the NSBA does have the legal authority, by promulgation of rule or regulation, reasonably to prescribe additional conditions otherwise consistent with indisputable legislative intent and purpose of fully protecting the public, i.e., Nevada owners and others who might be affected by improper construction work in Nevada.

Pending enactment of appropriate legislation which will expressly contemplate the problem herein considered, we respectfully suggest that the NSBA is obligated to resolve the same, as best it presently can, by promulgation of an appropriate rule or regulation. With promulgation of such rule or regulation, the NSBA would then be authorized to take action pursuant to [NRS 623.360](#) and [623.370](#).

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-239 PUBLIC EMPLOYEES RETIREMENT BOARD; COMMUNITY PROPERTY**—A spouse of a member of the Public Employees Retirement System, or other person, may effectually claim an interest in the trust moneys deposited with the Board under its retirement system, by such member, contingent upon the application and qualification of the member to withdraw the fund under the provisions of [NRS 286.430](#), and an appropriate court order of disbursement. [NRS 123.240](#)-286.670-286.430 construed.

Carson City, August 21, 1961

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, P.O. Box 637,  
Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. Buck:

The regular session of the Legislature of 1947 enacted Chapter 181, p. 623, which created the Public Employees Retirement System. The system thus created requires certain of the public employees of the State of Nevada and of participating political subdivisions to become members of the system and to contribute thereto by payroll deductions. Section 24 of the original act, now [NRS 286.670](#), effective March 27, 1947, contained provisions pertinent to the present inquiry. This section, in part, provides:

286.670 1. The right of a person to a pension, an annuity, a retirement allowance, the *return of contributions*, the pension, annuity or retirement allowance itself, any optional benefit or death benefit or any other right accrued or accruing to any person under the provisions of this chapter, and the money in the various funds created by this chapter, shall:

- (a) Be exempt from all state, county and municipal taxes.
- (b) *Not be subject to execution, garnishment, attachment or any other process.*
- (c) Not be subject to the operation of any bankruptcy or insolvency law.
- (d) Not be assignable.

\* \* \*. (Emphasis supplied.)

The original act, Section 16(2) contained the provisions now contained in [NRS 286.430](#), which provides:

286.430 If an employee who is a member of the system and has contributed to the public employees' retirement fund and has not attained his earliest service retirement age, is separated for any reason, other than death or disability, from all service entitling him to membership in the system, *he may withdraw from the public employees' retirement fund the amount credited to him in his account.* (Emphasis added.)

Chapter 123 of NRS is entitled "Rights of Husband and Wife." [NRS 123.220](#) et seq., deals with the rights of husband and wife in community property. [NRS 123.220](#) defines community property and [NRS 123.230](#) provides that the husband is entrusted with the control of the community property. [NRS 123.240](#) is a limitation upon the absolute control of the community property by the husband. This section enacted as Chapter 250, Statutes of 1953, effective March 25, 1953, now provides the following:

123.240 Notwithstanding the provisions of [NRS 123.220](#) and [123.230](#), whenever payment or refund is made to an employee, former employee, or his beneficiary or estate pursuant to a written retirement, death or other employee benefit plan or savings plan, such payment or refund shall fully discharge the employer and any trustee or insurance company making such payment or refund from all adverse claims thereto, unless, before such payment or refund is made, the employer or former employer, where the payment is made by the employer or former employer, has received at its principal place of business within this state written notice by or on behalf of some other person that such other person claims to be entitled to such payment or refund or some part thereof or where a trustee or insurance company is making the payment, such notice has been received by the trustee or insurance company at its home office, but nothing contained in this section shall affect any claim or right to any such payment or refund or part thereof as between all persons other than the employee and the trustee or insurance company making such payment or refund.

### QUESTION

Do the provisions of [NRS 123.240](#) apply to the Public Employees Retirement Board, despite the provisions of [NRS 286.670, 1\(b\)](#)?

### CONCLUSION

We have concluded that notice given to the Public Employees Retirement Board, pursuant to [NRS 123.240](#), must be honored by the Board, upon the conditions and under the limitations hereinafter set forth.

### ANALYSIS

Chapter 250, Statutes 1953, is an act to amend “An Act defining the rights of husband and wife.” We note also that in its revision, it is logically made a part of the community property law, which is limited in its application to husband and wife. However, the act itself does not limit the application thereof to spouses, but permits “some other person” to give notice that he (she) claims rights or an interest in the fund.

The Legislature did not expressly provide in the statute of 1953 that [NRS 123.240](#) was intended to apply to the Public Employees Retirement Board, and thus in certain situations partially repeal [NRS 286.670, 1\(b\)](#), by reason of an irreconcilable conflict therewith. A cardinal principle of statutory construction, however, requires that conflicting statutory provisions be reconciled, without the nullification of either, if it may be done without violence to either. This may be done and we, therefore, reluctantly conclude that the Public Employees Retirement Board is bound, within the limitations hereinafter set out, by notice given pursuant to the provisions of [NRS 123.240](#). We note also that [NRS 123.240](#) is of later enactment than [NRS 286.670](#) and this fact is in harmony with the construction herein contained.

We are reluctant to so conclude for the reason not only that it will, or could, result in a great deal of interference with the orderly administration of the Public Employees Retirement System, but also for the reason that the statute does not specifically provide what steps are then to be taken as to the time and manner of release of the funds so held. It, therefore, becomes necessary to analyze these matters. Under [NRS 286.200](#) the Board does have rule-making powers, such rules to harmonize with the statutes in respect to manner of operation.

After notice is given to the Public Employees Retirement Board, pursuant to [NRS 123.240](#), by a member’s spouse (or by spouse’s attorney), or by another person (or by his or her attorney), to the effect that such person claims an interest in the refund (or some part of it) and that the refund (or a definite portion of it) should be frozen and held by the Board until a suitable order to be issued by a court of competent jurisdiction may be obtained in respect thereto, what then follows?

The right of an employee to withdraw moneys deposited with the Public Employees Retirement Board under the provisions of [NRS 286.430](#) depends upon the employee's discontinuance of service with the participating public employer. He could not hold his employment and draw the money credited to his account from the retirement fund. It follows that notice given by a spouse or other person, or by his or her attorney, to the Board, pursuant to [NRS 123.240](#), would be and would remain totally ineffectual if the public employee, member of the system, does not separate from his public employment. It is also true that a member of the system may discontinue his public employment and, in the belief that he will secure other employment with a participating public employer (or for other reasons sufficient to himself), may decline to apply to the Board for the withdrawal of the fund credited to his account, under the permissive provisions of [NRS 286.430](#).

It follows from the foregoing that if a member (employee) does not apply to the Board for the return of his credited fund, but continues to hold his public employment after the notice is given, or having discontinued his public employment, prefers to leave his credited retirement fund with the Board, and makes no application to withdraw it, such notice given by the spouse or other person pursuant to the provisions of [NRS 123.240](#) is totally ineffectual. In such case such fund is beyond the reach of a court in a divorce or other action, and a court would not acquire jurisdiction to enter an order in respect to such fund.

However, assuming that the member has made application to the Board to withdraw his fund credited to his account, and but for the notice given pursuant to the provisions of [NRS 123.240](#), is legally entitled to withdraw such fund under the limitations above discussed, thus conferring upon the court jurisdiction under the facts to enter an effective order in respect to such fund, in the absence of such an order issued by a court of competent jurisdiction, how long should the fund be frozen, upon the authority of and pursuant to the notice given under the provisions of [NRS 123.240](#)? Clearly, the fund should not be withheld indefinitely merely upon the basis of the notice. In such event, the claim should be confirmed by a court order which should be filed with the Board within a reasonable length of time, counted from the date the claim is filed with the Board.

We, therefore, recommend that, when notice is received by the Executive Secretary of the Public Employees Retirement Board, pursuant to the provisions of [NRS 123.240](#), he respond to the person giving such written notice with the following advice:

1. The date that such notice was received.
2. That, under the authority of an opinion of the Attorney General Department, such notice will be deemed effectual for disbursement of funds thereunder *only if, and after*, the involved member makes application and otherwise qualifies for withdrawal of his accredited retirement fund.
3. That after members' separation from public employment and filing of a fund-withdrawal application with the Public Employees Retirement Board, a court of competent jurisdiction may then enter an effectual order with respect to the disbursement of said fund, in payment or partial payment of the claim thus noticed.
4. That the Board will honor said notice subject to said limitations and the further condition that claimant, within a period of ninety (90) days from the date of the receipt of notice, files with the Board an effective court order, respecting the disbursement of said fund, or portion thereof.
5. That in the absence of filing of such effective court order, within the said time limited, the "hold" on the member-employee's accredited funds, resulting from claimant's notice to the Board, will be deemed to have lapsed and to be null and void.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. PRIEST  
Deputy Attorney General



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**OPINION NO. 61-240 FIRE PROTECTION DISTRICT; COUNTY**—Failure to hold elections for office on the Board of Directors of a County Fire Protection District results in a vacancy in such office. County Commissioners have legal authority to make appointments to fill vacancies on the Board of Directors of a County Fire Protection District.

Carson City, August 21, 1961

Honorable Wayne O. Jeppson, District Attorney, Lyon County, Yerington, Nevada.

### STATEMENT OF FACTS

Dear Mr. Jeppson:

We are advised that elections for Directors to the Board of Directors of the Smith Valley, Lyon County, Fire Protection District in the past were not always held as required by statute, and that only one member of the present Board was elected in accordance with the provisions of such law. We are further advised that one member was appointed by the Lyon County Commissioners to fill a vacancy created by resignation.

### QUESTIONS

1. Does the failure to hold an election to the Board of Directors of the Fire Protection District, as required by statute, result in a vacancy in office?
2. May the County Commissioners fill a vacancy on the Board of Directors of a County Fire Protection District?

### CONCLUSIONS

Question No. 1: Yes.  
Question No. 2: Yes.

### ANALYSIS

[NRS 474.140](#)(1) states that, except as provided in subsection 2, after the first election, an election shall be held each year on the last Friday in March, at which one Director shall be elected. Subsection 2 of [NRS 474.140](#) provides that the board of Directors shall have the power, by resolution duly passed, to change the date for holding an election to a date to be named by the Board, but not more than 120 days after the last Friday in March. [NRS 474.140](#), subsections 3, 4, 5 and 6 further provide for the election procedure which must be followed.

Apparently the foregoing statutory procedure was not followed with regard to all of the present members of the Board of Directors of the Smith Valley, Lyon County Fire Protection District.

It is our opinion that the present members of the Board of Directors, other than the Director who was elected in accordance with [NRS 474.140](#) and the Director who was appointed by the Lyon County Commissioners, are not legally qualified Directors unless elections were held each year for the office of Director whose term had expired, as provided in Chapter 474 of NRS. We consider the election procedure, as set out in the above NRS section, mandatory and must be followed. There are no exceptions provided by said law.

[NRS 245.170](#) provides 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.

In our opinion, the members of the Board of Directors of the Lyon County Fire Protection District are county officers, and that [NRS 245.170](#) gives the County commissioners power to fill vacancies on the Board of Directors.

We feel it proper to suggest that any member of the Board of Directors who is not legally qualified, because of failure to hold elections as required by [NRS 474.140](#), or for any other reason, could resign as Director, thereby creating a vacancy in office. The Lyon County Commissioners could then reappoint a person to fill such vacancy pursuant to [NRS 245.140](#). This might well be the Director who resigned because legally disqualified presently to hold such office.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: David G. Parraguirre  
Deputy Attorney General

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**OPINION NO. 61-241 CHAPTER 241 NRS CONSTRUED**—1. Open Meeting Law has no application to meetings, no matter what their nature, conducted by the Governor in his executive capacity. 2. The Open Meeting Law is a manifestation of the fundamental right of a citizen in a democratic system “to know.” However, in order to make such a law workable, recognition must be accorded to the principle that the best interest of the people sometimes necessitates privacy in the conduct of government. 3. The word “meeting” as employed in that chapter does not mean every gathering of affected public officials at which government business is discussed, but applies only to formal assemblages of public boards, commissions or agencies within the purview of the law. 4. The law applies when deliberations are conducted as well as when formal action is taken. 5. Political bodies should not attempt to evade the express purpose of the Open Meeting Law by means of subterfuge or invention.

Carson City, August 24, 1961

Honorable Grant Sawyer, Governor of Nevada, Executive Chambers, State Capitol, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Governor Sawyer:

You have asked this office to furnish you with its opinion of what constitutes a “meeting” within the purview of the “Open Meeting Law,” Chapter 241 NRS, and our comments with respect to that legislation.

### QUESTION

What constitutes a “meeting” under the provisions of Chapter 241 NRS?

## CONCLUSIONS

1. The Open Meeting Law has no application to meetings, no matter what their nature, conducted by the Governor in his executive capacity.
2. The Open Meeting Law is a manifestation of the fundamental right of a citizen in a democratic system “to know.” However, in order to make such a law workable, recognition must be accorded to the principle that the best interest of the people sometimes necessitates privacy in the conduct of government.
3. The word “meeting” as employed in Chapter 241 NRS does not mean every gathering of affected public officials at which government business is discussed, but applies only to formal assemblages of public boards, commissions or agencies within the purview of the law.
4. The law applies when deliberations are conducted as well as when formal action is taken.
5. Political bodies should not attempt to evade the express purpose of the “Open Meeting Law” by means of subterfuge or invention.

## ANALYSIS

Chapter 241 NRS pertains to meetings of state and local agencies. Its provisions are herein set forth in full:

241.010 Legislative declaration and intent. In enacting this chapter, the legislature finds and declares that all public agencies, commissions, bureaus, departments, public corporations, municipal corporations and quasi-municipal corporations and political subdivisions exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

241.020 Meetings to be open and public: attendance of all persons; exception. Except as otherwise provided in [NRS 241.030](#), all meetings of public agencies, commissions, bureaus, departments, public corporations, municipal corporations and quasi-municipal corporations and political subdivisions shall be open and public, and all persons shall be permitted to attend any meeting of these bodies.

241.030 Executive sessions concerning public officers, employees; exclusion of witnesses. Nothing contained in this chapter shall be construed to prevent the legislative body of a public agency, commission, bureau, department, public corporation, municipal corporation, quasi-municipal corporation or political subdivision from holding executive sessions to consider the appointment, employment or dismissal of a public officer or employee or to hear complaints or charges brought against such officer or employee by another public officer, person or employee unless such officer or employee requests a public hearing. The legislative body also may exclude from any such public or private meeting, during the examination of a witness, any or all other witnesses in the matter being investigated by the legislative body.

241.040 Penalties. A violation of any of the provisions of this chapter or the wrongful exclusion of any person or persons from any meeting for which provision is made in this chapter is a misdemeanor.

The cited chapter was added to NRS in 1960 by virtue of the provisions of Chapter 23, Statutes of Nevada 1960. The legislation was patterned after the California “Brown Act,” but there are significant differences which will be alluded to below.

It should be understood, at the outset, that the “Open Meeting Law” has no application to meetings, no matter what their nature, conducted by the Governor acting in his executive capacity. The act, by its terms, applies only to “meetings of public agencies, commissions, bureaus, departments, public corporations, municipal corporations and quasi-municipal

corporations and political subdivisions. \* \* \*.” ([NRS 241.020.](#)) The extension of such a law to the office of governor might, in fact, constitute an unconstitutional attempt to modify the powers of that office. *See* Article 5, Sec. 6, Nevada Constitution; *State v. Douglass*, [33 Nev. 82](#), 110 P. 177; *King v. Board of Regents*, [65 Nev. 533](#), 200 P.2d 221.

Considering now those public bodies clearly within the scope of the statute, what is the nature of the meetings which must be “open and public”?

Chapter 241 itself furnishes no definition of the term “meeting.” Webster defines “meeting” to mean “a coming together; a gathering; an assembly.” It is our view that reason and authority dictate a more restricted meaning of the word as it is employed in the statute.

In construing the provisions of the term “meeting,” we are aided by the declaration of legislative intent appearing in [NRS 241.010](#): “\* \* \* all public agencies \* \* \* exist to aid the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” This declaration is an expression of the fundamental postulate of democratic government that public officers are responsible to the people, and its corollary that such a government functions best when the electorate is informed.

The policy favoring public access to government operations competes with another policy which is essential to efficient public administration. The public interest is sometimes best served by nondisclosure of government functions. The operation of government, like any other business, must sometimes be conducted in private. A clear example is furnished in Opinion No. 59-180, October 4, 1960, of the Attorney General of the State of California. It was there held that the “Open Meeting Law” did not apply to meetings between a city council and its city attorney held solely to discuss proposed or pending litigation. The opinion states:

City councils are engaged regularly in deliberating or acting upon ordinances, regulations, etc., where the legal implications of the subject matter are as important for a proper decision as factual or any other information in order to form an intelligent and proper decision. Thus, the city attorney may be called upon to explain the legality or legal implications of a proposal before the council. In such instances the public has a right to know all of the factors considered by the council, including the legal advice, if any, received.

\* \* \*

However, there is no indication in the language used in the Brown Act that its purpose is to grant in any fashion an advantage to an adversary of the people. It is one thing to require public meetings so that the public be informed about the deliberations as well as the actions of its representatives and quite another to deliberately give an advantage to an adversary of the people by extending the word “meeting” used in the act to include every conference between a city council and its city attorney which, if open, would not be to the people’s interest but to the interest of the people’s adversary. It would seem that before interpreting the sections to include such a conference the Legislature should clearly say so in unequivocal language.

\* \* \*

It seems obvious that the public would suffer from granting such an advantage to the city’s adversary. In fact, it would clearly appear to be contrary to the public interest for such conferences to be open to the public and therefore it is concluded that the Brown Act does not require such discussions over pending or prospective litigation between a city council and its city attorney to be open to the public.

\* \* \*.”

The Nevada Legislature has recognized the necessity for privacy in the conduct of government affairs. [NRS 48.090](#) provides:

A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

In enacting the law quoted above the Legislature wisely contemplated that, unless there was some statutory assurance that public officials could not be compelled to disclose confidences in open court, vital information would not be supplied to responsible officers.

The California Court of Appeals recently considered the question you have posed in the case of *Adler v. City Council*, 184 Cal.App.2d 763, 7 Cal.Rptr. 805. In that action certain taxpayers sought to declare a zoning ordinance invalid on the grounds that the California "Open Meeting Law" was violated. Prior to the filing of an application for a zoning variance, the members of the planning commission attended a private dinner given at a club by the applicant. At the dinner general problems of zoning and planning were discussed and the applicant was asked questions concerning the nature of the construction he proposed in the event his application was granted. The dinner was informal and no commitments or promises were made. The court held that the dinner gathering was not a "meeting" within the purview of the Brown Act. It stated:

It seems quite evident that the language of the Brown Act was not directed at anything less than a formal meeting of a city council or one of the city's subordinate agencies. If it were, no practical line could be drawn. The members of the planning commission and the city council (whether the full number or only two or three members) would be impeded in conducting informal discussions among themselves, thus exchanging information, would be handicapped in viewing property upon which they were about to legislate, would be unable to confer with real estate experts or with their planning director or with informed individuals having special qualifications to speak upon municipal problems.

The Court of Appeals stated that the views of the Florida Supreme Court, expressed in *Turk v. Richard*, 47 So.2d 543, "correctly reflects the spirit of our Brown Act \* \* \*." That decision construed a Florida statute providing that all meetings of any city or town council shall be held open to the public. Councilmen who violated this statute were subject to fine and imprisonment. The Florida Court said:

The real question in the case is, what did the legislature mean by the words "all meetings" when it enacted the statute requiring that all meetings of any city or town council should be held open to the public of any such city or town? The governing body of a municipality can act validly only when it sits as a joint body at an authorized meeting duly assembled pursuant to such notice as may be required by law; for the existence of the council is as a board of entity and the members of the council can do no valid act except as an integral body. \* \* \* Unless, therefore, the members of the council formally come together, in the manner required by law, for the purpose of joint discussion, decision and action with respect to municipal affairs there can be no "meeting" of this governing body, within the legally accepted sense of the term, for the individual or separate acts of a member of the unofficial agreements of all or a part of the members of the council are ineffectual and without binding force; joint, official deliberation and action as provided by law being essential to give validity to the acts of the council. (Citations.)

The rule being plain as to what is necessary to constitute a "meeting" under the law pertaining to municipal corporations, it must be assumed that when the legislature of the state enacted a statute providing that "all meetings of any city or town council \* \* \* of any city or town \* \* \* shall be held open to the public of any such city or town \* \* \*" it had knowledge of the general law pertaining to municipal corporations and intended the term "all meetings" to have reference only to such formal assemblages of the council sitting as a joint deliberative body as

were required or authorized by law to be held for the transaction of official municipal business; \* \* \*.

In light of the foregoing principles and decisions we are of the opinion that the word “meeting” as used in Chapter 241, NRS does not include every gathering of members of state and local agencies at which business is discussed, but refers only to formal assemblages of those political bodies falling within the scope of the statute.

It is relatively easy to apply this general principle to those cases where the law prescribes the mode or manner of holding meetings (see, for example, [NRS 244.085](#)-244.090 governing meetings of county commissioners); however, in the case of many state and local agencies, the Legislature has not furnished specific guides. [NRS 408.130](#) simply declares that the Board of Directors of the Nevada State Highway Department shall hold meetings “as such times, in such places and for such period and purposes as the board may deem essential \* \* \*.” In such cases the problem of determining whether a given assembly is a formal meeting is a difficult one. Clearly objective evidence of a usual and established method of calling and conducting such meetings would be useful. In some instances the board or agency itself may have promulgated regulations governing the method of holding formal meetings, certainly such regulations are desirable.

Taking action of record, in the nature of a resolution or the granting or denial of motions, is not a condition essential to conducting a “meeting” which is required to be public. The statute specifically applies to “deliberations” as well as “actions.” ([NRS 241.010](#).)

Political bodies governed by the “Open Meeting Law” should not avoid its provisions by subterfuge and invention. Thus, a city council may not constitute itself “a committee of the whole” to conduct business for the purpose of evading the requirements of the law, nor should deliberations be conducted and decisions made at a secret gathering prior to a scheduled public meeting so that the subsequent meeting is a mere formality. *See State v. Common Council of City of Milwaukee* (Wis.), 144 N.W. 1107; *Accord v. Booth* (Utah), 93 P. 734; 27 Ops.Cal.Atty.Gen. 123, 32 Ops.Cal.Atty.Gen. 240.

Violation of the provisions of the “Open Meeting Law” constitutes a misdemeanor. Criminal laws “should be plainly written, so that every person may know with certainty what acts or omissions constitute the Crime.” *Ex parte Deidesheimer*, [14 Nev. 311](#). Enforcement of Chapter 241 NRS is made difficult by reason of the fact that the legislation is in some respects vague and ambiguous. Comparison of portions of the Nevada statute and the California “Brown Act” points out some of the ambiguities present in the Nevada law.

Section 54959 of the California Government Code provides that “*Each member of the legislative body who attends a meeting \* \* \* where action is taken in violation of any provisions of this chapter, with knowledge of the fact that the meeting is in violation thereof is guilty of a misdemeanor.*” (Emphasis added.) Section 54952.6 defines “action taken” to mean a “collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of a legislative body to make a positive or a negative decisions, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, problem, resolution, order or ordinance.” The comparable Nevada provision simply states “A violation of any of the provisions of this chapter or the wrongful exclusion of any person or persons from any meeting for which provision is made in this chapter is a misdemeanor.” ([NRS 241.040](#).) Clearly, the California provisions satisfies the standard of certainty required in criminal statutes to a greater degree than the Nevada provisions .

The California statute includes a section requiring affected agencies to provide by rule for the time and place of holding regular meetings; other sections describe the mode of calling and noticing special meetings and the manner of adjourning meetings. (*See Secs. 54954, 54955, 54956 Cal.Govt.Code.*) As we have indicated in the foregoing analysis, the absence of such provisions in the Nevada law creates difficulty in determining precisely what gatherings are “meetings” within the meaning of the statute.

It should be noted that the scope of the California statute is narrower than the Nevada law, in that it applies only to “legislative bodies” of “local agencies” and that these phrases are defined by code provisions. No such limitation appears in Chapter 241 NRS.

The "Open Meeting Law" is a manifestation of the fundamental right of a citizen in a democratic system "to know." However, in order to make such a law workable, recognition must be accorded to the principle that the best interest of the people sometimes necessitates privacy in the conduct of government. Chapter 241 of the Nevada Revised Statutes has no application to meetings conducted by the Governor in his executive capacity. The word "meetings" as employed in that chapter does not mean every gathering of affected public officials at which government business is discussed, but applies only to formal assemblages of public boards, commissions or agencies. The law applies when deliberations are conducted, as well as when formal action is taken. Political bodies should not attempt to evade the express purpose of the "Open Meeting Law" by means of subterfuge or invention.

In the absence of a specific factual situation, our remarks with respect to the "Open Meeting Law" have been general. As we have indicated, the law is in some respects vague and ambiguous. We respectfully suggest that the expressly declared intent of the Legislature will best be manifested if political bodies, confronted with a questionable set of circumstances, presume that their assemblages should be open and public.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Earl Monsey  
Chief Assistant Attorney General

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**OPINION NO. 61-242 GAMING**—Gaming Commission has power to establish standards of suitability for live entertainment offered public on premises of gaming licensees, and to discipline licensees to enforce such standards of suitability.

Carson City, September 1, 1961

Nevada Gaming Commission, Carson City, Nevada.

#### **STATEMENT OF FACTS**

Gentlemen:

The recent strong condemnation by Bishop Robert J. Dwyer, the Roman Catholic Bishop for the State of Nevada, joined in by members of the clergy of other denominations, against indecent and immoral entertainment being offered for public consumption in gaming establishments in Las Vegas and Clark County, and more recently in Reno, has, as did similar condemnation by the Bishop several years ago, caused considerable controversy and interest within and without the State.

Although not specifically mentioned in the Bishop's letter addressed to all Roman Catholics in Nevada, the condemnation would seem to apply to both the use of nude and seminude show girls and to profane, lewd, lascivious and indecent speech by so-called comedians in live entertainment in gaming establishments.

Believing that the Bishop's remarks were directed only to nude and seminude productions, some members of the gambling fraternity, the producers of the condemned shows, and the nude performers themselves, have risen to defend these productions, contending that the nude girls are artfully portrayed and are not lewd, indecent, obscene or immoral.

In his letter, Bishop Dwyer says in part:

Three years ago I found it necessary to write to you in regard to a most unpleasant and unsavory subject, the problem of indecent and immoral entertainment in Nevada. Once again, I find that I am forced to call your attention to its prevalence.

I refer, of course, to the type of floor shows and plays presented by a certain number of resort hotels and casinos, located principally in the two major cities of state.

Let me repeat in part what I said then. Your Bishop is not a public law enforcement officer. It is not his business to determine whether certain entertainment features transgress the state, county, or municipal ordinances regulating public decency.

He is, however, the guardian of the morals of the flock entrusted to his care. It is very much his business to alert the faithful of the diocese to the gravity of the situation and to warn them of the dangers involved.

\* \* \*

Nevada is our home and we love it. Here we have our commonwealth, our dwellings, our work. Here we raise our families in the knowledge and love of God. It is a shocking thing that unprincipled men should be permitted to befoul this home of ours and to give to Nevada the reputation it is fast acquiring, of a state where decency doesn't matter.

Once again I appeal for a vigorous expression of public opinion in regard to this matter. I urge that we clean our own house before rising national sentiment forces this upon us.

There is no question here of imposing a puritanical censorship; the public decency of our commonwealth is at stake. Here, certainly, is an issue upon which all right-thinking people, Protestants, Jews, and Catholics, should join in instant and effective protest.

Let me be explicit. Nevada has legalized gambling and has set up the machinery to control its operation. But no effective machinery has been set up to control and police the by-product of gambling which we have noted in this letter.

It would be infinitely better if those immediately concerned would themselves assume this responsibility by keeping their entertainment within reasonable bounds of propriety. This was my plea three years ago, but it fell on deaf ears.

But it is manifest that it cannot be permitted to go on this way; there is a limit to the open flouting of morality. If nothing is done to correct the situation the state may well find itself in the position of a moral leper. And leprosy demands drastic treatment.

I am indeed sorry that I should find it needful to write in this manner, sorry that I should have to deal with this subject at all.

My first concern, obviously, is for you, my Catholic people, for your spiritual welfare and for the members of your families, especially your children who are exposed to this taint. But I am also concerned for the honor of the state of which I am, like yourselves, a citizen.

I object when certain elements try to rub our noses in filth. And I do not think I stand alone in my objection.

And I do not think I stand alone in my objection.

On July 16, 1961, the Las Vegas Review Journal, in an editorial entitled "Las Vegas Humor," stated in part:

If the entire crop of comedians who visit Las Vegas represent the best of American humor, we're in for very little comic relief this year.



A round of the casino lounge shows and even some of the dinner shows would indicate the only cause for laughter these days is an abnormal preoccupation with sex, particularly perverted sex.

Comedians have found that a perfect way to make people laugh at their own inhibitions is to discuss sex, natural and perverse, with complete irreverence.

Every facet of sex from the child molester to the homosexual has been exploited to the extreme so that it is now impossible to go anywhere without seeing one or more male entertainers mincing around the stage in imitation (we hope) of the opposite sex.

The leaders of this "humor" school have now reached the point where they not only kiss, but hug and pet each other on stage. We're afraid to think of what they'll do for an encore and would like to make a few suggestions before they think of something.

There may be nothing wrong with a joke pertaining to sex if it is in good taste. But are the comedians who are usually the critics and satirists of a society, so sick and untalented they can't cover any other topic?

For many years Las Vegas newspapers, in particular, have carried letters to the editor and editorials criticizing seminude and suggestive newspaper advertising of certain shows staged by gaming licensees as harmful to the morals of the community, especially children.

### QUESTION

Does the Nevada Gaming Commission have the power to establish standards of suitability for live entertainment offered the public on the premises of gaming licensees, and can the Nevada Gaming Commission enforce such standards of suitability by disciplinary action against gaming licensees?

### CONCLUSION

Within the limits herein defined, we answer the question in the affirmative.

### ANALYSIS

[NRS 463.130](#)(1) reads as follows:

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.* (Emphasis added.)

[NRS 463.140](#)(1) reads as follows:

The provisions of this chapter with respect to state gaming licenses shall be administered by the state gaming control board and the Nevada gaming 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.

Regulation 5.010 of the Nevada Gaming Commission and Nevada Gaming Control Board, entitled "Methods of Operation," reads in part as follows:

1. *It is the policy of the commission and the board to require that all establishments wherein gaming is conducted in this state be operated in a manner suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada.* (Emphasis added.)

2. Responsibility for the employment and maintenance of suitable methods of operation rests with the licensee, and *willful or persistent use or toleration of methods of operation deemed unsuitable will constitute grounds for license revocation.* (Emphasis added.)

3. *The commission and the board deem 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 or the gaming industry is an unsuitable manner of operation.* Without limiting the generality of the foregoing, the following acts or omissions may be deemed unsuitable manners of operation:

(a) Failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the state and act as a detriment to the development of the industry.

\* \* \*

(d) *Failure to conduct advertising and public relations activities in accordance with decency, dignity, good taste, honesty and inoffensiveness.* \* \* \* (Emphasis added.)

Chapter 214, 1961 Statutes, reads as follows:

Sec. 4. Chapter 463 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. The gaming policy board, consisting of the governor as chairman and the members of the commission and of the board, is hereby created.

2. The governor may, from time to time, call meetings of the gaming policy board for the exclusive purpose of discussing matters of gaming policy.

The Legislature has clothed the Gaming Commission with the responsibility of controlling the activities of gaming licensees to protect the public health, safety, morals, good order and general welfare of the inhabitants of Nevada. And, in addition, the commission has established as its policy that any activity on the part of a gaming licensee 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 or the gaming industry is an unsuitable manner of operation.” It is further declared to be the policy of the commission that “willful or persistent use or toleration of methods of operation deemed unsuitable will constitute grounds for license revocation.”

In *Nevada Tax Commission v. Hicks*, [73 Nev. 115](#), The Supreme Court made these significant statements:

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 those 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. \* \* \*

The Court then went on:

This court has already had occasion to note that the control and licensing of gambling is a duty demanding special knowledge and experience \* \* \*.

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.

\* \* \*

We are dealing with the duty to determine the suitability of those who would secure or retain gambling licenses. \* \* \*

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 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 \* \* \*. 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. \* \* \*

The Supreme Court has thus established the guidelines within which the commission may examine factually any activity of a gaming license and, applying its special knowledge and experience, determine whether such activity constitutes a suitable or unsuitable method of operation, keeping in mind that the standards of suitability must not be so unrelated to gambling as to be arbitrary, discriminatory, capricious, or wholly beyond the sphere of its authority.

Since the Supreme Court has said that it is not within the province of the courts to decide what shall constitute suitability, it is certainly not within the province of the office of the Attorney General to do so.

Therefore, if the Gaming Commission and the Gaming Policy Board should determine that certain entertainment currently being offered the public in gaming establishments is inimical to the public health, safety, morals, good order and general welfare, and reflects, or tends to reflect, discredit on the gaming industry and the State, then the Commission may establish standards of suitability in live entertainment and enforce the same by disciplinary action against gaming licensees.

The question now arises, how will the Gaming Commission determine in specific instances whether entertainment is suitable or unsuitable?

In our opinion, the state gaming authorities should not be placed in the role of censors.

The protection of the public against obscenity, indecent exposure, and against indecent or obscene speech is primarily a local law enforcement problem, whether or not the same occurs in a gaming establishment. The tools of local law enforcement are state criminal statutes and local criminal ordinances.

However, the powers of the Gaming Commission are so broad and all-encompassing as to overlap the powers and duties of local law enforcement.

We suggest two methods which the Gaming commission might employ, should it deem action by it necessary in the live entertainment field:

1. Regulation 5.010 of the Gaming Commission and Control Board could be amended to provide that any conviction for violation of state law, or city or county ordinance, pertaining to indecent exposure or speech by licensees, their agents and employees, or their independent contractors and their agents and employees, may or shall constitute an unsuitable method of operation.

2. The Commission could prescribe as an unsuitable method of operation the staging of productions displaying nudes, or seminude, in entertainment on the licensee's premises.

For your information we are forwarding to you with this opinion a copy of a letter and report which we have this date sent to the District Attorneys of Washoe and Clark Counties, and to the City Attorneys of Las Vegas and Reno, dealing with the constitutional problems of obscenity and indecent exposure, nudity, profane, lewd and indecent speech in live entertainment. This report contains language of an ordinance adopted in Newark, New Jersey, and this language could be employed by the Gaming Commission in a new regulation as the definition of an unsuitable method of operation.

Regulation 5.010 3(d), as it now reads, governs indecent and offensive advertisement by gaming licensees. If it were enforced vigorously, the problem of seminude and suggestive newspaper advertisements by gaming licensees could be effectively controlled.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

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**OPINION NO. 61-243 GAMING; DISCRIMINATION**—Gaming Commission has power to determine that discrimination by licensees against persons on basis of race, color or creed, is an unsuitable method of operation, and to discipline licensees for such discrimination.

Carson City, September 1, 1961

Nevada Gaming Commission, Carson City, Nevada.

### STATEMENT OF FACTS

Gentlemen:

On March 8, 1960, in Opinion No. 143, this office took the position that the Gaming Commission could not attach a condition to all state gaming licenses, subjecting licensees to disciplinary action for discrimination against patrons because of race, color, or creed. The reason given was that discrimination was only remotely connected with gaming control and licensing and, therefore, in the absence of express legislative authority, the Commission could not act against its licensees for such discrimination. The opinion limited the broad and seemingly all-encompassing language of pertinent gaming statutes and regulations to matters directly relating to licensing and controlling of gambling.

In 1961, by Chapter 364, Statutes of 1961, page 731, the Legislature passed and the Governor signed into law a bill creating a Nevada Commission on Equal Rights of Citizens.

### QUESTION

We have been asked by the Las Vegas Branch of the National Association for the Advancement of Colored People what effect, if any, Chapter 364, 1961 Statutes, has, in our view, on the position taken by us in Opinion No. 143 of March 8, 1960.

## CONCLUSION

1. Without considering Chapter 364, 1961 Statutes, we believe Opinion No. 143 was incorrect in its conclusion.

2. Chapter 364, 1961 Statutes, does not increase the powers of the Nevada State gaming authorities in regard to discrimination against persons on the basis of race, color and creed, but should be considered by the Nevada Gaming Commission and the Gaming Policy Board.

## ANALYSIS

Conclusion No. 1.

[NRS 463.130](#)(1) reads as follows:

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.* (Emphasis added.)

[NRS 463.140](#)(1) reads as follows:

The provisions of this chapter with respect to state gaming licenses shall be administered by the state gaming control board and the Nevada gaming 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.

Regulation 5.010 of the Nevada Gaming commission and Nevada Gaming Control Board, entitled "Methods of Operation," reads in part as follows:

1. *It is the policy of the commission and the board to require that all establishments wherein gaming is conducted in this state be operated in a manner suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada.* (Emphasis added.)

2. Responsibility for the employment and maintenance of suitable methods of operation rests with the licensee, and *willful or persistent use or toleration of methods of operation deemed unsuitable will constitute grounds for license revocation.* (Emphasis added.)

3. *The commission and the board deem 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 or the gaming industry is an unsuitable manner of operation.* Without limiting the generality of the foregoing, the following acts or omissions may be deemed unsuitable manners of operation:

(a) Failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the state and act as a detriment to the development of the industry. (Emphasis added.)

\* \* \*

Chapter 214, 1961 Statutes, reads as follows:

Sec. 4. Chapter 463 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. The gaming policy board, consisting of the governor as chairman and the members of the commission and of the board, is hereby created.
2. The governor may, from time to time, call meetings of the gaming policy board for the exclusive purpose of discussing matters of gaming policy.

The Legislature has clothed the Gaming Commission with the responsibility of controlling the activities of gaming licensees to protect the public health, safety, morals, good order and general welfare of the inhabitants of Nevada. And, in addition, the Commission has established as its policy that any activity on the part of a gaming licensee 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 or the gaming industry is an unsuitable manner of operation.” It is further declared to be the policy of the Commission that “willful or persistent use or toleration of methods of operation deemed unsuitable will constitute grounds for license revocation.”

In *Nevada Tax Commission v. Hicks*, [73 Nev. 115](#), the Supreme Court made these significant statements:

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 those 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.

The Court then went on:

This court has already had occasion to note that the control and licensing of gambling is a duty demanding special knowledge and experience \* \* \*.

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.

\* \* \*

We are dealing with the duty to determine the suitability of those who would secure or retain gambling licenses. \* \* \*

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 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 \* \* \*. 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 \* \* \*.

The Supreme Court has thus established the guidelines within which the commission may examine factually any activity of a gaming licensee and, applying its special knowledge and experience, determine whether such activity constitutes a suitable or unsuitable method of operation, keeping in mind that the standards of suitability must not be so unrelated to gambling as to be arbitrary, discriminatory, capricious, or wholly beyond the sphere of its authority.

Since the Supreme Court has said that it is not within the province of the courts to decide what shall constitute suitability, it is certainly not within the province of the office of the Attorney General to do so.

Therefore, if the Gaming Commission and the Gaming Policy Board should determine discrimination on the basis of race, color and creed, is being practiced by gaming licensees:

*First*, in not making available to all persons, because of their race, color or creed, all accommodations offered by the licensee to the general public, and

*Second*, by discriminating in the employment of persons on the basis of race, color or creed,

is inimical to the good order and general welfare of the inhabitants of the State of Nevada and reflects, or tends to reflect, discredit on the gaming industry and the State, then the Commission may either condition gaming licenses against such discrimination, or, by amendment to its regulations, denominate such discrimination an unsuitable method of operation, thus subjecting licensees who so discriminate to disciplinary proceedings.

Because of the Statutes, regulations, expressions of our Supreme Court, and for the reasons stated, *supra*, we reverse the conclusion reached in Opinion No. 143 of March 8, 1960.

Conclusion No. 2

Section 2, subsection 1, of Chapter 364, 1961 Statutes, reads as follows:

It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all the people of the state, and to foster the right of all persons reasonably to seek, obtain and hold employment and housing accommodations, and reasonably to seek and be granted services in places of public accommodation without discrimination, distinction or restriction because of race, religious creed, color, national origin or ancestry.

After this declaration of policy all the Legislature saw fit to do to implement said policy was to create a Commission on Equal Rights to foster mutual respect and understanding among racial and ethnic groups, investigate and report instances of discrimination, and formulate and carry out educational programs. The Legislature did not see fit to empower the Equal Rights Commission to prevent discrimination. Certainly, then, the Legislature did not, by the Equal Rights Act, impliedly increase the power of the state gaming authorities.

Thus, it is our opinion that, in spite of the declaration of public policy in regard to civil rights, the powers and the duties of the gaming authorities remain the same. However, in determining whether or not discrimination on the basis of race, color or creed, against patrons and employees found to exist is inimical to the public, good order and general welfare of the people of the State of Nevada, and whether or not such discrimination reflects, or tends to reflect, discredit on the State or the gaming industry, the Gaming Commission and Gaming Policy Board should consider such declaration of public policy, but the weight to be given such public policy is entirely within the discretion of the Gaming Commission and the Gaming Policy Board.

The primary duty in the field of civil rights delegated by the Legislature rests with the Equal Rights Commission, and not with the Gaming Commission and Gaming Policy Board. But, unlike the situation in the field of live entertainment (*see* our companion opinion of this date), the Equal Rights Commission cannot prevent discrimination in the same way local law enforcement can protect against obscene, indecent and nude entertainment, and, therefore, the Gaming Commission and Policy Board should consider the inherent weakness of Chapter 364, 1961

Statutes, in exercising its judgment as to whether or not it should act to prevent such discrimination.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

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**OPINION NO. 61-244 CORPORATIONS; FICTITIOUS NAME; BUSINESS UNDER —**

Nevada statutes do not prevent use of a fictitious name pursuant to the provisions of Chapter 602 of NRS, which name is the same as or deceptively similar to the name of a Nevada corporation. The corporation has a remedy in a proper case for injunctive relief based upon the theory of unfair competition. A name ending with the word "Company," or similar designation, may be used by an entity which is qualified to operate under a fictitious name, pursuant to the provisions of Chapter 602 of NRS. Chapter 602 of NRS and sections 78.035, and 80.010 NRS construed.

Carson City, August 30, 1961

Honorable John F. Mendoza, District Attorney, Clark County, Las Vegas, Nevada.

Attention: Mr. Albert Matteucci, Deputy District Attorney.

**STATEMENT OF FACTS**

Dear Mr. Mendoza:

A business is being operated in Clark County under the name of "Pacific Engineering and Manufacturing Company." The management of this business has informed your office that it has filed this name with the office of County Clerk of Clark County, pursuant to the provisions of Chapter 602 of NRS, as a business operated under a fictitious name. You are concerned with whether or not one may legally operate a business pursuant to Chapter 602, under a fictitious name which might theretofore have been authorized as the name of a duly constituted Nevada corporation, or in any event under a name which might suitably designate a corporation.

**QUESTIONS**

1. May one operate a business in Nevada by use of a fictitious name, which name is the same as or deceptively similar to the name of a Nevada corporation, either domestic or naturalized, it being understood that the Nevada corporation was incorporated or qualified to do business in Nevada as the case may be, at the time of the assumption and commencement of use of the fictitious name?
2. May one operate a business in Nevada under a fictitious name which name ends with a word "Company," or other language indicating that the entity is a corporation?

**CONCLUSION**

1. There is no statutory provision which would prevent the use of a name by an individual or partnership, pursuant to the provisions of Chapter 602 of NRS, as a fictitious name, even though such name is the same as, or deceptively similar to, a Nevada corporation, either domestic or naturalized. However, the corporation would not, in a proper case, be without a remedy, under the doctrine of unfair competition.



2. We find no statutory provisions to prevent a person or partnership operating a business under the authority of Chapter 602 of NRS, from adopting a name ending with the word “Company,” or other designation which would normally indicate that the business entity is a corporation. We are of the opinion that it may.

### ANALYSIS

Under the provisions of Chapter 602 of NRS, entitled “Business Under Fictitious Name,” no provisions is made to prevent the filing of fictitious names that are deceptively similar to such names of business entities formerly filed, nor is there any provisions to prevent the filing of such names that may be deceptively similar to the names of Nevada corporations. No provision of this chapter would preclude the use of a name ending with the word “Company” or other similar language indicating that the name designates a corporation.

[NRS 602.010](#) provides that when a business is carried on under a fictitious name there shall be filed in the office of the County Clerk of each county in which it proposes to carry on business, a certificate.

[NRS 602.020](#) provides the content of the certificate which is required to be filed in each county, and [NRS 602.030](#) provides that such certificate must be filed within one month after the commencement of business.

[NRS 602.040](#) provides that a new certificate shall be filed every time there is a change in the personnel composing the partnership. [NRS 602.070](#) provides that no action may be commenced or maintained upon a contract made in the name thus employed as fictitious until the certificate is filed and [NRS 602.080](#) provides that the chapter shall not apply to corporations. By the provisions of [NRS 602.090](#) violations are declared misdemeanors.

There is no provisions of Chapter 602 of NRS which would prevent both questions from being answered in the affirmative.

Under the provisions of [NRS 78.040](#), one may reserve for a period of ten days a corporate name proposed to be used by the filing of articles within that period. Under the provisions of [NRS 78.035](#), subsection 1, (as to domestic corporations) and [NRS 80.010](#), subsection 4 (as to the qualification of foreign corporations), it is provided that the Secretary of State shall not file articles of incorporation in which the name of the corporation is the same as or deceptively similar to “the name of any other corporation formed or incorporated in this state or of any foreign corporation authorized to transact business within this state or a name reserved for the use of any other proposed corporation as provided in [NRS 78.040](#),” unless with written consent, etc.

[NRS 78.035](#), subsection 1, also in part provides:

A name appearing to be that of an individual and containing a given name or initials shall not be used as a corporate name except with an additional word or words such as “Incorporated,” “Limited,” “Inc.,” “Ltd.,” “Company,” “Co.,” “Corporation,” “Corp.,” or other word which identifies it as not being an individual.

This provision does not provide that these appellations designated are reserved exclusively for corporations.

Although a Nevada corporation, either domestic or naturalized, may not take a name the same as or deceptively similar to the name of a corporation already legally qualified in Nevada, whether domestic or naturalized, a Nevada corporation is not precluded, insofar as the statutes are concerned, from adopting a name formerly in use as a fictitious name, pursuant to the provisions of Chapter 602 of NRS.

As we have shown, the Secretary of State is precluded from filing articles of incorporation under the provisions of [NRS 78.035](#), subsection 1, (as to domestic corporations) and precluded from filing articles under the provisions of [NRS 80.010](#), subsection 4 (as to foreign corporations), if the name proposed to designate the corporation is the same as or deceptively similar to a Nevada corporation (either domestic or naturalized) theretofore authorized. If, by

mistake of the Secretary of State, such articles are filed, the corporation thus created may be enjoined from the use of the name selected, under the theory of unfair competition. *Diamond Drill Contracting Co. v. International Diamond Drill Contracting Co.* (Wash. 1919), 179 P. 120, at 122. Similarly, insofar as the Nevada statutes are concerned, there is nothing to prevent one from using the name of a Nevada corporation, or a name deceptively similar thereto, in filing his fictitious name designation under the provisions of [NRS Chapter 602](#).

Although these evils and dangers are not precluded by statutory law, are they precluded or may they be required to be discontinued otherwise? Does a corporation in Nevada, either domestic or naturalized, have a right to the exclusive use of its corporate name as against infringement of that right by a person or partnership appropriating it for its use as a fictitious name? In certain instances it has such a right, enforceable by injunction, as against another corporation. *Grand Rapids Furniture Co. v. Grand Rapids Furniture Shoppe*, 221 Mich. 548, 191 N.W. 939; *Diamond Drill Contracting Co. v. International Diamond Drill Contracting Co.* (Wash. 1919), 179 P. 120; *Central Mutual Auto Insurance Co. v. Central Mutual Insurance Co.* (Mich. 1936), 267 N.W. 733; *Standard Oilshares, Inc. v. Standard Oil Group, Inc.* (Del. 1930), 150 A. 174. Apart from statutory prohibitions these cases stand upon the doctrine of unfair competition. Although there are not cases as between a corporation and legal entity later formed using a fictitious name deceptively similar to the corporate name, the same principles would, it appears, apply and control. It follows that a corporation either domestic or qualified in Nevada, could in a proper case, by injunction, upon the theory of unfair competition, prevent the use of its corporate name or a name deceptively similar, by a person or partnership under the fictitious name provisions of the Nevada law.

We are of the further opinion however, that except for the possible invocation of the doctrine of unfair competition, a person or partnership that has filed its certificate with the county clerk or clerks pursuant to Chapter 602 of NRS, to operate under a fictitious name, is not protected in the possession of that fictitious name as against its use as a corporate name by strangers to the original filing under Chapter 602 of NRS. We so conclude for the reason that such fictitious name could be used by strangers to the original filing, when filing is in a county or counties not originally used by the original filing. A suit for injunctive relief might succeed, based upon the theory of unfair competition, but the statute being silent could not serve as the basis for such an action.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-245 CORPORATIONS; PRACTICE OF MEDICINE IN NEVADA—**

Corporation may not be formed, nor licensed, to practice medicine. Individual licensed to practice medicine may not do so if stockholder, director, agent, employee, or independent contractor of corporation.

Carson City, September 1, 1961

Kenneth F. Maclean, M.D., President, Nevada State Board of Medical Examiners, 506 Humboldt Street, Room 201, Reno, Nevada.

**STATEMENT OF FACTS**

Dear Dr. Maclean:

A group of licensed physicians in Reno, Nevada, has written the Nevada State Board of Medical Examiners stating that they are interested in forming a Nevada corporation for the purpose of availing themselves of the benefits granted by the U.S. Internal Revenue Code to corporations and corporate employees seeking to establish pension plans. The contemplated pension plan would be for the benefit of the physicians and their employees and would permit setting aside retirement funds during periods of high earning capacity.

This group has sought advice from the American Medical Association regarding the ethical propriety of such a move and has received the following information:

On December 5, 1957, the House of Delegates of the American Medical Association adopted a resolution which not only recognizes unincorporated associations but corporate medical practice as well where it is permitted by law and exists under the exclusive ownership and management of physicians. The resolution reads:

“Whereas, it has been found by experience that physicians practicing as a partnership, association or as members of other lawful group arrangements can preserve the physician-patient relationship, insuring that medical responsibility lies in the hands of the patient’s own doctor and not in the hands of an unlicensed person or entity; and

“Whereas, the ethical principles of the A.M.A. apply to the individual physician whether he practices alone or with a group; now therefore be it

“Resolved, that the House of Delegates affirm that it is within the limits of ethical propriety for physicians to join together as partnerships, associations or other lawful groups provided that the ownership and management of the affairs thereof remains in the hands of licensed physicians.”

This group of Nevada physicians has further advised that the ownership and management of their proposed corporation would at all times remain in the hands of licensed Nevada physicians as the sole stockholders, and that all net income of the corporation would belong to and be distributed to the stockholder physicians, the same as though the group were operating as a partnership. This would be accomplished by the stockholders electing to have the income for tax purposes included in their own individual incomes, with no income being taxable to the corporation. The group further advises that the said doctor-patient relationship would be observed at all times.

### **QUESTION**

Is a Nevada corporation violating any provision of Nevada Revised Statutes, Chapter 630, if said corporation’s purpose is “to enter into contracts with persons to supply them with medical consultation, treatment, advice and service by duly licensed and qualified medical doctors and to employ duly licensed and qualified medical doctors to render such treatment and service; provided (1) that the ownership and management of the affairs of this corporation shall perpetually remain in the hands of physicians duly licensed by the State of Nevada and (2) that the relationship between said medical doctors as physicians and surgeons and their individual patients shall at all times be direct, personal and confidential”?

### **CONCLUSION**

1. A Nevada corporation may not be licensed to practice medicine.
2. A corporation may not be formed in Nevada to practice medicine, as the practice of medicine is not a lawful purpose for which a corporation may be formed.

3. Although individually licensed to practice medicine in Nevada, stockholders, directors, officers, agents, employees and independent contractors of a corporation, in the nature of that proposed for the corporate practice of medicine, may not practice medicine in this State.

### ANALYSIS

Since the American Medical Association has held ethical the corporate practice of medicine:

1. Where lawful under state law;
2. Where the physician-patient relationship can be preserved, insuring medical responsibility in the hands of patient's own doctor, and
3. Where the ownership and control of the corporation is exclusively vested in licensed physicians;

we are asked to determine whether Nevada law permits the proposed corporate medical practice plan. The Nevada Supreme Court has not had an occasion to pass on this problem, but the issue has been considered by a number of courts and the decisions are not reconcilable.

Before considering the cases, it should be pointed out that there is no Nevada statute prohibiting or permitting the practice of medicine by a corporation organized under the general corporation law. The statutory regulation of the practice of medicine in Nevada is contained in Chapter 630 Nevada Revised Statutes. Giving the words of the statute their ordinary meaning, Chapter 630 NRS clearly limits the qualification for licensing to natural persons. A corporation is a legal, but an artificial person. An artificial person cannot qualify to practice medicine and such practice would be unlawful. The lawful practicing of medicine requires the licensing by the State Board of Medical Examiners of individuals having the qualifications prescribed by law.

Since a corporation may not practice medicine, it follows that the practice of medicine is not a lawful purpose for which a corporation may be formed in Nevada under Chapter 78 NRS.

In the cases we have examined that are in point, the basic issue seems to be: What constitutes the practice of medicine within the meaning of the usual licensing statutes?

Cases deciding both ways are collected in 103 A.L.R. 1240, in an Annotation entitled "Right of Corporation or Individual, not himself licensed, to practice Medicine, Surgery, or Dentistry through licensed employees."

The general rule is that a corporation may not lawfully contract with patients for medical services, even though the corporation employs licensed physicians and surgeons. The weight of authority is to the effect that a corporation is not exercising a lawful purpose when it contracts for the treatment of disease for profit.

There is a minority rule that where ownership and management of the corporation are identical and all services normally considered to be within the area of the practice of medicine were in the hands of, and actually performed by, physicians, that contracts between a corporation and patients did not violate the statutes or common law. This is the holding of *State Electro-Medical Institute v. State*, and *State Electro-Medical Institute v. Platner*, 74 Neb. 23, 103 N.W. 1078, 1079 (1905) (companion cases). The Nebraska Court construed the statutes to preclude the practice of medicine by unlicensed persons employed by a corporation, but held that if the services normally required to be performed by licensed persons were so performed, the corporation was not practicing medicine unlawfully.

In *State ex rel. Loser, Attorney General, v. National Optical Stores Co.*, 189 Tenn. 433, 225 S.W.2d 263 (1949), a corporation hired optometrists to make examinations and issue prescriptions. The corporation owned the building and paid certain minimum salaries to the doctors so employed. The Court held that the corporation could be attacked by quo warranto as acting unlawfully in that it was practicing a profession without a proper license. The following comment was made:

[Y]et if it be suggested that defendants here were not actually engaged in the practice of optometry because the eye examinations were made by duly licensed physicians who are allowed by law to practice, it is completely answered by the

findings of fact by Justice Bellinger from which it was made perfectly clear that these physicians were not practicing in the due course of their private professional practice, but were acting as the agents and servants of the defendant national Optical Stores Company.

Unlike the facts in the Nebraska cases, the owners were nonprofessionals. The Court then commented on the deleterious effect of commercialization on professional standards and stated that public policy warranted the decision, since the practices complained of were fraudulent and illegal.

In *Painless Parker v. Dental Examiners* (Calif.), 216 Cal. 285, 14 P.2d 67 (1932), the California Supreme Court held that it was unlawful for a corporation to contract to provide professional services and hire professionals to render such services, thereby attempting to avoid the limits of practice regulation.

In an opinion by the Attorney General of California, 34 Attorney General Opinion 73, of August 21, 1959, it was held that an insurance corporation could not contract to provide professional services under a group insurance plan which proposed to give the insured an option of selecting his own doctor and receiving partial reimbursement for premiums paid, or accept treatment from a practitioner approved by the insurance company, paying no premium. This opinion distinguished California cases involving group medical plans, citing *Complete Service Bureau v. San Diego Medical Society*, 43 C.2d 201, 272 P.2d 497 (1954), on the grounds that these companies were nonprofit corporations.

The present problem has arisen and can arise in Nevada among other professional groups.

A significant article entitled, "The Incorporated Lawyer?," appeared in the May-June 1961 issue of the State Bar of California. Reports by James C. Sheppard, President of the California State Bar, which is quoted in part:

In the scramble for tax relief, some seventeen state legislatures have considered legislation authorizing the formation of either professional associations or corporations. Tennessee and Georgia have enacted the association type bill applicable to all professions. Arkansas permits physicians and dentists to have professional corporations. Minnesota and South Dakota permit only physicians to form professional corporations. Similar legislation has failed to pass in New York, Indiana, and Oregon.

On April 19, 1961, A. B. 2733 was introduced in the California Legislature. \* \*  
\* Briefly, A. B. 2733 provides that those performing professional services, including optometrists, public accountants, chiropractors, osteopaths, physicians and surgeons and attorneys could organize as a professional corporation, issue capital stock to its members, and possess certain corporate advantages. The bill would repeal all provisions of law in conflict with its provisions; presumptively the corporation so created would be designed to have some of the tax advantages which are enjoyed by other corporations.

On June 10, 1961, amendments were proposed to the bill by the California Medical Association changing its design to the framework of professional associations rather than corporations. These amendments were not accepted by the author of the bill.

Some lawyers feel that the bill possesses great advantages tax wise. Others have raised serious questions as to whether the expected tax advantages would in fact be realized.

Since it was introduced so late in the session, neither the Board of Governors nor other interested parties had opportunity to give adequate study to this bill. However the Board unanimously concluded that the bill failed to take into account numerous problems involved in the application of the State Bar Act and Rules of Professional Conduct to the corporate practice of law. Can a corporation be a member of the State Bar? Can it be held responsible for contempt of court? How can a corporation

be disciplined for violation of the rules? Should lawyers have limited liability? Because of these and many other unsettled questions, at its May meeting the Board recommended that the bill be referred to an interim committee for further study. This request was heeded by the Senate Committee. Chief Justice Gibson was so concerned about the effect of the bill that he wired each member of the Senate Governmental Efficiency Committee as follows:

“My attention has just been called to Assembly Bill 2733 which I understand is scheduled before your committee Monday morning, June 12. In my opinion this measure makes fundamental changes in the relationship of the attorneys to the courts and public and I am greatly disturbed by the possible consequences. I strongly urge this legislation be given further study.”

If it is possible for lawyers to obtain tax advantages such should not be gained at the expense of repealing or delimiting the State Bar Act which is now in its thirty-fourth year of existence. Now there will be ample opportunity to study this problem and to find an adequate solution. At its June meeting the Board will authorize a committee of lawyers to give immediate attention to the problem and the committee will be requested to make its recommendations prior to December 1, 1961.

This article points up the necessity for legislation if professional people are to do business under a corporate form and also emphasizes the gravity of making fundamental changes in the relationship between the learned professions and the people they serve.

In the light of the article by the President of the California State Bar, we believe the majority rule of the courts of other states, rather than the decision of the Nebraska Supreme Court, should be followed in Nevada until our Supreme Court passes on the question, or legislation similar to that proposed in California or existing in Tennessee, Georgia, Arkansas, Minnesota and South Dakota, or some combination thereof, is enacted in Nevada.

We thus conclude that, although individually licensed to practice medicine in Nevada, no stockholder, director, officer, employee, agent or independent contractor, of a corporate medical practice plan, such as proposed, may lawfully practice medicine in Nevada.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

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**OPINION NO. 61-246 CORPORATIONS**—A foreign corporation, by participating in a loan in Nevada under the provisions of [NRS 80.240](#), would not authorize, permit, or expose itself to the service of process in Nevada, involving controversies in no way connected with its Nevada business. [NRS 80.240](#) is not ambiguous, indefinite or uncertain.

Carson City, September 1, 1961

Honorable Russell W. McDonald, Director, Statute Revision Commission, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. McDonald:

Under the provisions of [NRS 220.080](#) the Statute Revision Commission is required to make recommendation to the Legislature from time to time in respect to clarification and conflicts in statutes, also in respect to the repeal of obsolete statutes.

The provisions of [NRS 80.240](#) have been called to your attention by an officer of a foreign corporation which is interested in participating in the making of loans secured by real property located in Nevada, pursuant to the provisions of this section. This corporation is concerned with the language of this section in the belief that it might permit service of process to be made in Nevada in respect to a cause of action which in no way or manner would be connected with business done in Nevada under the provisions of the chapter.

### QUESTION

If a foreign corporation, not qualified to do business in the State of Nevada, i.e., not naturalized in Nevada, avails itself of the provisions of [NRS 80.240](#), and thus participates with a domestic lender of the State of Nevada, in the making and servicing of loans secured by Nevada real property, would such corporation authorize or in any manner expose itself to the service of process in Nevada, in respect to controversies not connected with its Nevada business?

### CONCLUSION

We have concluded that such corporation by participating in the loan business in Nevada under the provisions of [NRS 80.240](#), would not authorize, permit or expose itself to the service of process in Nevada, involving controversies in no way connected with its Nevada business. As a result of this conclusion we have concluded that the Nevada statute in this respect is not ambiguous and not inadequate.

### ANALYSIS

Chapter 80 of NRS is entitled "Foreign Corporations." Sections 80.010 to 80.230 of NRS make provision for the requirement and manner of qualification of a foreign corporation to enter and do business in the State of Nevada. [NRS 80.210](#) provides penalties for failure to qualify, applicable to corporations that enter and do business in Nevada without qualifying under the law. [NRS 80.060](#) provides for the appointment of a resident agent upon whom the service of process may be made as provided in [NRS 14.020](#). Fees payable by foreign corporations, in order to qualify, are substantial, and although now under [NRS 80.050](#) are limited to \$25,000, they were, prior to 1960, in many instances, more than this amount. For full admission to the State to do business pursuant to Sections 80.010 to 80.230 of NRS, the requirements are exacting, difficult and in many cases very costly.

However, under the provisions of [NRS 80.240](#) foreign corporations may be admitted to Nevada for the limited purpose expressed in the statute, by complying with much less exacting requirements. *See* Attorney General Opinion No. 50 of April 26, 1958, in which we said:

It is clear from an examination of the present statute that it has been enacted to permit certain foreign corporations, in the limited functions declared by the statute, to do business, as an exception to the law previously applicable to such corporations.

In order to make the distinctions it is necessary to quote the statute fully. [NRS 80.240](#) provides:

80.240 1. Any corporation or insurance association organized under the laws of any other state, district or territory of the United States, or foreign government, which does not maintain an office in this state for the transaction of business, may carry on any one or more of the following activities:

(a) The acquisition of loans, notes or other evidences of indebtedness secured by mortgages, deeds or deeds of trust on real property situated in this state, by purchase or assignment, or by participation with a domestic lender, pursuant to the

commitment agreement or arrangements made to or following the origination, creation or execution of such loans, notes or other evidences of indebtedness.

(b) The ownership, modification, renewal, extension or transfer of such loans, notes, or other evidences of indebtedness, the foreclosure of such mortgages or deeds of trust, or the acceptance of additional obligors thereon.

(c) The maintaining or defending of an action or suit relative to such loans, notes, mortgages or deeds of trust.

(d) The maintaining of bank accounts in Nevada banks in connection with the collection or securing of such loans.

(e) The making, collection or servicing of such loans.

(f) The acquisition of title to property under foreclosure sale or from owners in lieu of foreclosure, and the management, rental, maintenance, sale or otherwise dealing or disposing of such real property.

(g) The physical inspection and appraisal of all property in Nevada which is to be given as security for such loans and negotiations for the purchase of such loans.

2. Any corporation or association carrying on the activities enumerated in subsection 1 of this section shall, *for the purpose of this section*, be deemed to have appointed the secretary of state as its agent for all purposes for which corporate resident agents are required under the general corporation laws of this state and shall, on or before June 30 of each year, file a list of officers and directors and shall pay a fee of \$50 for filing the list of officers and directors and the fee shall be in lieu of any fees or charges otherwise imposed on corporations under the laws of this state. The filing of such annual list shall not constitute the maintenance of an office for the transaction of business within this state for the purposes of subsection 1 of this section.

3. No corporation or association carrying on the activities stated in subsection 1 of this section shall be required to qualify or comply with any provision of [NRS 80.010](#) to [80.230](#), inclusive, or Title 55 of NRS. (Emphasis supplied.)

This section ([NRS 80.240](#)) within itself supports the conclusion heretofore recited.

The admission of such a corporation is for a limited purpose. It is admitted for the “acquisition of loans, notes or other evidences of indebtedness secured by mortgages, deeds or deeds of trust on real property situated in this state, by purchase or assignment, or by participation with a domestic lender, \* \* \*.”

It is also provided: “2. Any corporation or association carrying on the activities enumerated in subsection 1 of this section shall, *for the purpose of this section* be deemed to have appointed the secretary of state as its agent for *all* purposes for which corporate resident agents are required under the general corporation laws of this state \* \* \*.” (Emphasis supplied.)

The appointment of the Secretary of State as resident agent is therefore “for the purpose of this section.” The Secretary of State is not appointed for any other purpose but to serve as resident agent for the transactions or litigation that may arise under “this section.”

Subsection 3 of [NRS 80.240](#) provides in effect that foreign corporations that carry on the activities stated in subsection 1 of this section shall not be required to qualify or comply with any provision of [NRS 80.010](#) to [80.230](#), or Title 55 of NRS. We have formerly shown that to comply with [NRS 80.010](#) to [80.230](#) is arduous and costly. This is excused for the limited purposes expressed in [NRS 80.240](#) and if compliance is made with the relaxed requirements of [NRS 80.240](#). Title 55 of NRS is entitled “Banks and Trust Companies.” A foreign corporation may carry on the activities of subsection 1 of [NRS 80.240](#) by compliance with subsection 2 thereof and is not required to comply with the law for the organization and functioning of a Nevada bank or trust company.

Under subsection 3 of [NRS 80.240](#) the appointment of a resident agent is excused under [NRS 80.060](#), for Sections [NRS 80.010](#) to [80.230](#) do not apply, and the appointment of the Secretary of state as resident agent, is only “for the purpose of this section.” Litigation growing out of



corporate affairs arising in another state would not be “for the purpose of this section,” and service upon the Secretary of State of Nevada would not be authorized.

It follows from the reasons given that this section ([NRS 80.240](#)) in the matter under consideration, is not ambiguous or indefinite, nor does it in this respect require amendment.

Formerly, in four opinions, this department has had occasion to construe the provisions of [NRS 80.240](#). Such opinions are not in conflict with the conclusions here reached. *See* Attorney General Opinion No. 50 of April 26, 1955; Attorney General Opinion No. 102 of September 12, 1955; Attorney General Opinion No. 126 of November 21, 1955 and Attorney General Opinion No. 199 of August 21, 1956.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. PRIEST  
Deputy Attorney General

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**OPINION NO. 61-247 WELFARE DEPARTMENT, NEVADA STATE**—A child is not entitled to social security benefits, as a result of the death of its natural father, if the child was living with and adopted by another family who supported such child prior to the natural father’s death.

Carson City, October 13, 1961

Mrs. Barbara C. Coughlan, State Director, Nevada State Welfare Department, Carson City, Nevada.

### QUESTION

Dear Mrs. Coughlan:

Is a child entitled to social security benefits as a result of the death of its natural father, if the child was living with, and adopted by, another family who supported such child prior to the natural father’s death?

### CONCLUSION

No.

### ANALYSIS

We must look to the law of the state in which the insured person was domiciled at the time of his death to determine whether an applicant is a child of the insured individual at the time of his death (Title 42 USCA, Section 416(h)(1)).

Inasmuch as the father was domiciled in the State of Nevada at the date of his death, the status of parent and child must be determined on the basis of the law of Nevada.

[NRS 127.160](#) provides, among other things, that after a decree of adoption is entered, the natural parents of an adopted child shall be relieved of all parental responsibilities for such child, and they shall not exercise or have any rights over such adopted child or his property. The child shall not owe his natural parents or their relatives any legal duty nor shall he inherit from his natural parents or kindred.

Under Nevada law, therefore, natural parents lose all rights over their child once it has been adopted by another family and the child owes no legal duty to its natural parents.

However, it was stated in *Gonzalez v. Hobby*, 110 F.Supp. 893, that a child cannot be excluded from social security death benefits when the insured individual, at the time of his death, was living with and totally supporting such child, even if the child had been adopted by some other individual.

In the matter before us, the natural father was neither living with nor supporting such child.

Section 202(d)(1) of the Social Security Act (42 USCA 402(d)(1)) provides, among other things, that a child shall be entitled to insurance benefits if the child is dependent upon his father at the time of his death.

Section 202(d)(3) of the Social Security Act (42 USCA 402(d)(3)) provides that "A child shall be dependent upon a father \* \* \* or to have been dependent upon such individual \* \* \* unless at the time of \* \* \* death \* \* \* such individual was not living with or contributing to the support of such child and \* \* \* (B) such child had been adopted by some other individual."

Under this provision a child may be excluded or deprived of dependency benefits if such child had been adopted by some other family and the natural father was not living with or contributing to the support of such child.

On the basis of the foregoing analysis, therefore, we conclude that the applicant is not entitled to Children's Insurance Benefits under the Social Security Act (42 USCA 402(d)), because the child was adopted by another family and such child was neither living with nor supported by his natural father prior to his death.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: David Parraguirre  
Deputy Attorney General

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**OPINION NO. 61-248 NEVADA TAX COMMISSION**—Application of state's use tax to nonresidents making out-of-state purchases of tangible personal property for use in Nevada. Chapter 372 of Nevada Revised Statutes construed as establishing a presumption of intention to use tangible personal property purchased out-of-state within the State at the time it was purchased; such presumption is, however, subject to rebuttal. Held: Where the evidence substantially shows that tangible personal property was purchased out-of-state "for storage, use or other consumption in this state," Nevada use tax applies to out-of-state purchaser; otherwise not. Where another, for his own benefit, pays use taxes due and owing by an out-of-state purchaser, and thereby procures the release of tangible personal property from the tax lien levied to secure the collection of the taxes owed, he cannot thereafter claim, nor is he entitled to, refund thereof.

Carson City, October 16, 1961

Mr. R. E. Cahill, Secretary, Nevada Tax Commission, Carson City, Nevada.

#### STATEMENT OF FACTS

Dear Mr. Cahill:

It appears that the Nevada Tax Commission (Sales and Use Tax Division) placed liens on eight (8) pieces of leased tangible personal property found to have been used in the State of Nevada. The tangible personal property involved consisted of six (6) crane carriers, one (1) ball mill, and one (1) jaw crusher.

The described personal property is stated to have been leased by Ari-Cal Equipment Co., Inc., not authorized to do business in Nevada (hereafter referred to as “A”), to Southwest Machinery and Equipment Company, an Arizona partnership authorized to do business in Nevada, with a place of business in Nevada (hereafter referred to as “B”). All involved personal property had also been subleased by B to the Argentum Mining Company, a Nevada corporation (hereafter referred to as “C”).

The Nevada Tax Commission has submitted substantial evidence that the purchase by A of the six (6) crane carriers was made from an Oklahoma firm; the jaw crusher was purchased from B, doing business in Nevada, on a lease-back agreement; and the ball mill was purchased from a Pennsylvania firm, with billing to B.

There is also substantial evidence that the purchases, leases and subleases with respect to each piece of personal property involved were in all instances made and effected within a matter of days of each other, and, in one instance at least, that the lease and sublease were executed even prior to purchase of a piece of equipment. The number of separate transactions involved precludes characterizing any of them as isolated: there obviously was working understanding and arrangement between A and B, not only respecting the lease agreements between them, but also the sublease agreements between B and C, the ultimate beneficial user of all the involved personal property in Nevada. This is substantiated by a letter in the commission’s possession wherein A gives B blanket authority to sublease all personal property theretofore leased by B and A.

In short, there is a preponderance of evidence that purchase by A of all the involved personal property and contemporaneous leasing and subleasing thereof, respectively to B and from B to C, were for the purpose of use thereof in the State of Nevada.

James Western Talcott, Inc. (Denominated D herein), presumably financed A’s purchases of the personal property involved, and by assignment from A became holder of legal title to the property to secure payment of the purchase moneys, or loans made available or advanced by it.

The Nevada Tax Commission liened the involved personal property in Nevada on the basis of a levy of the Nevada use tax due and owing by A. In April 1961, D made payment in full, *under protest*, of said Nevada use taxes as assessed and levied against A, whereupon the tax liens or withholds on the personal property involved were released.

D now seeks refund of taxes paid under protest pursuant to [NRS 372.630](#) on the following grounds: (1) That the tax was levied against the wrong person; and (2) that even if levied against the right person, that person had no property interest in this State against which a valid levy or attachment could be made effective.

## QUESTIONS

1. (a) Was the involved tangible personal property subject to the Nevada use tax under the provisions of Chapter 372 of NRS?

(b) If said tangible personal property was subject to the Nevada use tax, who was liable therefor?

2. Is D legally entitled to refund of use taxes paid by it under protest to the Nevada Tax Commission, in order to secure release of the involved, tangible personal property which said commission had liened in Nevada?

3. Does the Nevada use tax apply to property purchased in another state if not “purchased . . . for storage, use or other consumption in this state” ([NRS 372.185](#), [372.190](#))?

## CONCLUSIONS

Question 1 (a): Yes.

Question 1 (b): Primarily A was liable. Presumptively, B might also be held jointly liable. B only was presumptively liable on the sublease transactions had with C.

Question 2: No.

Question 3: As herein qualified: No.

## ANALYSIS

[NRS 372.045](#) (“Purchase”), as here pertinent, provides as follows:

1. “Purchase” means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.
2. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price is a purchase.

[NRS 372.050](#) (“Retail sale”; “sale at retail”), provides as follows:

1. “Retail sale” or “sale at retail” means a sale for any purpose other than resale in the regular course of business of tangible personal property.
2. The delivery in this state of tangible personal property by an owner or former owner thereof or by a factor, or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this state, is a retail sale in this state by the person making the delivery. He shall include the retail selling price of the property in his gross receipts.

[NRS 372.060](#) (“Sale”), as here pertinent, provides as follows:

1. “Sale” means and includes any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration.
2. “Transfer of possession,” “lease,” or “rental” includes only transactions found by the tax commission to be in lieu of a transfer of title, exchange or barter.
3. “Sale” includes:  
\* \* \*  
(d) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

[NRS 372.100](#) (“Use”) provides as follows:

“Use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business.

[NRS 372.080](#) (“Storage” and “use”: Exclusion) provides as follows:

“Storage” and “use” do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state.

[NRS 372.185](#) (Imposition and rate of use tax) provides as follows:

An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer on or after July 1,

1955, for storage, use or other consumption in this state at the rate of 2 percent of the sales price of the property.

[NRS 372.190](#) (Liability for tax; extinguishment of liability) provides as follows:

Every person storing, using or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid in this state, except that a receipt from a retailer maintaining a place of business in this state or from a retailer who is authorized by the tax commission, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this chapter relating to the use tax, regarded as a retailer maintaining a place of business in this state, given to the purchaser pursuant to [NRS 372.195](#) is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

(NOTE: Since the facts herein apparently do not involve the exception provided for in [NRS 372.190](#), it is unnecessary to set forth the provisions of [NRS 372.195](#).)

[NRS 372.225](#) (Presumption of purchase for use; resale certificate) provides as follows:

For the purpose of the proper administration of this chapter and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use or other consumption in this state until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

[NRS 372.250](#) (Presumption of purchase from retailer) provides as follows:

It shall be further presumed that tangible personal property shipped or brought to this state by the purchaser after July 1, 1955, was purchased from a retailer on or after July 1, 1955, for storage, use or other consumption in this state.

[NRS 372.350](#) (Exemption certificates: Liability of purchaser who uses property declared exempt for purpose not exempt) provides as follows:

If a purchaser certifies in writing to a seller that the property purchased will be used in a manner or for a purpose entitling the seller to regard the gross receipts from the sale as exempted by this chapter from the computation of the amount of the sales tax, and uses the property in some other manner or for some other purpose, the purchaser shall be liable for payment of the sales tax as if he were a retailer making a retail sale of the property at the time of such use, and the cost of the property to him shall be deemed the gross receipts from such retail sale.

In our considered opinion, on the basis of the facts submitted, A must be deemed the equitable owner of the involved tangible personal property, possessed of all the attributes and powers of such ownership. In this connection, D, the claimant for refund herein, must be deemed the legal owner thereof, holding naked legal title thereto merely to secure the payment of the balances on the purchase prices of the personal property, or loans made by it to A.

As to A's original acquisition of the tangible personal property involved, therefore, we conclude that there was a "sale" and "retail sale" and "purchase." ([NRS 372.045](#), [372.050](#) and [372.060](#), *supra*.)

It definitely also appears that the described equipment was delivered into and came to rest in the State of Nevada, and was used in this State within the purview of the provisions of [NRS 372.100](#), [372.080](#), *supra*. Even apart from the preponderant evidence submitted to us by the Nevada Tax Commission, showing that A's purchase thereof out-of-state was for the purpose of use in Nevada, certain presumptions of Nevada use thereof attached thereto pursuant to [NRS 372.225](#), [372.250](#) and [372.350](#), *supra*. These presumptions have not been rebutted in any manner or degree whatsoever, as was incumbent upon A, in the first instance, and upon D, derivatively, under [NRS 372.225](#) and [372.250](#).

Imposition of liability for the use tax on A was both proper and valid pursuant to [NRS 372.185](#) and [372.190](#), *supra*. This conclusion is predicated on the lease agreements between A and B, whereby A authorized and permitted the "storage" and "use" of the described equipment in Nevada, for a consideration to A measured by the rental payments in each particular instance. Purchased by A from a retailer outside the State of Nevada for use in Nevada, the described equipment was expressly subject to the Nevada use tax ([NRS 372.185](#) and [372.190](#), *supra*). See *Morrison-Knudsen Co., Inc. v. State Tax Commission*, 242 Iowa 33, 44 N.W.2d 449 (1959); *Rowan Drilling Co., Inc. v. Bureau of Revenue*, 60 N.M. 123, 228 P.2d 671 (1955); Annotation, 41 A.L.R.2d 535, et seq.; *Cf., Comptroller v. James Julian, Inc.*, 215 Md. 406, 137 A.2d 674 (1958).

It has been inferentially contended that, under the stated facts, lessor A should be deemed the "seller" and lessee B the "purchaser," and that B should be held subject to the Nevada Use Tax. The fact is that A *purchased* the described equipment outside the state of Nevada for use in Nevada, thus bringing A specifically within the purview of the express language of [NRS 372.185](#) and [372.190](#), and the judicial authorities above cited. A is the equitable owner of the involved property, having purchased the prorata for use in Nevada, and, by lease agreement with B, authorized and permitted its delivery into, and its use in, Nevada. B, in fact, was only a *lessee*, paying rent on the equipment pursuant to the lease agreements which were executed outside the State of Nevada. Admittedly, B is also presumptively liable for the Nevada use tax on such equipment. As lessee thereof from lessor A, B was vested with a possessory right in said equipment (an attribute of ownership) and rendered itself presumptively liable to the Nevada use tax by virtue of the separate taxable events, namely, the sublease agreements executed between B and C, whereby C obtained and was permitted to use such equipment in Nevada ([NRS 372.250](#)).

We conclude, therefore, that A and B were jointly and/or severally liable for the Nevada use tax on the described equipment, on the basis of their respective separate transactions or taxable events. Joint use tax liability attached to the initial purchase-lease transactions, having for their object the delivery into, and use in, Nevada of the described equipment, effectuated on the basis of exercise of ownership and/or possessory rights. Several use tax liability presumptively attached to B only in respect of the sublease agreements made with C, the actual beneficial user of the equipment delivered into the State of Nevada ([NRS 372.250](#)). Though the actual beneficial user of the equipment in Nevada, C is a sub-lessee, paying rent thereon, *and not a purchaser*; while C has possession and use, the balance of the ownership rights, i.e., equitable proprietary or possessory rights and legal title are vested elsewhere, so that C is not subject to the Nevada use tax.

We next address ourselves to the question of D's right to refund of the Nevada use taxes paid by it, under protest, on behalf of A, in order to secure the release of the equipment liened by the Nevada Tax Commission. The claim for refund has been filed pursuant to the provisions of [NRS 372.630-372.645](#), and, as already noted, is based on the following grounds: (1) That the tax was levied against the wrong person; and (2) that even if levied against the right person, that person had no property interest in this State against which a valid levy or attachment could be made effective.

Our foregoing analysis must suffice for answer to the contention that the tax was levied against the wrong person.

With respect to the second contention, it is our view that claimant D is obliged to assume one of the following positions:

1. D, as legal owner of the described equipment, merely held such legal title to secure payment of the balances on the purchase prices therefor. Equitable ownership, with all overt indicia thereof, was vested in A.

D (Finance Company) only had such rights and obligations, through subrogation, as A's vendors of equipment had. The presumption of sale and purchase of the described equipment for use in Nevada, provided in [NRS 372.225](#), expressly and clearly applies to all such vendors and, derivatively, to D, the Finance Company, under its subrogation to vendor's obligations. Rebuttal of such presumption to the satisfaction of the Nevada Tax Commission by either said vendors or, derivatively, by D (as also provided in [NRS 372.225](#)), has not been made or is not disclosed. Until such presumption is rebutted as statutorily provided, liability for the Nevada use tax would attach to the vendors of the equipment here involved and, derivatively, to D, the Finance Company, also on the basis of subrogation to the rights and obligations of the vendors or sellers thereof.

Parenthetically, we note the collateral and material question involved respecting the priority and attachment of the use tax lien to the involved equipment, as against other possibly recorded liens or encumbrances. Presumably, the liens of the purchase or conditional sales agreements pertaining to the equipment, were recorded in or about the time of transfer of possession thereof to A, the purchaser. Again, presumptively, such recordation was effected prior to the date when the Nevada use tax levied, and, due and payable, became a lien. [NRS 372.565](#), paragraph 2, provides that the State does not have a preference over recorded liens which attached and were filed prior to the date when the tax, due and payable, became a lien. Legally, therefore, the State's tax lien would normally be subordinate to D's presumptively prior lien. However, D's presumptively prior lien must have been filed in *Nevada* before the State's tax lien was filed and became effective, in order to have any priority and preference.

2. D paid the Nevada use tax levied against A as a *volunteer*, in order to secure the release of the described equipment from the tax liens imposed by the Nevada Tax Commission. D obviously made such payment in its own interest to safeguard the security of such equipment (as to which it held legal title), for payment of the obligations owed by A. The Nevada Tax Commission's release of said equipment from the tax lien constituted a detriment to or legal consideration on the commission's part of D's payment of the taxes due and owing by A. D cannot now be heard to complain with respect to his "bargain." D's legal remedy at this time is against A (the party primarily liable for the levied taxes), for reimbursement of the taxes voluntarily paid by D on A's behalf.

We conclude, therefore, as follows:

1. That the equipment purchased out-of-state for use in Nevada by A (Ari-Cal Equipment Co., Inc.), a nonresident of Nevada, was subject to the Nevada use tax under applicable provisions of Chapter 372 NRS.

2. That, with respect to the initial purchase and lease agreements, involving A and B (Southwest Machinery and Equipment Company, an Arizona partnership authorized to do business in Nevada), A, as purchaser of the out-of-state equipment is expressly and primarily liable for said Nevada use taxes.

3. That, with respect to the sublease agreements and transactions between B and C (Argentum Mining Company, a Nevada corporation), B is presumptively separately liable for Nevada use taxes.

4. That D (James Western Talcott, Inc., a non-Nevada corporation), the claimant herein for refund of Nevada use taxes paid under protest on behalf of A, is not entitled to such claimed refund, having for its own benefit, procured the release of the involved equipment from the tax lien imposed by the Nevada Tax Commission to secure payment of said taxes which were due and owing.

\* \* \*

Question Number 3, hereinbefore stated, has been included within the scope of this opinion because there are many other instances in which other nonresidents of Nevada, owners of tangible personal property, entered into lease agreements with B (Southwest Machinery and Equipment Company) and also authorized and permitted B to sublease the said personal property

to C (Argentum Mining Company, a Nevada corporation) in the same general manner as has been already described. Our further analysis in connection with Question No. 3 may, therefore, perhaps be helpful in establishing a proper basis for disposition of some of such other cases involving the question as to whether out-of-state residents who leased personal property for use in Nevada are subject to this state's use tax under applicable law.

It should be noted that [NRS 372.185](#), *supra*, does not impose a tax on the use in this State (Nevada) of all personal property, but only such as was *purchased for use here*. The said statutory provision may not properly be construed as requiring the imposition of the use tax on all personal property at any time during its life, and whether or not purchased for such purpose. Such a construction would read the language "purchased . . . for storage, use or other consumption in this state . . ." out of the statute ([NRS 372.185](#), *supra*). The Legislature is presumed to have used the indicated statutory language advisedly and for a purpose (*Morrison-Knudsen Co., Inc. v. State Tax Commission*, *supra*, 41 A.L.R.2d 523, at page 527, citing with approval *Hartz v. Truckenmiller*, 228 Iowa 819, 824, 293 N.W. 568; 50 Am.Jur., Statutes, section 358).

Whether property is purchased for use in Nevada should be determinable at or near the time of its purchase. Any long delay in such determination must necessarily entail considerable difficulty in ascertaining whether or not, in fact, the purchase of personal property in another state was made for use here. We have on other occasions already noted that the use tax law is supplementary to the sales tax law, and that part of its rationale is to protect Nevada dealers who must collect and pay a sales tax by placing them on a tax equality with competing out-of-state vendors whose sales are not subject to the sales tax. The only basis for imposition and claim of the use tax, therefore, is the fact of out-of-state purchase for use in Nevada. The factual situation at the time of the out-of-state purchase, therefore, is determinative of the question as to whether or not said purchase was made for use here.

In the Ari-Cal situation, hereinbefore considered, there is preponderant evidence that the series of purchases made by Ari-Cal out of the State were, in fact, for use of the tangible personal property involved in Nevada.

Such evidence in some of the other related cases now pending before the Commission may not be so substantial as to justify the same conclusion. In cases where the transaction is an isolated one and the out-of-state purchase was made many years before the tangible personal property was delivered into, and used in, Nevada, it certainly could be reasonably argued that the *prima facie* presumption provided by [NRS 372.225](#) and [372.250](#) was rebutted, and that there existed no proper basis for exaction of the Nevada use tax. Otherwise, a resident of another state which has no sales tax would be subject to the Nevada use tax if he moved here for a few months and brought with him tangible personal property which he had purchased in another state many years before. And such tax would equal 2 percent of the original purchase price even though the property were worth only a small fraction thereof when brought to Nevada.

Certainly, if the Legislature intended to impose a use tax under such circumstances it could have done so in terms more clear and unmistakable than those which it used in the existing law. (See *Morrison-Knudsen Co., Inc. v. State Tax Commission*, *supra*; *Rowan Drilling Co., Inc. v. Bureau of Revenue*, *supra*; Note, 41 A.L.R.2d 535; *Comptroller v. James Julian Inc.*, *supra*.)

We conclude, therefore, that, in the absence of a finding that tangible personal property was purchased out-of-state ". . . for storage, use or other consumption in this state . . .," the Nevada use tax does not apply.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-249 WHERE A PERSON CHARGED WITH A CRIME HAS BEEN COMMITTED TO THE NEVADA STATE HOSPITAL** under the procedure for commitment of mentally ill persons, Chapter 433 NRS, such person may not be released for trial under procedure for commitment and release of persons charged with or convicted of crimes as provided in Chapter 178 NRS.

Carson City, October 17, 1961

Sidney J. Tillim, M.D., Superintendent, Nevada State Hospital, P.O. Box 2460, Reno, Nevada.

### **STATEMENT OF FACTS**

Dear Mr. Tillim:

We are advised that two felony charges are presently pending against a person committed to the Nevada State Hospital from Clark County, one being assault with a deadly weapon with the intent to do bodily harm, and the other, lewdness with a minor. The charge of lewdness with a minor was brought to trial on Wednesday, March 8, 1961, in the Eighth Judicial District Court in and for the County of Clark. This trial resulted in a hung jury. It was determined by the District Attorney that the accused should be tried a second time on the lewdness charge. Before the case could be set for trial, the accused, on the 1st day of June, 1961, in Department 3 of the Eighth Judicial District Court of the State of Nevada, in Case No. 110234, pursuant to a petition for commitment, was, by court order, committed to the Nevada State Hospital as a result of proceedings under [NRS 433.200](#).

It is your belief that the accused has presently sufficiently recovered from the psychotic condition for which he was committed to know the difference between right and wrong, to understand the nature of the offense charged, and to aid and assist in the defense of the offense charged. You have forwarded a certification to the District Attorney that the accused is presently competent to stand trial in Clark County. The District Attorney has advised you that the accused should be returned to Clark County for trial.

### **QUESTION**

Where a person has been committed to the Nevada State Hospital under the procedure of commitment for mentally ill persons, being [NRS 433.200](#), may such person be released for trial under the procedure for commitment and release of persons charged with or convicted of public offenses as provided in [NRS 178.445](#) through 178.446?

### **CONCLUSION**

No.

### **ANALYSIS**

The procedure for returning a person from the Nevada State Hospital to stand trial under the provisions of [NRS 178.445](#) through 178.465, as amended by Chapter 293, 1961 Statutes of Nevada, apply only to situations where an individual has been committed under Chapter 178 NRS.

[NRS 178.405](#):

When an indictment or information is called for trial, or upon conviction the defendant is brought up for judgment, if doubt shall arise as to the sanity of the

defendant, the court shall order the question to be submitted to a jury that must be drawn and selected as in other cases.

[NRS 178.410](#):

The trial of the indictment or information or the pronouncing of the judgment, as the case may be, shall be suspended until the question of insanity shall be determined by the verdict of the jury.

[NRS 178.425](#) provides in part:

1. If the jury find the defendant insane and the court deems his freedom a menace to public quietude, the judge shall order the sheriff to convey him forthwith, \* \* \* to the Nevada state hospital.

[NRS 178.445](#):

Where any person shall have been charged in an indictment or an information with a public offense and is placed upon his or her trial therefor and shall have been found by the jury to be insane at that time, or in the event of a conviction for the commission of the offense and before or at the time of the pronouncement of the judgment of the court the question of the then sanity of such person is raised, all as provided in [NRS 178.400](#) to [178.440](#), inclusive, and the jury shall have found the convicted person insane as of that time, the district judge of the trial court shall commit such person to the Nevada state hospital and such person shall remain in the hospital until released therefrom for trial, judgment or discharge, as provided in [NRS 178.445](#) to [178.470](#), inclusive.

NRS Sections 178.450, 178.455 and 178.460 as amended by Chapter 293, 1961 Statutes of Nevada provides the procedure to be followed, once the person charged with or convicted of a public offense, and committed by the Court, has recovered his mental faculties and is ready for release from the Nevada State Hospital for trial, judgment or discharge.

[NRS 433.550](#), subsection 1:

At any time the superintendent may discharge any patient who in his opinion has recovered from his mental illness, or is a dotard and not mentally ill, or who is a person who in the judgment of the superintendent will not be detrimental to the public welfare or injurious to himself.

[NRS 433.550](#), subsection 4:

Nothing contained in this section shall authorize the release of any person held upon an order of a court or judge having criminal jurisdiction arising out of a criminal offense.

[NRS 433.550](#), subsection 5:

The superintendent shall not discharge a patient known to have exhibited physical violence toward persons or property immediately prior to commitment and who was committed subject to further order of the court, without first giving notice in writing, not less than 10 days prior to discharge, to the court or judge who ordered such patient committed.

We conclude [NRS 433.200](#), subsections 4 and 5, was intended to mean that where any person is held upon order of court or judge having criminal jurisdiction arising out of criminal offense, or was committed subject to further order of court, [NRS 433.550](#), subsection 1, does not apply.

We suggest that the District Attorney obtain a court order requesting that Mr. York be delivered to the Sheriff of Clark County, Nevada for further proceedings, if he has not already obtained such order.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: David G. Parraguirre  
Deputy Attorney General

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**OPINION NO. 61-250 PARK SYSTEM, STATE**—When authority to expend moneys from the state park grant and gift fund is clearly expressed, it is unimportant that the Legislature has not made such provision in the Authorized Expenditure Act. Chapters 136 and 313, Statutes 1961, construed.

Carson City, October 20, 1961

Mr. Howard E. Barrett, Budget Director, State of Nevada, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. Barrett: The Legislature of 1961 enacted Chapter 136, which revised the body of the law in respect to the regulation of the State Park System. Section 18 of this act approved the determination made by Attorney General Opinion No. 156 of May 17, 1960, in respect to the power of the System to acquire real and personal property without the consent of the Legislature, except in cases in which such property would require matching funds or other costs in excess of the usual costs of custodial care.

Under Section 19 of Chapter 136, Statutes 1961, the authority of the State Park System, through its Director, is provided, and under subsection 5 the Director is authorized to rent concessions in State Parks, under certain conditions, and receive moneys for the System by reason of such rent or lease transactions.

Under Section 22 of this chapter a “State Park Grant and Gift Fund” is created, and the origin of funds that are to be deposited therein is provided. Subsection 1(c) thereof provides one of the sources of moneys to be deposited therein:

Grants and moneys accepted by the system from the Federal Government or any federal department or agency, any county, city, public district or political subdivision of this state, any public or private corporation, group of individuals or individual under the provisions of section 20 of its act.

Section 22, subsection 3 thereof provides:

Expenditures from the state park grant and gift fund shall be made only for the purpose of carrying out the provisions of this act and other programs or laws administered by the system.

Section 23 thereof provides:

1. Funds to carry out the provisions of this act and to support the system, its various divisions, and programs administered by the system, *may* be provided by direct legislative appropriation from the general fund.

2. *All moneys in any fund in the state treasury available to the system shall be paid out on claims approved by the director as other claims against the state are paid.* (Emphasis supplied.)

Senate Concurrent Resolution No. 13 (Statutes 1961, p. 817) authorized the State Park Commission to accept a gift from the American Women's Voluntary Service in the amount of \$285.32, for the purpose designated by donor, namely, the restoration and development of Mormon Station Historic State Monument.

Chapter 316, Statutes 1961 (the General Appropriation Act), Section 49, makes a substantial appropriation for the State Park System.

Chapter 313, Statutes 1961 (the Authorized Expenditure Act), makes provision for expenditures for certain agencies of the State Government that are not at all or only partially supported by general fund moneys, from funds other than general funds and highway funds. This chapter makes provision and authorizes certain enumerated agencies to spend certain amounts from their special funds, during each of two fiscal years, but makes no appropriations for them.

## QUESTION

Does Chapter 136, Statutes of Nevada 1961, permit the Nevada State Park System to expend funds from the state park grant and gift fund when such authority has not been included in the Authorized Expenditure Act?

## CONCLUSION

We have concluded that moneys may be expended from the state park grant and gift fund for the purpose of carrying out the provisions of the act, even though the Authorized Expenditure Act does not mention the Nevada State Park System.

## ANALYSIS

Appropriation acts, being required by the Constitution, have been included in the legislative acts since statehood. However, authorized expenditure acts appear to be no more distant in time than 1953. There is a need for such acts, for they enable the Legislature to keep abreast of all that transpires in the expenditure of moneys of the agencies enumerated. A number of these agencies, as for example the agency here under examination, do receive appropriations from the general fund, and receive other funds in differing manners (e.g., appropriations from the congress as matching funds) to enable them to perform the purposes for which they are created.

However, an authorized expenditure act, clearly consenting to the expenditure of nonappropriated moneys by an agency of government, merely constitutes a consent for a definite agency to expend funds of a definite amount, for its authorized purposes, during a specific fiscal period. Perhaps failure to include in the act (Chapter 313, Statutes 1961) the Nevada State Park System was intentional in that certain funds that are to be received are of indefinite amount, and it would serve no useful purpose to place the System in a position of restrictions and restraints beyond those heretofore mentioned that are contained in Chapter 136, Statutes 1961.

In any event, the Legislature has spoken as to the limitations, restrictions and restraints that surround the operation of the Nevada State Park System, and these limitations are exclusive. The Legislature has provided the source of moneys that are to be deposited in the state park grant and gift fund. It has provided that moneys may be expended from the fund only for purposes of carrying out the provisions of the act and other programs administered by the system and it has provided that the restoration and development of the Mormon Station Historic State Monument

shall constitute one of the programs of the System. The will of the Legislature is, therefore, clear and it is not of importance that this will is expressed otherwise than in the authorized Expenditure Act.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-251 PARK SYSTEM, NEVADA STATE**—The provision in Chapter 136, Statutes 1961, that appointees to the State Park Commission shall be for irregular and “staggered” terms cannot be effective until vacancies in office in such Commission arise.

Carson City, October 24, 1961

Mr. William J. Hart, Director, State Park Commission, Carson City, Nevada.

#### **STATEMENT OF FACTS**

Dear Mr. Hart:

The Legislature of 1961 enacted Chapter 136, effective March 22, 1961, which completely revised the law in respect to State Parks and created the Nevada State Park System, under the direction of the State Park Commission.

Under the prior law, [NRS 407.010](#) to [407.070](#), inclusive, repealed by Chapter 136, Statutes 1961, it was provided that the State Park Commission should consist of seven members, appointed by the Governor, to serve at his pleasure. Accordingly, Governor Sawyer appointed seven commissioners in or about January 1959, who were on the effective date of Chapter 136, and now are, serving as members of the State Park Commission.

Chapter 136, Statutes 1961, in part provides:

Sec. 4. There is hereby created the Nevada state park system in which shall be vested the administration of the provisions of this act.

Sec. 5. There is hereby created in the Nevada state park system a state park commission composed of seven members to be appointed by the governor.

Sec. 6. 1. The members of the commission shall serve at the pleasure of the governor, but no appointment shall extend beyond a period of 4 years.

2. The members shall be appointed with staggered terms so that at all times there are at least four members, each with no less than 1 year's experience on the commission.

Sec. 25. Upon the effective date of this act:

1. The members of the state park commission shall retain without impairment or diminution the appointments, terms, rights and status now applicable to them.

\* \* \*

Sec. 26. [NRS 407.010](#) to [407.070](#), inclusive, are hereby repealed.

It is apparent from the foregoing facts that a point of uncertainty exists as to the time at which the provision for staggered terms shall become operative.

## QUESTION

In the absence of resignation or removal of members of the State Park Commission, during their present term of office, is the Governor empowered to make effectual the provision for staggered terms, now, or at any time during his present term of office?

## CONCLUSION

We are of the opinion that the Legislature has intended by the provisions of Section 25, 1, of Chapter 136, Statutes 1961, that the commissioners who were in office on the effective date should not suffer any impairment or diminution in their terms of office by reason of the enactment of the statute.

## ANALYSIS

The provisions of Section 25, subsection 1, of the act are crystal clear and require no interpretation. It follows that if all incumbent members of the Commission remain in office, their terms will expire at the end of the term of the appointing authority. A State Park Commission would then be appointed by the Governor for terms conforming to the "staggered" concept that is expressed in Section 6, subsection 2.

It is clear, however, that the Legislature also intended to confer upon the Governor power to appoint to this Commission, members for terms not to exceed a period of four years. The power to fill a vacancy in office, although not contained in Chapter 136, is necessarily inferred, and derived from the expressed power of appointment.

Should a vacancy (or vacancies) occur in the State Park Commission, it is our opinion that the power to fill it (them) for a term (terms) up to four years in duration, has been conferred upon the Governor, and it would be his duty to fill vacancies in office in such a manner as to permit the terms of the members to expire at different times, i.e., provide for "staggered" terms. However, should a vacancy arise, it would appear more advisable that it be filled to December 31st of a year certain (not over four years) than to appoint for a term of years, thereby causing confusion, by expiration of terms upon irregular dates.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-252 NEVADA TAX COMMISSION;** Nevada Sales and Use Tax Act (Chapter 372 of NRS) construed. Held: 1. Transactions between a Nevada corporation and a wholly owned subsidiary, a foreign corporation, in the form of "sales" and "purchases," resulting in the transfer of tangible personal property into this State from out-of-state, and entering into commodities utilized in a Nevada "linen supply service" conducted on a lease or rental basis, are subject to the Nevada use tax, and not entitled to exemption as "occasional sales," under the circumstances indicated. 2. Subsequent sale of unused linen supplies or inventory in Nevada subject additionally to Nevada sales tax, but act authorizes allowance of "credit" as to out-of-state purchases on which use tax has been paid in proper circumstances. Such subsequent sales are not "occasional sales" entitled to exemption under the act. 3. Subsequent sales of used linen supplies or inventory in Nevada subject additionally to Nevada sales tax, without authorized allowance of any "credit" as to out-of-

state purchases on which use tax has been paid. Such subsequent sales are not "occasional sales" entitled to exemption under the act.

Carson City, October 26, 1961

Mr. R. E. Cahill, Secretary, Nevada Tax Commission, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. Cahill:

The American Linen Supply Company (a Nevada Corporation) conducts two distinct and separate operations in Reno and in Las Vegas, Nevada, said operations consisting of supplying and laundering various types of linens rented or leased to hotels, motels, and other customers, requiring and using such linen supply service.

Some question has been raised concerning the liability of the American Linen Supply Company for payment of the Nevada use tax with respect to purchases of linens made by it from its wholly owned subsidiary, the American Uniform Company (a foreign corporation). Distinct and separate books and records are maintained by the American Linen Supply Company and its wholly owned subsidiary, American Uniform Company (the foreign corporation), as to such purchases of linen supplies.

It has been admitted by American Linen Supply Company that heretofore it has made payment of the Nevada use tax on such purchases from the American Uniform Company at the rate of 65 percent of the bookkeeping entries relative thereto, presumably the value of the material entering into the commodity as purchased by the American Linen Supply Company, the parent organization. Such payments at the 65 percent rate basis were predicated on an alleged "agreement" had with the Nevada Tax Commission. The Nevada Tax Commission has been unable to find any record of any such "agreement" as to the formula to be employed and, therefore, maintains that its application is not proper; further that even if made, it would, in any event, be ultra vires and illegal. It is, therefore, the Nevada Tax Commission's position that the Nevada use tax on purchases made by the American Linen Supply Company must be applied on the basis of 100 percent of the value or sales price thereof to said Company by the American Uniform Company, the foreign corporation. In such eventuality, the American Linen Supply Company further contends that any such new rate (100 percent) of the Nevada use tax should only be assessed prospectively, and not retrospectively.

The American Linen Supply Company has also raised some question as to application of the Nevada Sales and Use Tax Act with respect to transactions involving the sale of some of its linen supplies to customers, both in cases where the Company continues to render laundering services, and also where the linen supplies, or accounts, are sold with further laundering services being rendered by others. In this particular connection, the American Linen Supply Company claims an "exemption" to any tax assessment to the extent of the value of the materials in linen supplies so sold, both prior to and since the effective date of the Nevada Sales and Use Tax Act. Regarding the sales transactions to other linen supply business entities or to its customers, where the American Linen Supply Company no longer renders laundering services, it is the contention of said Company that the act is not at all applicable, or in the alternative, if deemed applicable, that such transactions are nevertheless "exempt" as occasional sales."

Based upon the agreed facts submitted to us, both by the Nevada Tax commission and the American Linen Supply Company, there are, therefore, four (4) possible taxable events, as follows:

1. Purchases by American Linen Supply Company (a Nevada corporation) from its wholly owned subsidiary, American Uniform Company (a foreign corporation).
2. Lease or rental agreements for linen supply services between American Linen Supply Company and various customers conducting business or resident in Nevada.

3. Sales of supplies of linen by American Linen Supply Company to Nevada customers, with said Company continuing to render laundering services in connection [connection] with such sold linen supplies.

4. Sales of supplies of linen or accounts by American Supply Company either to Nevada customers or to other linen supply firms or businesses, where the seller no longer renders any laundering services in connection with such sold linen supplies, or accounts.

As noted, the Nevada Tax Commission has taken the position that the transactions mentioned in No. 1, above, are subject to the Nevada use tax on a 100 percent basis of the value of all said purchases.

The Nevada Tax Commission's present position is that transactions mentioned in No. 2, above, are not subject either to the Nevada sales or use tax.

As to transactions mentioned in Nos. 3 and 4, the facts submitted to us do not clearly or definitely disclose whether or not the Nevada Tax Commission has made any assessment of sales tax, and if so, what the measure of said sales tax assessment has been. This opinion, therefore, will deal with such transactions on the basis of general principles as required by applicable provisions of the Nevada Sales and Tax Act (Chapter 372 of NRS).

## QUESTIONS

1. What is the measure of the Nevada use tax, if any, applicable to the transactions resulting in the transfer to, and acquisition by, American Linen Supply Company (a Nevada corporation) of material from its wholly owned subsidiary, American Uniform Company (a foreign corporation), which is utilized in various commodities comprising "the linen supply service," which the American Linen Supply Company thereafter makes available to different Nevada customers on a lease or rental basis?

2. Are any of the above-described transactions engaged in by American Linen Supply Company "occasional sales" as defined by [NRS 372.035](#), within the purview of the exemption provisions contained in [NRS 372.320](#)?

3. Are any of the transactions described in Nos. 3 and 4 (sales of linens or accounts to customers or other linen supply firms) subject to the Nevada sales tax, and if so, to what extent?

## CONCLUSIONS

1. Since the transactions between American Linen Supply Company and the American Uniform Company (two separate and distinct *corporations* maintaining separate books) are reflected as purchases and sales, and said sales are not for resale purposes, said transactions are subject to the Nevada Use Tax at the rate of 100 percent of the value or selling price of the commodities transferred to, and acquired by, American Linen Supply Company from American Uniform Company (a foreign corporation), notwithstanding that the latter is a wholly owned subsidiary of the former Company.

2. None of the transactions as mentioned in Nos. 1, 2, 3 and 4, above, are "occasional sales," nor are any of them entitled to tax exemption as such under the provisions of the Nevada Sales and Use Tax Act.

3. As herein qualified and limited: Yes.

## ANALYSIS

[NRS 372.025](#) (Gross receipts), as pertinent herein, provides as follows:

1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the tax commission may prescribe, a deduction may be taken if the



retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property prior to its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

\* \* \*

[NRS 372.035](#) (Occasional sale) provides as follows:

1. "Occasional sale" includes:

(a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit.

(b) Any transfer of all or substantially all the property held or used by a person in the course of such an activity when after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer.

2. For the purpose of this section, stockholders, bondholders, partners or other persons holding an interest in a corporation or other entity are regarded as having the "real or ultimate ownership" of the property of such corporation or other entity.

[NRS 372.045](#) (Purchase) provides as follows:

1. "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

2. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price is a purchase.

3. A transfer for a consideration of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication, is also a purchase.

[NRS 372.050](#) (Retail sale; sale at retail) provides as follows:

1. "Retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business of tangible personal property.

2. The delivery in this state of tangible personal property by an owner or former owner thereof or by a factor, or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this state, is a retail sale in this state by the person making the delivery. He shall include the retail selling price of the property in his gross receipts.

[NRS 372.055](#) (Retailer), as here pertinent, provides as follows:

1. "Retailer" includes:

(a) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

(b) Every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use or other consumption.

(c) Every person making more than two retail sales of tangible personal property during any 12-month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bankruptcy.

\* \* \*

[NRS 372.060](#) (Sale), as here pertinent, provides as follows:

1. "Sale" means and includes any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

2. "Transfer of possession," "lease," or "rental" includes only transactions found by the tax commission to be in lieu of a transfer to title, exchange or barter.

3. "Sale" includes:

\* \* \*

(d) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

[NRS 372.065](#) (Sales price), as here pertinent, provides as follows:

1. "Sales price" means the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold.

(b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

(c) The cost of transportation of the property prior to its purchase.

2. The total amount for which property is sold includes all of the following:

(a) Any services that are a part of the sale.

(b) Any amount for which credit is given to the purchaser by the seller.

\* \* \*

[NRS 372.100](#) (Use) provides as follows:

"Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business.

[NRS 372.185](#) (Imposition and rate of use tax) provides as follows:

An exercise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this state at the rate of 2 percent of the sales price of the property.

[NRS 372.190](#) (Liability for tax; extinguishment of liability), as here pertinent, provides as follows:

Every person storing, using or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this state . . .

\* \* \*

[NRS 372.225](#) (Presumption of purchase for use; resale certificate) provides as follows:

For the purpose of the proper administration of this chapter and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use or other consumption in this state until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

[NRS 372.250](#) establishes a presumption that tangible personal property shipped or brought to this State by the purchaser after July 1, 1955 was purchased from a retailer on or after that date for storage, use or other consumption in this State.

[NRS 372.230](#) (Effect of resale certificate) provides as follows:

The certificate relieves the person selling the property from the burden of proof only if taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds the permit provided for by [NRS 372.125](#) to [372.180](#), inclusive, and who, at the time of purchasing the tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase whether the property will be sold or will be used for some other purpose.

[NRS 372.240](#) (Liability of purchaser giving resale certificate: Use of article bought for resale) provides as follows:

If a purchaser who gives a certificate makes any storage or use of the property other than retention, demonstration or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used. If the sole use of the property, other than retention, demonstration or display in the regular course of business, is the rental of the property while holding it for sale, the purchaser may elect to pay the tax on the use measured by the amount of the rental charged rather than the sales price of the property to him.

Nevada Tax Commission Ruling No. 3, adopted May 23, 1955, (Barbers, Beauty Shop Operators, Bootblacks, Launderers and Cleaners) provides as follows:

Barbers, beauty shop operators, bootblacks, launderers and cleaners are the consumers of the supplies and other property used in performing their services. They are retailers, however, of any such supplies or of used articles or other tangible personal property which they sell to consumers in the regular course of business.

Sales taxes can be classified into two general types of the basis of whether or not commodities are subject to the tax more than once as they pass through production and distribution channels.

The *multiple-stage* form of sales tax is applied to transactions at more than one stage in production and distribution channels, and, in the most complete version, to those at all stages. The *single-stage* form of sales tax applies only once to each commodity as it passes through production and distribution channels, and may be imposed at any one of three possible levels, namely: (1) the sale by the manufacturer; (2) the wholesale level, or more precisely, the last wholesale transaction, that is, the purchase by the retailer, whether from a manufacturer or wholesaler; and (3) sales at retail. The retail sales tax is the familiar form in the United States, as all of the state sales taxes, including that of Nevada, strictly defined, take this form.

Under the broad statutory provisions hereinabove set forth, any one of the four taxable events enumerated in our Statement of Facts is subject to the Nevada Sales and Use Tax Act (Chapter 372 of NRS).

As a substantive matter, and generally, the Nevada Tax Commission has apparently selected the first of the enumerated taxable events in our Statement of Facts for levy of the Nevada use tax, namely, upon the purchases made by the American Linen Supply Company, a Nevada corporation, from the American Uniform Company, an out-of-state or foreign corporation. Such levy is undoubtedly legally justified, in that said purchases of materials entering into the commodities leased and rented to Nevada customers were not for *resale* purposes, but used by the American Linen Supply Company ([NRS 372.050](#), [372.060](#), 372.100, 372.185, 372.190, 372.225, 372.250, *supra*).

It is equally clear that applicable provisions of the Nevada Sales Tax Act (*see supra*) are sufficiently broad to include use, or license to use, under rental or lease agreements, within the definition of "sale." Consequently, while it is apparently present policy of the Nevada Tax Commission not to do so, it can, both properly and legally, levy a sales tax on the gross proceeds from the transactions between the American Linen Supply Company and its Nevada customers, based upon the rental or lease agreements respecting said Company's "linen supply services." (*See Saverio v. Carson*, 186 Tenn. 166, 208 S.W.2d 1018 (1948); *Philadelphia Ass'n of Linen Suppliers v. Philadelphia*, 139 Pa. 560, 12 A.2d 789 (1940); *Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 65 N.E.2d 711 (1946); *Theo B. Robertson Products Co. v. Nudelman*, 389 Ill. 281, 59 N.E.2d 655 (1945); *Carpenter v. Carman Distributing Co.*, 111 Colo. 566, 144 P.2d 770 (1943).

The service rendered by linen supply companies consisting of the supplying of freshly laundered flat linens and garments at regular intervals to business establishments or professional offices and the laundering of soiled articles previously supplied, was held taxable as a sale under an ordinance taxing sales of tangible personal property at retail, which defined "sale" as "any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or means whatsoever for a consideration, or any agreement therefore" (citing *Philadelphia Asso. L. S. v. Philadelphia*, *supra*), since the transaction constituted a transfer of possession of tangible property with a license to use the same for a consideration rather than a mere rendering of a service, the transfer or possession for use contemplating a wearing out or ultimate consumption of the articles (Annotation, 172 A.L.R. 1817, 1818).

That the Nevada Tax Commission has timed the taxable transaction at the earlier notch in the economic process when American Linen Supply Company purchases materials from the out-of-state seller (American Uniform Company, a foreign corporation) for use in Nevada, has certainly operated to the advantage of the American Linen Supply Company, since the impact of the tax assessment or levy with respect to its "sales" of "linen supply services" to Nevada customers would otherwise undoubtedly be heavier and greater. Though intimately interconnected with the question as to whether the purchaser is engaged in rendering service or in making sales, the problem is nevertheless whether a transaction is a nontaxable sale for resale or a taxable sale for use or consumption. And the distinguishing characteristic of a retail sales tax is the broad notion that the tax applies only to sales to the consumer of the goods, not to an intermediate vendor who

resells the goods or who processes or manufactures the goods for resale, or to bona fide lessors (as here) of tangible personal property, when themselves the substantial beneficiaries of the use or consumption thereof.

“Linen supply service” transactions include both the involved commodities and the laundering services connected therewith. Linen service customers do not buy the services which went into producing the linens. In fact, a customer may or may not receive the same linens repeatedly, the supplier performing a laundry service to make the linens usable. The more significant motivating factor for subscribers to such services appears to be the laundering aspect of the service. On such view of the matter, and by administrative regulation additionally, Nevada has partially exempted such linen services from application of the sales tax. (*See* Ruling No. 3, *supra*.) However, as already noted, such sales tax is authorized by the act, and there is substantial judicial support therefore, should the Nevada Tax Commission see fit to time or move the taxable transaction up one notch in the economic process.

So long as the Nevada Tax Commission holds the purchases by American Linen Supply Company from the out-of-state foreign corporation (American Uniform Company) to be the taxable event, levy of the use tax, on the basis of a 100 percent rate of the value or selling price of such purchases, is indicated. Any reduction in the rate of such tax assessment or levy would clearly be ultra vires and illegal, even if actually “agreed” to by any person connected with the Nevada Tax Commission. Moreover, the full rate of 100 percent of the value or selling price of such purchases is applicable retrospectively as well as prospectively, since the act specifies such to be the only valid rate ([NRS 372.185](#)).

We next consider American Linen Supply Company’s sales of unused and used linen supplies or inventory to Nevada customers or other linen supply businesses.

Since originally presumptively purchased for its own use or consumption, as hereinbefore shown, any subsequent sale in Nevada of tangible personal property acquired by American Linen Supply Company from out-of-state suppliers is governed by the provisions of [NRS 372.025](#), [372.055](#), 372.230 and 372.240, *supra*. As to new or unused inventory, or linen supplies, subsequently sold by American Linen Supply Company to Nevada customers or other linen supply firms, such transactions are *additionally* taxable, but a claim for *credit* (not exemption), if properly supported, may be allowed under the provisions of [NRS 372.240](#), *supra*.

Insofar as the subsequent transfer or sale of used items of linen supplies or tangible personal property is concerned, such transactions on the part of American Linen Supply Company are also *additionally* taxable, as subject to the Nevada sales tax, without authorization for allowance of any credit, under the provisions of [NRS 372.105](#), [372.050](#), 372.060, 372.065, 372.240, Nevada Tax Commission Rulings Nos. 3 and 61. There are two grounds for this conclusion. In the first place, the intention to *resell* such used inventory items did not, presumptively, coincide with the purchase thereof with intention to use them, but was a matter of subsequent independent or separate decision, since it could not possibly be previously known that such specific items so sold would not be entirely worn out or consumed and consequently not be available for sale. (*See Baltimore Foundry and Machine Corp. v. Comptroller*, 21 Md. 316, 127 A.2d 368 (1956).) In the second place, there is the question whether the “purchase for use” and the later or subsequent sale of used linen supplies constitutes a purchase “for any purpose other than for resale.” ([NRS 372.050](#).) The converse of the indicated exclusionary statement, i.e., purchases “for resale,” sweeps in all ordinary commercial transactions where goods are bought solely for wholesale or retail trade. But the wording of [NRS 372.050](#) makes the legislative purpose reasonably clear to exempt only property *solely* used for resale, because “any purpose” would include all purposes generally. The words “other than” narrow the exempted purpose down to the singular. It is, therefore, reasonable to conclude that using purchased material in linen supply services and subsequently selling such articles after such usage will not carry with it the singular exemption from the sales tax as created by the act. ([NRS 372.050](#), [372.105](#), 372.350. *See Jacobs v. Joseph*, 282 App. Div. 622, 126 N.Y.S.2d 274 (1953)).

It has been urged that such purchases and sales transactions on the part of American Linen Supply Company are “occasional sales” and, therefore, should be exempt from either the sales or

use taxes of this State. The act sufficiently rebuts any such claim and prohibits any such exemption.

[NRS 372.320](#) (Occasional sales) provides as follows:

There are exempted from the taxes imposed by this chapter the gross receipts from occasional sales of tangible personal property and the storage, use or other consumption in this state of tangible personal property, *the transfer of which to the purchaser is an occasional sale.* (Emphasis supplied.)

It has already been shown that transfers of tangible personal property to the “purchaser,” American Linen Company, by American Uniform Company (among others) were, in fact, not “occasional sales.” On the contrary, such transfers or purchases were and are usual and necessary, if not essential, to American Linen Supply Company’s capability for continuing business operation in providing linen supply services to its Nevada customers. [NRS 372.320](#) is, therefore, clearly applicable to prohibit any tax exemption as to such transactions on the basis of their being “occasional sales.”

As regards subsequent sales of unused or used linen supplies by American Linen Supply Company to its Nevada customers or other linen supply firms, we reasonably assume (in the absence of any showing to the contrary) that such transactions number more than two during any 12-month period, the maximum entitled to exemption under the act ([NRS 372.055](#), [372.035](#)). Tax exemption on the basis that these transactions are “occasional sales,” therefore, is also unauthorized. It is elementary, of course, that the burden of proof to show that not more than two such transactions have taken place during any 12-month period, and that one is entitled to tax exemption on the basis of “occasional sales,” rests upon the claimant.

Finally, much has been made of the fact that American Uniform Company (a foreign corporation) is a wholly owned subsidiary of the American Linen Supply Company (a Nevada corporation). In this connection, our attention has been invited to the provisions of [NRS 372.035](#) (Occasional sale), as allegedly authorizing treatment of the transactions between these related corporations as “occasional sales” and, therefore, entitled to tax exemption. We see no merit in such contention.

The two corporations, though related, are separate legal entities, maintaining separate books and records of their transactions. American Uniform Company does not sell all of its productive output solely and exclusively to American Linen Supply Company, the parent organization, but, in fact, makes sales to others also. Moreover, transfers of commodities to American Linen Supply Company by its said corporate subsidiary are reflected as credits or “sales” in the books of the latter, and as “purchases,” or additions to inventory, in the books of the parent corporation. Since such is the form and established mode of treatment of the transactions between the related corporations, i.e., “seller” and “purchaser,” the Nevada Tax Commission is entirely justified in accepting the parties’ own treatment of the transactions between them as the proper legal basis for assessing and levying the Nevada use tax. The Nevada Sales and Use Tax Act provides no basis whatsoever for treating such transactions between the related corporations under the circumstances indicated as “occasional sales.” In this connection, the following is both relevant and determinative:

Generally, a corporation and its stockholders are deemed separate entities, and such is true in respect to tax problems.

Ownership of capital stock in one corporation by another does not, itself, create an identity of corporate interest between the two companies, nor render the stockholding company the owner of the property of the other, nor create the relation of “principal and agent,” representative, or alter ego between the two.

Where corporations meticulously observe formalities incident to separate corporate existence and receive substantial economic benefits therefrom they will not be permitted to disregard the distinction for purpose of avoiding burdens

likewise incident to maintenance of separate corporate identities. (*Superior Coal Co. v. Department of Finance*, 377 Ill. 282, 36 N.E.2d 354 (1941).)

See also *Frank Amodio Moving & Storage Co. v. Connelly*, 144 Conn. 569, 135 A.2d 757 (1957); *Pacific Pipeline Const. Co. v. State Board of Equalization*, 49 Cal.2d 729, 321 P.2d 729 (1958).

It is believed that the foregoing covers all questions pertaining to the matter of American Linen Supply Company's liability for Nevada sales and use taxes, as submitted to us for opinion and advice. Determination of all claims heretofore made by said Company as to its tax liability and obligations should be resolved on the basis of the principles and conclusions herein stated.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-253 STATE PLANNING BOARD; STATE BOARD OF ARCHITECTS; STATE BOARD OF ENGINEERING; STATE CONTRACTORS BOARD**—Construction and application of [NRS 281.220](#) and [281.230](#) with respect to possible conflicts-of-interest in award of public works construction projects. Held: In absence of showing of fraud, abuse of office, or other official misconduct, members of State Board of Architects, State Board of Engineering, and State Contractors Board, serving State on an occasional and gratuitous basis, are not ineligible or disqualified from award of state public works construction contracts by the State Planning Board under statutory legislative prohibition restrictively intended for regularly employed personnel in the classified and unclassified service of the State.

Carson City, November 2, 1961

Mr. William E. Hancock, Manager, State Planning Board, Carson City, Nevada.

#### **STATEMENT OF FACTS**

Dear Mr. Hancock:

Some question has apparently arisen as to the construction and application of the following: [NRS 281.220](#) (State officers prohibited from having interest in state contracts; penalties) provides as follows:

1. It is unlawful for any officer of this state to become a contractor under any contract or order for supplies, or any other kind of contract authorized by or for the state, or any department thereof, or the legislature or either branch thereof, or to be in any manner interested, directly or indirectly, as principal, in any kind of contract so authorized.
2. It is unlawful for any state officer to be interested in any contract made by such officer, or to be a purchaser or be interested in any purchase of a sale made by him in the discharge of his official duties.
3. All contracts made in violation of the provisions of this section may be declared void at the instance of the state or of any other party interested in such

contract, except the officer prohibited from making or being interested in the contract.

4. Any person violating the provisions of this section, directly or indirectly, shall forfeit his office, and shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment in the state prison for not less than 5 years, or by both fine and imprisonment.

[NRS 281.230](#) (Officers, deputies, employees of state, counties, municipalities: Unlawful commissions and compensation) provides as follows:

1. No state, county or municipal officer of the state of Nevada nor any deputy or employee of any state, county or municipal officer of the State of Nevada shall in any manner, directly or indirectly, receive any commission, personal profit, or compensation of any kind or nature, inconsistent with loyal service to the people, resulting from any contract or other transaction in which the state, county or municipality is in any way interested or affected.

2. Any contract or transaction prohibited by this section entered into with any of the persons designated in subsection 1, with the knowledge of the party so entering into the same, shall be void.

3. Every person violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than \$25 nor more than \$500, or by imprisonment in the county jail not exceeding 6 months, and shall be removed or dismissed immediately from service.

## QUESTIONS

1. Under the foregoing statutory provisions, can the State Planning Board enter into contracts with individual members of the State Board of Architecture, the State Board of Engineering, or the State Contractors Board for the planning, design, or construction of public works projects?

2. If the answer to the above question is negative, can existing contracts with individual members of the State Board of Architecture, the State Board of Engineering, or the State Contractors Board be considered valid?

## CONCLUSIONS

Question No. 1: As herein qualified: Yes.

Question No. 2: In view of our affirmative conclusion to Question No. 1, no answer is indicated or necessary.

## ANALYSIS

[NRS 281.010](#) (Elected and appointed officers) sets forth the classification and enumeration of “officers,” both elected and appointed. Unless deemed to be included under paragraph 2(c) thereof, which contemplates “All officers who are not elected,” members of the State Board of Architecture, the State Board of Engineering, and the State Contractors Board are not “officers,” specifically designated as such in Nevada law.

However, since members of such Boards are appointed by, and receive commissions from, the Governor of the State relative to their respective designations and offices, they may, in the general sense of the word, be deemed state “officers.” (*See* 42 Am.Jur. 901, Section 30.)

It is a rule, embodied in the statutes of some states, that public officers are debarred from contracting with the public agency which they represent or from having a private interest in its contacts. The rule is intended to be applied to all cases where there would be conflicting interests. In the absence of a statute on the



subject, such a conflict of interest is the test of the disqualification of an officer by reason of his office to make a contract. Dealings between a public officer and himself as a private citizen that bring him into collision with other citizens equally interested with himself in the integrity and impartiality of the officer are against public policy. Clearly, an officer, in making a contract, may not, as agent, represent the conflicting interests of both parties. However, there is authority to the effect that the mere fact that a person is a ministerial officer of a public corporation does not debar him from making a contract with the officers controlling its affairs.

An officer's duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding for a consideration by which his judgment or duty conflicts with his private interest is corrupting in its tendency. Giving anything of value to a public officer to influence him in the discharge of a legal duty renders void any contract to the validity of which his vote or assent is necessary. And where public officers are involved, the courts are stringent in holding void and contrary to public policy a contract for compensation, contingent on the officer's success in securing contracts or other advantages from the public agency he represents, or from his superiors, or contingent on the benefits that may be received from an officer's performing the duties for which he is paid by the public. It has been determined that an agreement whereby a public official having a voice in the location of a public building is to receive compensation contingent on the location of the building at a designated place is opposed to public policy and void.

A contract entered into by a board with one of its own members is void, or at least voidable, even in the absence of a statutory prohibition. The reason is that in such cases the member's public duty and his private interests are directly antagonistic. It matters not if he did in fact make his private interests subservient to his public duties. This rule would seem to be especially applicable where the member took part in the proceedings whereby the contract was let, although the contract has been held invalid in instances in which the member did not take part in the proceedings authorizing the contract, on the ground that his position upon the board gives him means of information not possessed by others, and enables him to exercise an undue influence over the members of the board. But according to other decisions, such a contract is valid if free from fraud, and if the member with whom it is made does not vote on the proposition and takes no part in behalf of the public in making the contract. And even though the vote of the member is necessary to the authorizing of the contract, it has been held that the contract may be upheld, or at least can be ratified, if it is for a purpose authorized by law, if there is no showing that the contract is tainted with fraud, and if there is no statutory prohibition against the making of the contract. (*See* 43 Am.Jur. 105-107.)

The foregoing quotation of general rules and principles concerning conflicts of interests in connection with governmental activities is considered justified in view of the increasing importance of the problem, as evidenced by the frequent references to it in newspaper accounts of particular infractions. Such statement of general rules and principles is also pertinent in clarification of the specific problem and questions submitted to us for opinion and advice.

It is to be noted that the individual members of the state Board of Architecture, the State Board of Engineering, and the State Contractors Board are appointees of the Governor to their respective positions, rendering public service without pay, except for reimbursement of subsistence and travel expenses actually entailed in the performance of their official duties. They are engaged in private activities, professional or otherwise, upon which they depend for their livelihood and income, and have made themselves available for rendition and performance of public service in the public interest as a matter of civic responsibility and duty. They are not "employed" for salary or compensation, as other regular state officers and employees are, in the

classified or unclassified service of the State. They are not entitled to annual or sick leave, or any of the other fringe benefits of regular state officials or employees, such as retirement benefits.

In short, members of the named Boards have no tenure, serve without salary, and their duties are occasional, and, in such sense, temporary, differentiating them from regular state officers and employees.

We have had occasion to note elsewhere that such distinctions, however, do not of themselves alone necessarily suffice to remove or eliminate the problem and question of possible conflict of interest. (*See United States v. Mississippi Valley Generating Co.*, 364 U. S. 520, 81 S.Ct. 294 (1961), commented upon by us in an address on the subject "Conflicts of Interests," delivered to the 1961 Annual Conference of Western Attorneys General.)

The problem and question of conflicts of interest at various levels of government is deeper and more complex than any such distinctions might suggest. Two basic requirements are necessarily involved in any proper appraisal and evaluation of the matter. The first is that, presumptively, ethical standards in government activities at all levels should be beyond reproach, and that there must, accordingly, be effective regulation of conflicts of interest in government at all levels. The second is that government, at all levels, must be in a position to obtain the personnel and information it needs to meet the demands of the twentieth century in the public interest.

These basic requirements are coequal. Neither may be safely subordinated to the other. It must be emphasized that balance is needed in the pursuit of the two objectives. In the long run, the objective is a policy which neither sacrifices governmental integrity for opportunism, nor drowns practical staffing needs in a sterile moralism. Involved and needed, therefore, is a careful regulatory scheme that effectively restrains official conflicts of interest without generating pernicious side effects on recruitment of both regular staff, and talents or capabilities on an occasional or temporary basis, for performance of governmental functions and responsibilities.

Manifestly, as evidenced by [NRS 281.220](#) and [281.230](#) (set forth in our Statement of Facts herein), our Legislature has been aware of, and has sought to deal with, the conflict-of-interest problem in this State, as it might occur in governmental activities involving officials and employees. The specific question here involved is whether or not it was legislative intent and purpose to include within the absolute prohibition of said statutory provisions, members of boards such as those herein mentioned, who are not regular, salaried state officials or employees owing their entire time and complete and exclusive services to the State.

Otherwise stated, does appointment and voluntary and uncompensated services as members of such state boards, in rendition and performance of civic responsibility and duty, automatically disqualify such member personnel from seeking and securing contracts for public works construction projects on the same basis as others in no way connected with an involved governmental entity, even though there be no improper official misconduct, irregularity, or fraud?

In our considered opinion, the legislative prohibition contained in the above statutory provisions is primarily and essentially leveled at regular, salaried state or other governmental officials and employees, and is not reasonably intended to place persons, voluntarily and gratuitously rendering and performing public service, in a position of disadvantage and unnecessary personal sacrifice as compared with others in the community. While voluntary and gratuitous performance of public service should not give one an unfair and improper advantage or benefit in respect to any award of government contract, it cannot reasonably and properly be assumed that the Legislature intended to penalize any such person, faithfully rendering public service, by depriving him of the equal economic right of competing with every other member of the community in the conduct of his private business in respect of any award of governmental public works contracts.

Unambiguous, clearer, and more specific prohibitory language than that contained in the present statute could certainly have been found and employed if legislative intent and objective had been so all-inclusive and broad. Reasonable construction of the above statutory provisions requires no such extreme conclusion. Especially since, if so construed and applied, it would have the inevitable result of discouraging public spirited and qualified persons from offering their

time, talents or capabilities, gratuitously and as a matter of civic responsibility, to public service, to the detriment of the general public interest.

We find additional support for our foregoing conclusion in the fact that, fundamentally, it is evident legislative intent of the involved statutory provisions to proscribe and invalidate improper and fraudulent public works contracts resulting from situations where “officers” or other employees representing the State (or other governmental authority) in the negotiations and executions of such agreements are, in fact, motivated by private and personal considerations to the detriment of the public interest with which they are officially charged.

That the official acts of all public officials and employees are always open to scrutiny and question is clear. Any suggestion of official misconduct, i.e., bribery, undue influence, abuse of office, improper preference or bias, etc., is properly, and should always be, open to question and, if actually involved, renders a public works contract void or voidable. Such is undoubtedly true in any case where a state “officer,” such as a member of one of the Boards herein mentioned, had nay personal interest in, or were to derive any personal benefit from, any public contract, in the consummation of which he officially participated.

However, such conflict-of-interest situation certainly does not appear to exist in the circumstances here involved. The question, as presented to us, is whether the State Planning board may properly award or enter into contracts with individual members of the State Board of Architecture, the State Board of Engineering, or the State Contractors Board for planning, design, or construction of public works projects.

The decision to award any such contract to any individual members of any of these Boards, if not improperly induced, is the ultimate decision and responsibility solely of the State Planning Board, and of no one else. The members of the State Planning Board, presumptively, have no personal or private economic interest, directly or indirectly, in such awarded contract, i.e., they will not derive any pecuniary benefit therefrom, either by receipt of a share of the profits, payment of any commission or fee, or presentation of gifts or other valuable consideration, etc., in any manner, form or kind.

Under such circumstances, there is, therefore, no reason in ethics, morals, public policy or common sense, why any conflict-of-interest restriction should be presumed or inferred. Architects, engineers and contractors involved in awards of public contracts are as much entitled to the benefits thereof as other persons in such callings and occupations. And the State should not be deprived of their experience and capabilities, automatically and routinely, merely because their attainments in their respective fields have brought them to public attention and to enlistment in public service, on a voluntary and gratuitous basis.

We conclude, therefore, that, as above qualified, the State Planning Board may enter contracts with individual members of the State Board of Architects, the State Board of Engineering, and the State Contractors Board, since such contracts do not, in our opinion, fall within the prohibitions contained in [NRS 281.220](#) and [281.230](#), in the absence of any showing that the consummation of such contracts was based upon fraud or other improper official act or conduct.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-254 FAIR AND RECREATION BOARD, COUNTY**—Both county, and a city lying within the county, being incorporated under general law, are empowered to enact separate ordinances, assessing a room tax for revenue, without the formation of a County Fair and Recreation Board. A County Fair and Recreation Board may operate

without the sale of bonds, in its program of recreation and community betterment, if it so elects. [NRS Chapter 266](#), 244.335, 244.640, 244.700, construed.

Carson City, November 3, 1961

Honorable Robert R. Gill, City Attorney, City of Ely, Ely, Nevada.

### STATEMENT OF FACTS

Dear Mr. Gill:

The City Council of the city of Ely, and the Board of County Commissioners of the county of White Pine are not in complete accord as to community betterment programs and it is therefore desirable to enable them to arrive at proper decisions, that they each be advised, among other things, as to its powers in obtaining license tax revenues, and other pertinent matters. The city of Ely is incorporated under the provisions of general law, being Chapter 266 NRS.

1. Can a county, and a city incorporated under general law, lying within the county, enact separate ordinances assessing a room tax for revenue, without forming a County Fair and Recreation Board?
2. Is it necessary for a County Fair and Recreation Board to sell bonds, or may it expend moneys in accordance with its program for community betterment, as they are collected?

### CONCLUSIONS

1. Although there are certain disadvantages, each entity (City Council and Board of County Commissioners) is empowered to enact an ordinance, effective within its own geographic area, for the assessing and collection of a room tax for revenue, or for regulation, or for both revenue and regulation, without the formation of a County Fair and Recreation Board.
2. The creating of a bonded indebtedness by the County Fair and Recreation Board is entirely a matter of discretion with such Board.

### ANALYSIS

The city of Ely is incorporated under general law (Ch. 266 of NRS) as distinguished from those cities incorporated under special charter.

A license tax may be enacted for regulation or for revenue or for both regulation and revenue. If enacted for revenue, the authority in the pertinent statute must clearly appear, otherwise the ordinances will fail as being in excess of delegated authority. *Clark County v. Los Angeles City*, [70 Nev. 219](#), 265 P.2d 216.

Under the provisions of [NRS 244.335](#), the Boards of County Commissioners are authorized to enact ordinances for revenue, effective within their counties, except for the areas embraced within incorporated cities lying in such counties. This section provides:

244.335 The board of county commissioners shall have power and jurisdiction in their respective counties to:

1. Regulate all character of lawful trades, callings, industries, occupations, professions and business conducted in their respective counties, outside of limits of incorporated cities and towns.
2. Fix, impose and collect a license tax for revenue or for regulation, or for both revenue and regulation, on such trades, callings, industries, occupations, professions and business.

Similar authority to enact ordinances for revenue purposes is conferred upon the governing body of cities of both classes, under the provisions of [NRS 268.095](#), which in part provides:

268.095 1. The city council or other governing body of each incorporated city or town in the State of Nevada, whether or not organized under general law or special charter, shall have the power and jurisdiction:

(a) To fix, impose and collect for revenues or for regulation, or both, a license tax on all character of lawful trades, callings, industries, occupations, professions and businesses conducted within the corporate limits.

This statute proceeds further with provisions that the City Council may assign the proceeds of such tax to the county, as additional security for general obligation bonds, and for constructing, maintaining and operating recreational facilities, under the administration of a County Fair and Recreation Board. These further provisions of [NRS 268.095](#) are purely permissive and the enactment of an effective ordinance under [NRS 268.095](#) 1(a) is not dependent upon the additional provisions of this section.

This interpretation of the statute ([NRS 268.095](#)) that the City Council may enact an ordinance providing for a tax for revenue, without assigning the proceeds to the county, is strengthened by the fact that subsection 1(a) applies to all cities, regardless of size; whereas a County Fair and Recreation Board cannot be organized in a county having a total population under 9,000. (*See* [NRS 244.640](#), as amended by Ch. 274, p. 453, Stats. 1961.) Conceivably a county could have a total population under 9,000, and, therefore, be unable to organize a County Fair and Recreation Board, but nevertheless contain a duly incorporated city.

We therefore conclude that all cities and counties of the state are authorized to enact ordinances providing for the assessment and collection of room taxes for revenue, within their respective areas, without the necessity of the existence of a Fair and Recreation Board in such county.

We feel that we would be remiss, however, if we should fail to point out that the powers in the expenditure of funds for recreational purposes, by a County Fair and Recreation Board ([NRS 244.640](#), et seq., as amended 1961, pp. 300, 453) are much broader than are the powers in respect to recreational facilities, as conferred on either the City Council of cities incorporated under Chapter 266 of NRS, or on Boards of County Commissioners. It is one thing to legally assess and collect funds from this proposed source, and quite another to legally expend such funds for a great variety of recreational purposes. We shall not labor this point, for you have not asked in respect to it, but we invite your attention to the pertinent statutes appertaining to powers in the expenditure of funds by a city incorporated under Chapter 266 of NRS, and the contrasting extensive powers that are granted to County Fair and Recreation Boards for the same purposes.

In respect to the second question, the provisions of [NRS 244.700](#), subsection 1, leave the question of the creation of a bonded indebtedness of a County Fair and Recreation Board entirely to the discretion of the Board. In a proper case the ordinance could provide that the funds to be so exacted should be held in a separate fund, with appropriate designation, and be accumulated in such fund, to be used solely for a designated purpose. In such case a bond issue might, in the judgment of the Board, be unnecessary.

[NRS 244.700](#), subsection 1, provides:

244.700 1. Whenever the county fair and recreation board shall be resolution, determine that the interest of the county and the public interest, necessity or desirability demand the creation of a bonded indebtedness or the making of any contract creating an indebtedness with the United States Government, or any agency or instrumentality thereof, corporate or otherwise, or any other person or corporation, public or private, in excess of \$5,000, the board shall order the submission of the proposition of issuing the bonds, or creating the indebtedness, to the qualified electors of the county at an election held for that purpose. The election may be held separately, or may be consolidated or held

concurrently with, any other election held in accordance with the laws of the State of Nevada.

This provision is clearly permissive. It provides in effect that if the County Fair and Recreation Board shall by resolution declare it to be to the interest of the county that a bonded indebtedness be incurred, they may submit the question to the electorate.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-255 TAXATION**—A county that is indebted to a real property taxpayer may set off the debt by the amount of the tax due such county.

Carson City, November 3, 1961

Honorable L. E. Blaisdell, District Attorney, Mineral County, Hawthorne, Nevada.

### QUESTION

Dear Mr. Blaisdell:

When a county is indebted to a delinquent real property taxpayer, may the county set off the debt by the amount of the tax due such county?

### CONCLUSION

Yes.

### ANALYSIS

[NRS 244.220](#) provides, in part, as follows:

No demand upon the treasury shall be approved by the board of county commissioners or allowed by the county auditor:

1. In favor of any person or officer in any manner indebted to the county, without first deducting the amount of such indebtedness.

It will be noted that the above statute provides that no demand upon the treasury shall be approved or allowed, if such person or officer is in any manner indebted to the county.

In *State of Nevada v. Yellow Jacket Mining Company*, [14 Nev. 220](#), where an action was brought to collect personal property taxes upon proceeds of a mine, it was stated that taxes are not debts in the sense that they are obligations or liabilities arising out of contract expressed or implied, and in the true and usual sense, are not debts at all. They are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the State for the support of government, and for public needs. They owe their existence to the action of the legislative power, and do not depend for their validity or enforcement upon the individual assets of the taxpayer, but operate in invitum.

It was stated in *Walser v. Moran*, [42 Nev. 111](#), p. 141, that our later statutes on the subject of taxation and actions for the collection of the same have been amended, so as to overcome the force and effect of the decision in the case of *State v. Yellow Jacket*, *supra*.

Hellerstein, *Cases on State and Local Taxation*, 2nd Ed., p. 640, states as follows:

Personal liability from property taxes has a long history in the American law. As noted in an excellent discussion by Rubin in "Collection of Delinquent Real Property Taxes by Action in Personam," 3 *Law & Cont. Prob.* 416 (1936), a Massachusetts Statute enacted in 1789, permitted a tax collector to bring an action for debt for taxes in some cases, 1 *Mass. Law* 465 (1801); and in *Mayor v. McKee*, 10 *Tenn.* 150 (1826), a tax on town lots was held a debt on the taxpayer which could be recovered by an action in view in the name of the town. Generally, however, the rule developed that in the absence of an explicit statutory provision, no personal action will lie to recover property taxes. These holdings are grounded on the theory that taxes are not debts.

[NRS 361.635](#) provides, in part, as follows:

\* \* \* the county treasurer shall make out and deliver to the district attorney \* \* \* a list \* \* \* of all delinquencies to be collected by suit \* \* \* and unless \* \* \* paid \* \* \* action will be commenced by the district attorney for the collection of the taxes, penalties and costs.

[NRS 361.650](#) provides, in part, as follows:

1. The district attorneys \* \* \* are authorized and directed \* \* \* to commence action in the name of the State of Nevada against the person or persons so delinquent, and against all owners known or unknown, to recover such delinquent taxes in all cases where suit is required.

[NRS 361.690](#) provides, in part, as follows:

1. If on the return day named in the summons, the personal defendant fails to appear and answer the complaint, his default may be entered by the clerk, as in other civil cases.

[NRS 361.695](#) provides, in part, as follows:

The defendant may answer, which answer shall be verified:

3. Denying all claim, title or interest in the property assessed at the time of the assessment.

[NRS 361.700](#) provides, in part, as follows:

2. In case judgment is rendered for the plaintiff, it may be entered against such defendant or defendants as are found liable for the tax, and for such portions as he or they may be found liable for.

\* \* \*

7. In case any person shall be sued for taxes on any lands or improvements of which he was the owner, or in which he had a claim or interest at the time of institution of suit, and shall be discharged from personal liability under an answer in conformity with subsection 3 of [NRS 361.695](#), and such lands or improvements shall be sold under a judgment obtained against it, and shall thereafter be redeemed by such discharged defendant, or if he shall pay the taxes and costs to prevent a

sale, then such personally discharged defendant shall have, and is hereby given, the right of recovery over against the owner at the time of assessment, or any subsequent purchaser, for the full sum of all taxes, penalties and costs, or redemption money paid.

The above NRS statutory provisions indicate that there is personal liability from property tax, and if any person is in any manner indebted to the county no demand will be allowed without first deducting the amount of such indebtedness.

On the basis of the foregoing analysis, therefore, we conclude that a county indebted to a delinquent real property taxpayer has legal authority to set off the debt by the amount of the tax due such county as provided in [NRS 244.220](#).

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: David G. Parraguirre  
Deputy Attorney General

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**OPINION NO. 61-256 PUBLIC EMPLOYEES RETIREMENT BOARD**—The Public Employees Retirement Board, under advice from its investment counsel, may liquidate bonds carried in its portfolio to maturity. [NRS 286.680](#), et seq., construed.

Carson City, November 3, 1961

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, P.O. Box 637, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. Buck:

Pursuant to the provisions of [NRS 286.680](#), et seq., the Public Employees Retirement Board has engaged investment counsel with office headquarters in San Francisco. The Public Employees Retirement Board has engaged investment counsel with office headquarters in San Francisco. The Public Employees Retirement Board now holds in its portfolio, representing an investment of a part of its trust funds, bonds issued by legal entities of the State of Nevada in the approximate value of \$797,000. These bonds are in the custody of the State Treasurer of the State of Nevada.

Investment counsel, professional experts in such matters, have recommended that said bonds be liquidated and the proceeds therefrom be reinvested in securities to be recommended by them, under the limitations provided by Nevada law. Counsel have advised that such proposed reinvestment would not impair investment objectives of security, proper diversification, capital growth, and other recognized investment values, and would increase the yield upon the involved sum by an anticipated amount of some \$12,000.

### QUESTION

Is the Public Employees Retirement Board empowered to authorize the liquidation of bonds held in its portfolio, prior to maturity, under advice of its investment counsel, to the end that the



proceeds therefrom may be reinvested in securities under the limitations provided by Nevada law, as advised by its investment counsel?

## CONCLUSION

The Public Employees Retirement Board has been so empowered.

## ANALYSIS

[NRS 286.020](#) creates the Public Employees Retirement Board. [NRS 286.680](#), subsection 1, provides:

Notwithstanding the provisions of chapter 355 of NRS or of any other law, the board may invest and reinvest the moneys in its funds as provided in [NRS 286.690](#) to [286.800](#), inclusive, and may employ investment counsel for such purpose. The provisions of [NRS 286.680](#) to [286.800](#), inclusive, shall not be deemed to prevent the board from making investments in accordance with the provisions of chapter 355 of NRS.

The provisions of Chapter 355 of NRS regulate generally the investment of state funds, e.g., the state permanent school fund, by the State Board of Finance, in those cases in which the particular fund is not otherwise regulated, e.g., the investment of the Public Employees Retirement Fund.

Sections 286.690 to 286.790 of NRS, inclusive, provide for various types of authorized investments by the Board. Each of these eleven sections, sealing with differing types of authorized investments, begins with identical language, namely, “The board may invest and reinvest the moneys in its funds \* \* \*.” For the most part these sections deal with and authorize investment in bonds of the United States, the State of Nevada, and its political subdivisions. Since bonds have a definite maturity date, if the above designated sections dealt exclusively with bonds, it might be concluded that the Board is authorized to “reinvest the moneys in its funds” only after the bond issue has matured and the bonds have been redeemed by the issuing entity.

Certain of these sections contain limitations as to percentages of total funds that the Board may invest in a specific type of investment, default in payments, and other limitations, but the limitations have no relevance to the question here under consideration. (See Secs. 286.700, 286.710, 286.720, 286.730, 286.740, 286.750, 286.760, 286.770, 286.780 and 286.790 of NRS.)

However, [NRS 286.780](#) authorizes the Board to invest and reinvest the moneys in its funds in nonassessable common stocks. Common stocks do not represent a loan, but represent partial ownership. They do not mature, and in order that a “reinvestment” of such funds may be made, the stocks must be liquidated.

It is, therefore, clear that in respect to stocks the power of the Board to sell them at its pleasure, under advice of investment counsel, has been granted. The preliminary language of these eleven sections heretofore mentioned, being identical, strongly infers that it was the intent of the Legislature to permit the board to exercise the same latitude in respect to the liquidation of its bonds.

To deny that the Board has this power, that is, to liquidate bonds prior to maturity, and to reinvest the funds so derived, would, in effect, render the service of investment counsel partially impotent and commensurably reduce the value of such counsel to the Board. The limitations upon investments under this chapter are contained in [NRS 286.800](#) and the sections formerly mentioned, which enumeration of limitations is exclusive. This section provides:

286.800 The following limitations on investments shall be observed:

1. The board shall not have at any time any combination of investments in any one institution, agency, corporation or political subdivision aggregating an amount exceeding 5 percent of the assets of the system. This restriction shall not apply to:

(a) Investments in general obligations of the United States of America.

(b) Investments owned by the system on July 1, 1959.

2. The board shall not have in total more than 10 percent of the assets of the system invested in the Dominion of Canada, its provinces, its cities, its municipal corporations and the obligations of corporations organized under the laws of the Dominion of Canada or any of its provinces.

We are informed by the State Treasurer that the entire total (approximately \$797,000) is issued by a number of different entities and it would appear that the authority to deregister such bonds and reissue bonds of smaller denomination, covering the same terms as to date of maturity, interest rates, and like matters, will depend largely upon the content of the ordinances under which they were issued. Such matters will apparently require the reflection of the bonding attorneys, and examination of the relevant documents (the full record) as to each issue. We leave these matters for their attention as suggested in your letter. It would appear to be necessary that smaller denomination bonds be issued to render them readily saleable.

For the foregoing reasons, the question must be answered in the affirmative.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-257 DISTRICT ATTORNEY, WASHOE COUNTY**—Right of military personnel to register and vote in state elections. 1. A member of the armed forces of the United States, who has continuously lived outside Nevada, is not entitled to register and vote at the next succeeding election merely because he owns property in the State which he has always intended to make his home, if he had not acquired Nevada residence prior to enlistment. 2. The residence of a minor serving in the Armed Forces of the United States does not follow the residence of his parents.

Carson City, November 7, 1961

Honorable William J. Raggio, District Attorney, Washoe County, Reno, Nevada.

#### **STATEMENT OF FACTS**

Dear Mr. Raggio:

We are advised that a person presently serving in the Armed Forces of the United States has made application to the County Clerk for registration to vote, as a resident of Washoe County.

It is indicated that said person lived with his parents at Jackson, Wyoming, until he joined the U.S. Navy on October 14, 1948, at the age of seventeen. He has served in such capacity continuously from that date to and including the present time, and he expects to continue such service until he has completed twenty years.

He is presently serving in Japan, and has never been stationed in the State of Nevada.

His mother moved to Elko, Nevada, after his father's death in 1951, and he has claimed Nevada as his home since that date. He has never registered to vote in any other state.

In 1960 he purchased a home in Sparks, Nevada, for his mother and himself. It is his intention to live in such home after retirement from the military service. He owns other real estate in

Nevada and has a savings and checking account in the First National Bank of Nevada, Reno, Nevada.

Since 1952 he has spent a total of 270 days, leave-time from the U. S. Navy, in Nevada.

### QUESTION

1. Does the residence of a minor serving in the armed forces of the United States follow the residence of his parents?

2. Is a member of the Armed Forces, who has continuously lived outside the State, entitled to register and vote at the next succeeding election in the State, on the basis of ownership of property here which he has always intended to make his home, if he had not acquired residence in Nevada prior to enlistment?

### CONCLUSIONS

Question No. 1: No.

Question No. 2: No.

### ANALYSIS

This office in prior opinions has ruled upon the question as to whether or not a soldier, who has resided in the State, county and precinct the required length of time, is entitled to register and vote at the next succeeding election. (*See* Attorney General Opinion No. 339, dated August 6, 1946; Attorney General Opinion No. 281, dated March 29, 1946; Attorney General Opinion No. 220, dated July 22, 1936.)

The above cited opinions were all concerned with service personnel who were serving in this State pursuant to military orders.

A minor takes the domicile of his father, if living; otherwise, the domicile of his mother, if she has custody, until such child becomes emancipated. (Witkin, Summary of California Law, Vol. 3, p. 2417.)

Based upon the principal that the domicile of a minor is that of his father, the person here in question was a resident of Jackson, Wyoming, at the time of his enlistment into the U. S. Navy. Such residence continues until he acquires a residence elsewhere. (*See* 129 A.L.R. 1382.)

The Constitution of Nevada in Section 2 of Article II provides as follows:

For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of the United States or of the high seas; \* \* \*.

A minor who enlists in the military or naval service is emancipated as long as such service continues (67 C.J.S. 814). When the sailor's mother moved to Elko, Nevada, after his father's death, the sailor could not claim Nevada as his residence on the basis that his residence followed that of his parents, since he had become emancipated before his mother moved to Nevada. Because a minor becomes emancipated when he joins the Armed Forces of the United States, his residence does not follow any subsequent residence of his parents as long as he continues in such military service.

Section 3 of Article II of the Nevada Constitution provides:

The right of suffrage shall be enjoyed by all persons, otherwise entitled to the same, who may be in the military or naval service of the United States; provided, the votes so cast shall be made to apply to the county and township of which said voters were bona fide residents at the time of their entry into such service; \* \* \*.

[NRS 292.190](#) provides, in part, as follows:

1. If any applicant for registration has not resided within the State of Nevada or the county for the required length of time, he shall not be registered until he complies with the provisions of [NRS 292.070](#).

[NRS 292.070](#) provides as follows:

Every citizen of the United States, 21 years of age or over, who has continuously resided in this state 6 months and in the county 30 days and in the precinct 10 days next preceding the day of the next ensuing election, shall be entitled to vote at such election if he is duly registered as provided in this chapter.

[NRS 292.080](#) provides as follows:

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.

The person here in question is presently serving with the Armed Forces of the United States in Japan and he has continuously served outside the State of Nevada. He does not intend to return to Nevada until he has completed twenty years of military service.

[NRS 292.080](#) states that 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.

[NRS 292.070](#) prescribes the length of time that a person must reside in the State, county and precinct before he is entitled to register and vote.

[NRS 292.190](#) states that no person shall register until he complies with [NRS 292.070](#).

For the foregoing reasons, therefore, it is our opinion and advice that the person here involved is not entitled to register and vote at the next succeeding election.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: David G. Parraguirre  
Deputy Attorney General

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Note: See letter of November 14, 1961, to Honorable William J. Raggio, following this opinion.

Carson City, November 14, 1961

Honorable William J. Raggio, District Attorney, Washoe County, Reno, Nevada.

Dear Mr. Raggio:

Opinion No. 257, dated November 7, 1961, should be corrected by deleting therefrom [NRS Chapter 292](#) and adding thereto the following provisions:

- a. [NRS 293.485](#), subsection 1.
- b. Section 1 of Article 2 of the Constitution of the State of Nevada.
- c. [NRS 293.553](#).
- d. [NRS 293.055](#).

Chapter 292 of NRS was repealed by Chapter 157, Statutes of Nevada 1960, which became effective on January 16, 1961.

Except for the above changes, our opinion that the person here involved is not entitled to register and vote at the next succeeding election remains the same.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: David G. Parraguirre  
Deputy Attorney General

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**OPINION NO. 61-258 SAVINGS ASSOCIATION BOARD; COMMISSIONER OF SAVINGS ASSOCIATIONS**—[NRS 673.080](#), subsection 8 construed. Held: Commissioner of Savings Associations may not grant ex parte approval of an application for transfer or removal of a licensee's main and sole business office to a new location without first giving notice to all associations within the radius statutorily fixed, and according a hearing to any protestant to the issuance of such new license, as provided by [NRS 673.080](#), subsection 8. Failure of Commissioner of Savings Associations to comply with said statutory requirements constitutes action appealable to the Savings Association Board under the provisions of [NRS 673.047](#), subsections 1 and 3, and to District Court under [NRS 673.050](#). Remand and requirement of proceedings de novo on the part of the Commissioner of Savings Associations for redetermination of involved application for transfer and removal of license to proposed new location, recommended to Savings Associations Board.

Carson City, November 21, 1961

Mr. John H. Bell, Commissioner of Savings Associations, State of Nevada, Carson City, Nevada.

#### STATEMENT OF FACTS

Dear Mr. Bell:

Chapter 378, 1961 Statutes of Nevada (approved and effective as of April 7, 1961) amended a number of statutory provisions theretofore contained in Chapter 673 of Nevada Revised Statutes. Said 1961 act, among other things, created and established the office of "Commissioner of Savings Associations," hereinafter referred to as "Commissioner," and made provisions as to the jurisdiction and powers of said office and Commissioner. Prior to said 1961 act, Savings and Loan Associations had been under the supervisory administration of the Superintendent of Banks.

The Frontier Fidelity Savings and Loan Association, a domestic corporation, hereinafter referred to as "Frontier," was licensed on May 25, 1960 by the Superintendent of Banks (according to advice herein submitted) and, upon such grant of license, engaged in the conduct of its business at 120 North 3rd Street, Las Vegas, Nevada, where it is still conducting its said

business. We are further informed that, prior to August 4, 1961, Frontier acquired property on Charleston Boulevard, between 8th and 9th Streets, in the same city of Las Vegas, for the purpose of erecting and constructing thereon an office building and facilities to which it might remove its Savings and Loan business. In this connection (also prior to August 4, 1961), it appears that Frontier made written application to the Commissioner for permission or approval of its plan to construct such proposed office building and to remove its business office thereto upon completion thereof.

On August 4, 1961, by letter, the Commissioner gave his approval to Frontier's planned construction program, subject, however, to specific approval of the financial aspects of said plans, in respect of their feasibility, and required protection of Frontier's depositors and welfare of Frontier as a Savings and Loan Association. The Commissioner, in his said letter, clearly indicated that when the proposed new building has been constructed and was ready for occupancy he would approve the transfer or removal of Frontier's home office license thereto.

From the Commissioner's aforesaid decision and approval of August 4, 1961, the Nevada Savings and Loan Association, a Nevada-licensed and domestic association, also conducting business in Las Vegas, appealed to the Savings Association Board. Conceding the Commissioner's jurisdiction and authority to hear and determine Frontier's application for transfer and removal of its home and sole office, said appeal places in issue the question as to whether the Commissioner is, or is not, required to give notice of said application to other Savings and Loan Associations who might be injured or adversely affected by the Commissioner's approval of said removal application, and to accord them a hearing thereon; in other words, the appeal takes issue with the Commissioner's ex parte approval of Frontier's application for transfer and removal of its home office license, as contrary to, and violative of, statutory requirements.

A full hearing on the matter was had before the Savings and Loan Association Board in Carson City, Nevada, on October 4, 1961. Both Frontier and appellant Nevada Savings and Loan Association were represented by their respective attorneys. Testimony was taken; arguments were presented; and the matter was submitted to the Board for ruling. The Board deferred any immediate decision on the matter, but instead took it under advisement, contemplating referral of a specific legal question relative thereto to the Department of Attorney General. When received by this Department, said question, as submitted, was too general, and request was made that it be reframed or reworded. There has been no compliance by the Board with such request, undoubtedly because the Board has not had occasion to have another meeting. In these circumstances, the Commissioner has seen fit to submit certain specific questions, on his own motion, for opinion and advice from this Department. They are stated as follows:

## QUESTIONS

1. Is the Commissioner of Savings Associations authorized or required to entertain, grant or deny an application of a duly licensed Savings and Loan Association for permission to transfer or remove its principal or home office to another location?

2. Was the Commissioner of Savings Associations required to accord a hearing to Nevada Savings and Loan Association, or any other similar association, prior to his approving the planned construction program of Frontier Fidelity Savings and Loan Association, as provided in his letter dated August 4, 1961, in view of the fact that such construction contemplated facilities to which Frontier would transfer or remove its principal or home office?

3. Was Nevada Savings and Loan Association an "aggrieved party" entitled to the right of appeal under the provisions of Section 673.047, subsection 1 of NRS, as a result of the Commissioner's action granting approval of Frontier's application of removal, as contained in the Commissioner's letter dated August 4, 1961?

4. Was Nevada Savings and Loan Association an "interested and affected party" under subsection 3 of [NRS 673.047](#), in the aforesaid circumstances?

5. Was Nevada Savings and Loan Association an "association or person affected" under the provisions of [NRS 673.050](#), in the aforesaid circumstances?

6. If questions 4 and 5 are answered in the affirmative, did Nevada Savings and Loan Association, as an “interested and affected party,” or, as an “association or person affected,” have the right to appeal from the Commissioner’s decision under the provisions of subsection 1 of [NRS 673.047](#), in the aforesaid circumstances?

## CONCLUSIONS

Question No. 1: Yes.  
Question No. 2: Yes.  
Question No. 3: Yes.  
Question No. 4: Yes.  
Question No. 5: Yes.  
Question No. 6: Yes.

## ANALYSIS

Savings and Loan Associations, as fiduciaries, are engaged in a business affected with a public interest and, therefore, subject to regulation under the state’s police powers (9 Am.Jur. 101-102, Section 8).

[NRS 673.040](#) confers authority upon and charges the Commissioner of Savings Associations with supervisory responsibility of all foreign and domestic savings and loan associations conducting business in Nevada, and with the administration and enforcement of law applicable thereto.

Under [NRS 673.047](#), any association aggrieved by an act or failure to act under the provisions of Chapter 673 of NRS, on the part of the Commissioner, may appeal to the Savings Association Board.

[NRS 673.050](#) secures the right or an association or person to test the validity of the Commissioner’s action, act, order, proceeding, or ruling in a proper District Court of the State.

[NRS 673.080](#) authorizes the Commissioner to approve articles of incorporation, and amendments thereto, of Savings and Loan Associations and companies, and to approve the sale of securities by them. [NRS 673.250](#) further authorizes the Commissioner to effect the impounding of the proceeds of any sale of capital stock, if necessary, to insure proper disposition thereof for the protection of depositors and the general public.

At the time when Frontier was licensed for business in Nevada (May 25, 1960), subsections 8 and 9 of [NRS 673.080](#) were in effect and applicable. (Chapter 354, 1959 Statutes of Nevada, p. 542, approved March 30, 1959.) They provided as follows:

8. Upon approval of any application for a new license the superintendent shall notify all associations doing business within a radius of 50 miles of the principal place of business of the applicant of such approval. Any association notified may within 20 days protest the granting of the application. If no protest is received within 20 days, the superintendent shall issue the license.

9. Any applicant who is denied a license may appeal the decision to the state board of finance within 20 days of such denial.

The foregoing provisions were amended, effective April 7, 1961, by Chapter 378, 1961 Statutes of Nevada, p. 766, to read as follows:

9. Prior to approval of any application for a new or a branch office license the commissioner shall notify all associations doing business within a radius of 50 miles of the principal place of business of the applicant. Any association so notified may, within 20 days, protest in writing the granting of the application. After receipt of such written protest, the commissioner shall fix a date for a hearing upon the protest within 30 days after the receipt thereof.

Said 1961 act (*supra*, Section 68, pp. 780-781) also added [NRS 673.112](#) (Branch offices: Definition; establishment; revocation of approval by Commissioners of Savings associations; appeals) which as herein pertinent, provides as follows:

1. A branch office is a legally established place of business of an association other than the home office, authorized by the board of directors and approved by the commissioner, and at which any and all association business may be conducted.

\* \* \*

3. No association may establish or maintain a branch office without prior written approval of the commissioner. Each application for approval of the establishment and maintenance of a branch office shall:

(a) State the proposed location thereof, the need therefor, the functions to be performed therein, the estimated annual expense thereof and the mode of payment therefor.

\* \* \*

(c) Be accompanied by a budget of the association for the current dividend period and for the next succeeding semi-annual period, which reflects the estimated additional expense of the maintenance of such branch office.

4. After receipt of an application the commissioner shall determine:

(a) Whether the establishment and maintenance of the branch office will unduly injure any properly conducted existing association in the community where such branch office is proposed to be established or in any neighboring community; and

(b) Whether or not the establishment and maintenance of the branch office will serve the public interest.

5. If the commissioner finds that no undue injury is likely to result, that the establishment and maintenance of such branch office is advisable and will serve the public interest, he may approve the application.

6. For good cause and after notice to the association, the commissioner may revoke his approval for the maintenance of a branch office. Such revocation may be appealed by the association pursuant to the provisions of [NRS 673.047](#).

It is to be noted that approval of any new or branch office license by the commissioner ([NRS 673.080](#), subsections 5(b) and 8; [NRS 673.112](#), *supra*) constitutes approval of the location of the business; in other words, the license issued by the Commissioner is to an association at a particular location, and not to an association alone, thereafter transferable by the association to any location it may please. While [NRS 673.080](#), subsection 8, applies to an entirely new applicant for a license, it also applies to an already licensed association, such as Frontier herein, which desires to remove to a new location for establishment of its main and sole business office.

Certainly, if the commissioner was empowered to disapprove the original application of Frontier on the basis of its proposed location, if its operations would have adversely affected other licensed similar associations, it is equally empowered to disapprove transfer of the license already granted, to a new location of Frontier's main and sole business office. The same considerations respecting approval, or disapproval, by the Commissioner of branch office applications for licenses ([NRS 673.112](#), *supra*), namely, financial feasibility, effect on competitor licensed associations, and need in the public interest, are at least equally present in the case of removal to a new location of a main and sole business office, as in the case of the location and establishment of a branch office, by a licensee.

To deny such jurisdiction and regulatory power in the Commissioner would mean that an association, once in possession of a license, could remove its main and sole business office immediately adjacent to another licensed association, in complete disregard of any adverse effects upon such other licensee and the general public interest, without requirement of any approval whatsoever from the commissioner. Such a result would be in contravention of the regulatory purpose and provisions of Chapter 673 of Nevada Revised Statutes for protection of



the depositors of all such associations and the general public interest, under the state's police powers, and will not be presumed.

From the foregoing, it follows (pursuant to [NRS 673.080](#), subsection 8) that the Commissioner, upon receipt of Frontier's application for removal of its main and sole business office to its acquired property on Charleston Boulevard, upon completion of construction of facilities thereon, was required to "notify all associations doing business within a radius of 50 miles of the principal place of business of the applicant." Said section further expressly provides: "Any association so notified may, within 20 days, protest in writing the granting of the application. After receipt of such written protest, the commissioner shall fix a date for a hearing upon the protest within 30 days after the receipt thereof."

It appears, therefore, that in failing to give the requisite notice to other associations doing business within a radius of 50 miles, the Commissioner violated [NRS 673.080](#), subsection 8, and rendered Nevada Savings and Loan Association, appellant herein, an "association aggrieved" by the commissioner's failure to act pursuant to the provisions of applicable law. Nevada Savings and Loan Association, therefore, was entitled to appeal to the Savings Association Board. In addition, insofar as the hearing before the Board itself was concerned, said Nevada Savings and Loan Association, because an interested licensed association possibly affected by the action of the Commissioner and the Board's review of said action, was certainly a proper party entitled to appear and testify before the Board ([NRS 673.047](#), subsections 1 and 3). For similar reasons, [NRS 673.050](#) is also applicable, affording Nevada Savings and Loan Association the right of recourse to any court of competent jurisdiction for review of any action taken by either the Commissioner or the Board.

It should be clear but, perhaps, will bear explicit statement that, while we affirm the Commissioner's obligation to give notice of any application for a "new" or a branch office license to all associations within a radius of 50 miles of the principal place of business of the applicant and to hold a hearing on any protest to approval of application and grant of license ([NRS 673.080](#), subsection 8, *supra*), the burden of proof for Commissioner's denial of a grant of such license primarily rests upon, and must be borne by, a protestant, in any such hearing. In the instant case, if at such a hearing held by the Commissioner, Nevada Savings and Loan Association (appellant herein) failed to sustain such burden and the Commissioner saw fit to approve the application and issue the license because financially sound and in the interests of both the applicant and the general public, both the Board and the courts would properly be bound thereby.

In other words, the only issues which any objecting licensed association can properly make to the Commissioner's grant or issuance of a "new" or a branch office license are: (1) the adverse effect upon it; and (2) the lack of any need therefor in the public interest. On the other hand, any applicant for a "new" or branch office license, in addition to countering and disproving both said possible objections, must also affirmatively satisfy the Commissioner that its proposed plan of operation and conduct of business, including location or relocation of offices, are financially sound and will not adversely affect its depositors or the general public interest.

In the determination of the financial soundness and feasibility of such proposed plans, the applicant, its depositors (if any), and the Commissioner, are the only necessary and proper parties concerned. Competitor licensed associations are not entitled to any disclosure of information concerning the same, for the purpose of either objecting to such financial plans or protesting approval of the application and issuance of a license to the applicant. We have found no statutory provisions in Chapter 673 of NRS which accords to business competitors a right to such information, except, possibly, as contained in [NRS 673.080](#), subsection 8, hereinbefore quoted. In our considered opinion, the scope of inquiry provided therein is limited (as regards competitor associations) to the location of "new" and branch office licenses, the need therefor, and the effect to the general public interest. Said conclusion on our part is based upon our view that proper and reasonable exercise of the state's police powers in this field, as legislatively intended, would not justify any further extension of the limitation and interference with private business and property. (*Viale v. Foley*, [76 Nev. 149](#); *Kelley v. Raggio*, [76 Nev. 157](#); *State v. Redman Petroleum Corp.*, No. 4341 Nev.Sup.Ct., filed April 5, 1961.)

For the reasons herein stated, therefore, it is our opinion and advice that all of the specific questions submitted by the Commissioner must properly be answered in the affirmative.

It appears that applicant herein, Frontier Savings and Loan Association, has not yet submitted the financial plans for construction of its new office facilities to the Commissioner, and that the latter has not approved the same. Such approval by the Commissioner is statutorily required under the general and specific powers conferred upon the Commissioner. (See: [NRS 673.040](#), [673.430](#), [673.440](#), [673.485](#), [673.495](#).)

Insofar as the proceedings herein had are concerned, it would appear that the Savings Association Board should remand the entire matter to the Commissioner by order directing that the Commissioner vacate his prior order or decision of approval of Frontier's application for transfer or removal of its main and sole business office to the proposed location on Charleston Boulevard in Las Vegas, Nevada, and that said application be determined on the basis of proceedings de novo, including notice and hearing as provided in [NRS 673.080](#), subsection 8.

We trust that the foregoing sufficiently answers the specific questions submitted herein, clarifies the legal issues and procedures involved and approves helpful to a speedy resolution of this matter.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-259 DISTRICT ATTORNEY, WASHOE COUNTY**—The board of trustees of a county hospital is without authority to guarantee a patient's repayment to a lending institution of money borrowed by the patient to pay his hospital bill.

Carson City, November 22, 1961

Honorable William J. Raggio, District Attorney, Washoe County, Reno, Nevada.

### QUESTION

Dear Mr. Raggio:

Does the board of trustees of a county hospital have authority to guarantee a patient's repayment, to a lending institution, of money borrowed by the patient to pay his hospital bill?

### CONCLUSION

No.

### ANALYSIS

In *The First National Bank of San Francisco v. Nye County*, 38 Nevada 123, 134-135, the County Commissioners of Nye County, Nevada, faced with an emergency, borrowed money from the bank. The Supreme Court of Nevada said:

\* \* \* It will be noted that there is no express statutory authority for the execution of any negotiable instrument as security for the money borrowed. It has been

repeatedly decided by this court that boards of county commissioners are of special and limited jurisdiction, and that authority to do any act must have special statutory provisions therefor, or must be clearly implied, from other language contained in the statute \* \* \*.

Except for bonds under certain circumstances, nowhere does the law authorize county hospital trustees to execute promissory notes, borrow money, assign or pledge the assets of the hospital as security therefore.

[NRS 450.230](#) provides that in the fiscal management of the affairs of the public hospital and all other institutions under the supervision, government and control of hospital trustees, the board of hospital trustees shall be governed by the provisions of chapter 354 of NRS. Nothing in this latter chapter authorizes either the execution of a promissory note or the assignment or pledge of the assets of a political subdivision, except under conditions not here present, i.e., emergency loans.

[NRS 450.260](#) and [450.390](#), subsection 2, expressly authorize hospital trustees to collect claims due, owing and unpaid to the hospital and to pay the expenses incident thereto.

In conclusion, it is our opinion that any plan involving assigning or pledging of assets of a county hospital by its board of trustees is beyond their authority, void and unenforceable in a court of law.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: David G. Parraguirre  
Deputy Attorney General

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**OPINION NO. 61-260 PRISON, NEVADA STATE; FIXING OF INDEFINITE SENTENCES BY COURTS**—A trial court does not have discretion to fix a greater minimum of a less maximum sentence than that which the statute prescribes, where as in the crime of first degree burglary, the statute fixes a minimum and a maximum sentence.

Carson City, December 6, 1961

Mr. Jack Fogliani, Warden, Nevada State Penitentiary, Carson City, Nevada.

### QUESTION

Dear Mr. Fogliani:

Where, as in the crime of first degree burglary, the statutes fixes a minimum and a maximum sentence, does the trial court have discretion to fix a greater minimum or a less maximum sentence than that which the statute prescribes?

### CONCLUSION

No.

### ANALYSIS

[NRS 205.060](#) provides that burglary of the first degree is punishable by imprisonment in the State Prison for not less than one or more than 15 years.

[NRS 176.180](#) provides, in part, as follows:

1. Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, and where a judgment of confinement is rendered, the court shall, in addition to any fine or forfeiture which it may impose, direct that such person be confined in the state prison for an indeterminate term limited only by the minimum and maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted.

[NRS 176.190](#) provides as follows:

The state board of parole commissioners may, at any time after the expiration of the minimum term of imprisonment for which any person was committed thereto, direct that any prisoner confined in the state prison shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case.

In *Ex parte Melosevich*, 36 Nevada 67, at pp. 70-72, the defendant was convicted of the crime of grand larceny, and confined, as a result of the trial court's sentence, in the State Prison for a period of not less than two years and not to exceed three years. The Supreme Court of Nevada said:

\* \* \* Under the old statute, trial judges in all cases were required to impose a definite sentence. Some misconception appears to have existed for a time in the minds of a number of trial judges as to how sentences should be imposed under the new law. In a number of cases that have been under consideration by the board of pardons, sentences were imposed like that now in question. The court, upon imposing sentence, had assumed that it had discretion to fix a greater minimum or a less maximum sentence than the minimum and maximum sentence prescribed in the statute for the particular offense, for the commission of which judgment was imposed. This was not in accordance with the purposes designed to be accomplished by the indeterminate or, more properly speaking, the indefinite sentence law.

Where, as in the crime of grand larceny, the statute fixed a minimum and a maximum sentence, the trial court had no discretion to fix a greater minimum or less maximum sentence than that which the statute prescribed. \* \* \* The length of service under the sentence was left entirely in the discretion of the board of pardons. It is manifestly the purpose of this statute to leave the period of confinement to the determination of the board of pardons, from a consideration of the circumstances of the crime, the defendant's past history, his conduct within the prison, the probabilities of or for reformation, and every other fact and circumstances which might have a bearing upon a determination of a just measure of punishment.

In view of the foregoing, it is our opinion that the trial court has no discretion, where the statute fixed a minimum and a maximum sentence, to fix a greater minimum or a less maximum sentence than that which the statute prescribes.

Respectfully submitted,

ROGER D. FOLEY

Attorney General

By: David G. Parraguirre  
Deputy Attorney General

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**OPINION NO. 61-261 DAIRY COMMISSION;—HEARINGS-EVIDENCE—**Admission into evidence at public hearings held by Commission of exhibits and testimony by staff. The Commission need not limit evidence to conditions specifically within marketing area involved.

Reno, Nevada, December 1, 1961

Mr. Clarence J. Cassady, Administrator-Secretary, Nevada State Dairy Commission, 830 Ryland Street, Reno, Nevada.

### **STATEMENT OF FACTS**

Dear Mr. Cassady:

The duties, powers and responsibilities of the State Dairy Commission, State of Nevada, are set forth generically and in some instances with great particularity in the statutory provisions as contained in the Nevada Revised Statutes 584.325 through 584.695.

Pursuant to authority delegated to the State Dairy Commission by the Legislature, it has duly and regularly adopted regulations for its operation, and the conduct of its meetings, hearings and disciplinary proceedings. These regulations are found in the Stabilization and Marketing Plans for the various Nevada marketing areas, as determined by the Commission.

The State Dairy Commission as of June 1, 1961, adopted certain administrative procedures which further govern its operations in the enforcement and administration of the provisions of Nevada Revised Statutes 584.325 through 584.695.

### **QUESTION**

At public hearings conducted by the State Dairy Commission pursuant to its authority, is it proper and legal for the commission staff to present testimony and offer exhibits at said hearings, and is the Commission at said hearings restricted to evidence pertaining to the dairy industry within the prescribed area of the marketing plan involved?

### **CONCLUSION**

It is proper for the State Dairy Commission administrator and his staff to present testimony and exhibits at public hearings conducted by it, and testimony and evidence need not be restricted to facts and conditions existing within the prescribed area of the marketing plan involve din a public hearing.

### **ANALYSIS**

The general rule with respect to the conduct of public hearings by administrative agencies is to the effect that such agencies should base their findings upon the facts adduced at hearings. The cases distinguish between the “quasi-judicial” and the “quasi-legislative” functions of administrative agencies. Greater latitude in the admissibility of evidence is permitted when a commission, such as the State Dairy Commission, is performing a “quasi-legislative” function, such as when it is conducting a hearing to consider amendments to a Stabilization and Marketing

Plan, or to consider the fixing of price of fluid milk, fluid cream and other dairy products. A closer adherence to the general rules of evidence which prevail in courts of law is required when the Commission is sitting in a “quasi-judicial” body, such as when it is hearing alleged violations of the State Stabilization and Marketing Law.

The Dairy Commission is charged, under the provisions of Nevada Revised Statutes 584.665, with the task of being informed and disseminating statistical data or importance concerning the dairy industry.

Collection, Dissemination of Statistical and Other Data. In addition to the compilation of information pertaining to fluid milk and fluid cream from the reports required by [NRS 584.325](#) to [584.690](#), inclusive, the commission shall collect, assemble, compile, and distribute statistical data relative to fluid milk, fluid cream, other milk and milk products and such other information as may relate to the dairy industry and the provisions of [NRS 584.325](#) to [584.690](#), inclusive. (73:387:1955.)

Since the Commission is charged with the responsibility as set forth above, it would be inconsistent to conclude that the Commission should be prohibited from presenting its summaries, reports, and conclusions at the time of a public hearing, which reports would have a bearing on the subject matter of said hearing.

The rule governing the action of a milk commission has been clearly stated in the case of the *Colteryahn Sanitary Dairy v. Milk Control Commission* (1938) cited in 332 Pa. 15, 1 A.2d 775, 122 A.L.R. 1049. This case involved a hearing with respect to the fixing of prices of dairy products under statutory provisions similar to, but not precisely the same as those of the Nevada Stabilization and Marketing Act, but alike in the following two respects:

1. A public hearing is required before the commission can act on the matter of price-fixing.
2. Notice must be given to all interested parties of the time and place of said hearing, and a record shall be kept of said hearings.

The Court in its opinion stated the general rule governing such hearings as follows:

It is the general intent and purpose of the Act that in the promulgation, revision or change of official orders fixing prices, a definite record should be made of all evidence produced before the Commission, and all matters upon which it bases its order. The production of proof before this administrative body is not subject to the strict rules of evidence and the Commission may make its independent survey of the milk industry in the particular area to acquire a just and fair understanding of the problems before it. But the result of that survey should be placed on the record of the hearing before the Commission, and the parties who made the survey should be subject to such cross-examination as is proper. Interested parties should be accorded opportunity to test the reliability of the Commission’s evidence before an order is promulgated, revised or changed.

The rule, as set forth in the *Colteryahn* case, has been reiterated and followed in *National Dairy Products Company v. Milk Control Board* (1945) as reported in 133 N.J.L. 491, 44 A.2d 796.

The Nevada Dairy commission Secretary-Administrator and his staff are an impartial fact-finding body, whose summaries, reports and statistical analysis of the dairy industry are admissible in evidence at hearings and are to be considered by the Commission members along with all other evidence submitted, In the case of *National Dairy Products v. Milk Control Board*, *supra*, the right of the director and an auditor on the staff to testify was challenged. The Court in upholding the propriety of the testimony of the director said:

9. The stenographic transcript of the proceedings before the director was introduced in evidence; and the director, himself, took the witness stand and testified as to all of the factors that entered into his determination, whether based

upon the evidence formally presented to him or otherwise received. Apart from the proof adduced by one of the processors of substantial losses suffered in the transaction of business in the particular area, the testimony of the director and an auditor who had analyzed financial reports made to the director by processors and subdealers demonstrate that the processors were all doing business at a loss, and that the profits of the subdealers were such as to enable them to absorb the directed minimum price rise and yet reap a fair and reasonable return.

11. But it is insisted that the director was not a “competent witness,” and that it was to proper to admit testimony from him as to matters dehors the evidence which entered into his determination. It is said that the director’s order “Must stand or fall upon the evidence adduced upon the hearing had before him.” This criticism is groundless. The director was under no legal testimonial disqualification.

As has been stated herein, administrative agencies are not bound by strict rules of evidence and hearsay evidence may be admitted and the common-law rules governing the admission of evidence are not strictly adhered to in hearings conducted by administrative bodies. If the Nevada State Dairy Commission were absolutely limited to testimony and other evidence pertaining to conditions existing in a given marketing area to form the basis for its findings and decisions, it is quite probable that the Commission would be without sufficient or substantial evidence upon which to make its findings. The Legislature in delegating a portion of its legislative authority to agencies such as the Nevada Dairy Commission has recognized the specialized experience and technical knowledge of such an agency which qualifies it to regulate an industry such as the dairy industry. The Nevada Supreme Court, in a recent case, cited as *Nevada Industrial Commission v. Phil W. O’Hare*, 76 Nevada 107, 349 P.2d 1058, commenting on the functions of administrative boards stated as follows:

This court has heretofore defined the nature of its review of the findings and decisions of administrative boards. *Nevada Tax Commission v. Hicks*, [73 Nev. 115](#), 310 P.2d 852. *See also State ex rel. Grimes v. Board of Com. Of Las Vegas*, [53 Nev. 364](#), 1 P.2d 570; *Dunn v. Nevada Tax Commission*, [67 Nev. 173](#), 216 P.2d 985. We have recognized the finality of administrative determinations of administrative commissions in the exercise of the commission’s judgment based upon its specialized experience and knowledge. This evolved from the growing appreciation of the undesirability of trying de novo in the courts appeals from the rulings and decisions of the commission. We recognized the desirability of having the commission or administrative tribunal assume a real responsibility for weighing and considering the facts in the fields where it had peculiar competence. We repeatedly referred to such experience and skill acquired by the administrative tribunals in their respective spheres. This we may again confirm with reference to administrative determination, at the same time recognizing that the final action and judgment of the administrative tribunal made in the exercise of a quasi-judicial function is subject to judicial review. *Oliver v. Spitz*, [76 Nev. 5](#), 348 P.2d 158. Where the factual determinations are made after such hearing and notice necessarily provided to satisfy the requirements of due process, the absence of compliance with such provisions may undoubtedly be the subject of judicial inquiry. *Nevada Tax Commission v. Hicks*, *supra*.

In a recent public utilities case cited as *Pennsylvania Railroad Company v. Department of Public Utilities, Board of Public Utilities*, 102 A.2d 618, the Court enunciated as follows:

5. In the course of the hearing the board must be given full latitude to avail itself of the wealth of general information and expert knowledge which it obtains in the performance of its day-to-day administrative activities. *Cf. Elizabeth v. Board of Public Utility Com’rs.*, 99 N.J.L. 496, 497, 123 A. 358 (E.&A. 1924); *In re Port*

Murray Dairy Co., 6 N.J. Super. 285, 296, 71 A.2d 208 (App. Div. 1950). By taking appropriate official notice, making it part of the hearing record, and affording fair opportunity of refutation, the board may adequately protect both the public and private interests concerned. *See Krauss v. A. & M. Karagheusian*, 13 N.J. 447, 461, 100 A.2d 277 (1953); Davis, *Official Notice*, 62 Harv.L.Rev. 537 (1949). Similarly, official reports and transcripts in other proceedings before the board may readily be made part of the hearing. *Cf. United States v. Abilene & Southern R. Co.*, 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016 (1924). In this fashion the board may stay within the record and rest thereon its order accompanied by adequate findings which determine the basic facts and the conclusions therefrom.

From the foregoing, it is evident that the Dairy Commission Administrator and his staff not only should be permitted to present testimony at public hearings of the Commission, but they have a duty and responsibility to so do, and all available evidence should be made a part of the record.

Further, it is clear that the specialized and expert knowledge of the Administrator and his staff should be brought forth for the consideration of the Commission in reaching its findings and making its decisions.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: Joseph J. Kay, Jr.  
Special Deputy Attorney General,  
for Nevada State Dairy Commission.

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**OPINION NO. 61-262 NEVADA INDUSTRIAL COMMISSION**—The Nevada Industrial Commission, under advice from its investment counsel, pursuant to a resolution of the Commission, may liquidate bonds carried in its portfolio prior to maturity of such bonds. [NRS 616.497](#) and Article IX, Section 2, Constitution, construed.

Carson City, December 6, 1961

Mr. C. A. Heckethorn, Chairman, Nevada Industrial Commission, Carson City, Nevada.

### **STATEMENT OF FACTS**

Dear Mr. Heckethorn:

The Legislature of 1959 enacted Chapters 498 and 499, very similar in purpose, scope and language. Under the former, provision was made for a more broadened and expanded authorization for the investment of the trust funds of the Public Employees Retirement Board. The same was the purpose under Chapter 499 in respect to the trust funds of the Nevada Industrial Commission. Chapter 498, Statutes 1959, has been incorporated in Chapter 286 of NRS (Public Employees Retirement), and Chapter 499, Statutes 1959, has been incorporated in Chapter 616 of NRS for the regulation of the Industrial Insurance Commission.

The governing bodies of both trust funds have engaged the same investment counsel.

Formerly, investment counsel recommended that certain of the bonds held by the Public Employees Retirement board (not yet matured) be liquidated and the proceeds reinvested in other qualified bonds of higher yield and also possessing certain other advantages. The question was



presented of whether or not such Board was empowered to liquidate certain of its bonds prior to maturity, to the end of reinvestment of the proceeds under the restrictions of Chapter 286 of NRS. Under Opinion No. 256 of November 3, 1961, this office answered in the affirmative.

### QUESTION

Is the Nevada Industrial Commission empowered to authorize the liquidation of bonds held in its portfolio, prior to maturity, under advice of its investment counsel, to the end that the proceeds therefrom may be reinvested in securities under the limitations provided by Nevada law, as advised by its investment counsel?

### CONCLUSION

The Nevada Industrial Commission has been so empowered.

### ANALYSIS

[NRS 286.680](#), subsection 1, provides:

Notwithstanding the provisions of chapter 355 of NRS or of any other law, the board may invest and reinvest the moneys in its funds as provided in [NRS 286.690](#) to [286.800](#), inclusive, and may employ investment counsel for such purpose. The provisions of [NRS 286.680](#) to [286.800](#), inclusive, shall not be deemed to prevent the board from making investments in accordance with the provisions of chapter 355 of NRS.

[NRS 616.497](#), subsections 1 and 2, provides:

1. Notwithstanding the provisions of chapter 355 of NRS or of any other law, the commission may, pursuant to a resolution of the commission, invest and reinvest any moneys in its funds deemed available for investment as provided in [NRS 616.4971](#) to [616.4983](#), inclusive, and may employ investment counsel for such purpose.

2. The provisions of [NRS 616.497](#) to [616.4983](#), inclusive, shall not be deemed to prevent the commission from making investments in accordance with the provisions of chapter 355 of NRS.

The similarity of these sections is apparent at a glance. We have concluded that under [NRS 286.680](#) the Public Employees Retirement Board has such power. Nothing contained in [NRS 616.497](#) would prevent the same conclusion from being equally valid in respect to the power of the Nevada Industrial Commission. We conclude that the Nevada Industrial Commission has a like power, "pursuant to a resolution of the commission."

Article IX, Section 2 of the State Constitution, in part provides:

Any moneys paid for the purpose of providing compensation for industrial accidents and occupational diseases, and for administrative expenses incidental thereto, shall be segregated in proper accounts in the state treasury, and such moneys shall never be trust funds for the uses and purposes herein specified.

The existence of this constitutional provision applicable to the funds of the Nevada Industrial Commission, not existing as regards the funds of the Public Employees Retirement Board, does not alter the conclusion reached.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-263 NEVADA TAX COMMISSION; APPLICATION OF NEVADA SALES AND USE TAX ACT (CHAPTER 372 OF NRS) TO NATIONAL BANKS; INTERGOVERNMENTAL TAX IMMUNITY AS APPLIED TO AN ADMITTED INSTRUMENTALITY OF THE FEDERAL GOVERNMENT**—Held: National banks, even though admittedly instrumentalities of the Federal Government, are subject to and liable for payment of nondiscriminatory Nevada “sales” or “use” tax as to transactions not directly related to attainment of national purposes, or not consummated by them in the status of agents of the Federal Government. Limited congressional immunity conferred on national banks by Section 548, 12 U.S.C.A. 5-6 construed as restricted to transactions involving such federal agency status in the attainment of a federal governmental purpose. Claim for refund of “sales” or “use” taxes collected from national bank in connection with taxable transactions, as above delimited, and which taxes have been remitted to Nevada Tax Commission, should be denied.

Carson City, December 8, 1961

Mr. R. E. Cahill, Secretary, Nevada Tax Commission, Carson City, Nevada.

#### **STATEMENT OF FACTS**

Dear Mr. Cahill:

We are informed that Recordak Corporation is a registered retailer under the Nevada Sales and Use Tax Act and is qualified to collect applicable taxes thereunder.

Recordak is also represented as dealing in microfilming equipment and allied products and services through a number of branch locations situated in various cities throughout the United States. It is further stated that Recordak maintains no business establishments or stocks of goods within the State of Nevada, and that orders from Nevada customers are solicited through traveling employee-salesmen, assigned to out-of-state branch offices, or directly by mail or telephone. All said orders for Recordak products are said to be subject to the acceptance and approval of branch offices and of the Corporation’s main office at New York City. As regards Nevada customers, orders are filled by shipment of goods from stock inventories maintained outside the State, and generally are transported f.o.b. San Francisco or Los Angeles, California.

From time to time First National Bank of Nevada purchases microfilming equipment and supplies from Recordak Corporation. Recordak adds the Nevada “use” excise tax to its billings for such purchases by the Bank. The Bank claims that, as an instrumentality of the Federal Government, it is exempt from payment of both the Nevada sales and use taxes on equipment or supplies purchased from Recordak, and has made demand for refund of all such Nevada taxes collected and remitted to the Nevada Tax commission to date by Recordak.

We are asked for opinion and advice on the following questions, on the basis of the foregoing facts:

#### **QUESTIONS**

1. Is the First National Bank of Nevada, as an instrumentality of the Federal Government, subject to and liable for payment of the Nevada sales or use taxes which have been collected by Recordak Corporation, as hereinabove described?

2. Is the First National Bank of Nevada, as an instrumentality of the Federal Government, entitled to refund of all Nevada sales or use taxes heretofore collected and remitted to the Nevada Tax Commission in connection with purchases by said Bank from Recordak Corporation, as hereinabove described?

## CONCLUSIONS

Question No. 1: The First National Bank of Nevada, even though admittedly an instrumentality of the Federal Government, is nevertheless subject to and liable for payment of the Nevada sales or use tax collected by Recordak Corporation in connection with the above-described sale-purchase transactions between said Corporation and said Bank.

Question No. 2: The First National Bank of Nevada is not entitled to any refund of Nevada sales or use taxes collected by Recordak Corporation in connection with the above-described sale-purchase transactions between them, and which taxes have been remitted by Recordak to the Nevada Tax Commission, merely on the basis that said Bank is an instrumentality of the Federal Government.

## ANALYSIS

The following Nevada statutory provisions are pertinent to our determination of the specific questions above-stated:

[NRS 372.105](#) Imposition and rate of sales tax. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after July 1, 1955.

[NRS 372.110](#) Method of collection of sales tax. The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done.

[NRS 372.185](#) Imposition and rate of use tax. An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this state at the rate of 2 percent of the sales price of the property.

[NRS 372.190](#) Liability for tax; extinguishment of liability. Every person storing, using or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this state, except that a receipt from a retailer maintaining a place of business in this state or from a retailer who is authorized by the tax commission . . . to collect the tax and who is, for the purposes of this chapter relating to the use tax, regarded as a retailer maintaining a place of business in this state, given to the purchaser pursuant to [NRS 372.195](#) is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

[NRS 372.195](#) Collection by retailer; purchaser's receipt. Every retailer maintaining a place of business in this state and making sales of personal property for storage, use or other consumption in this state, not exempted under [NRS 372.260](#) to [372.350](#), inclusive, shall, at the time of making the sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the tax commission.

[NRS 372.200](#) Tax as debt to state. The tax required to be collected by the retailer constitutes a debt owed by the retailer to this state.

[NRS 372.265](#) Constitutional and statutory exemptions. There are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in this state of, tangible personal property the gross receipts from the sale of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the constitution of this state.

[NRS 372.325](#) Sales tax: United States; state; political subdivisions; religious, eleemosynary organizations. 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 wholly owned by the United States or by a corporation wholly owned by the United States.

\* \* \*

On behalf of the First National Bank of Nevada, it is contended that, by reason of the provisions of federal law (12 U.S.C.A. Section 548), states may impose taxes on the shares of stock of national banks and upon real property owned by them, but are prohibited from imposing any other kind of tax upon such banks, including a “sales” or “use” tax.

The fundamental problem and question here involved, therefore, is the persistent one of intergovernmental tax immunities, or claimed exemption from state taxation of an instrumentality of the Federal Government, as affected by the doctrine of implied constitutional immunity, derived from certain pronouncements by Chief Justice Marshall in the historic case of *McCulloch v. Maryland* (1819) 4 Wheat. (U.S.) 316, 4 L.Ed. 579. Broadly stated, said doctrine maintains that the Constitution of the United States implies an immunity from state taxation of the means and instrumentalities employed by the Federal Government to carry on its proper functions.

However, as has been noted (140 A.L.R. 622), “. . . the precise reach of the doctrine of implied immunity is obscure, and the obscurity of its compass is attributable basically, perhaps, to the weakness of the foundation upon which it is usually regarded as having first been placed—Marshall’s rhetorical flourish in *McCulloch v. Maryland* (U.S.) *supra*, that ‘the power to tax involves the power to destroy,’ a dictum which the pen of Justice Holmes inked out in a stroke with his dissenting aphorism in *Panhandle Oil Co. v. Mississippi* (1928) 277 U.S. 218, 72 L.Ed. 857, 48 S.Ct. 451, 56 A.L.R. 583: ‘The power to tax is not the power to destroy while this court sits.’ ”

As penetratingly and succinctly noted in an article “The Waning of Intergovernmental Tax Immunities,” by Thomas Reed Powell (58 Harvard Law Review 633, pp. 651-652):

We may agree that action by the nation within its powers is governmental action, but some of governmental action may be also business activity. The fact that the nation may do only what it may do does not mean that none of the things that it may do can be business activity. The fact that the scope of national action is restricted by a written constitution in no way prevents a ruling that when the United States elects “to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners,” (citing *Allen v. Regents*, 304 U.S. 439, 451 (1938)) such business is not thereby withdrawn from state taxation. Marshall’s lumping of all national activity into the single category of “governmental” can be rebuked somewhat after the fashion of Mr. Justice Frankfurter’s characterization of his statement that the power to tax is the power to destroy. It was “a flourish of rhetoric,” a “seductive cliché” and “a free use of absolutes.” (Citing *Graves v. N. Y. ex rel O’Keefe*, 306 U.S. 466, 489 (1939). See also: “The Remnant of Tax Immunities,” by Thomas Reed Powell, 58 Harvard Law Review 757.)

In our considered opinion, the argument and claim for tax exemption and tax refund on behalf of the First National Bank of Nevada is bottomed on “a free use of absolutes,” in apparently total disregard of the fact that the principle of tax immunity invoked does have inherent and well-recognized limitations.

As stated in *Western Lithograph Co. v. State Board of Equalization*, 73 P.2d 731, at p. 733, wherein a sales tax on the basis of receipts from sales of tangible personal property to a national bank was held valid:

The immunity of the state and federal governments from taxation of the one by the other was created out of the necessity for preserving the independence of the dual system of government under our constitutional system. . . (Cases cited.)

That this principle of immunity has its inherent limitations has also been recognized. (Case cited.) The decision in *Davis v. Elmira Savings Bank*, *supra*, 161 U.S. 275 at page 283, 16 S.Ct. 502, 503, 40 L.Ed. 700, indicated that the exercise of authority sought to be condemned or avoided must be one which “either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.” And in *Helvering v. Powers*, *supra*, 293 U. S. 214, at pages 224, 225, 55 S.Ct. 171, 173, 79 L.Ed. 291, it was said: “But whether that field of activity, in relation to the state, carries immunity from federal taxation is a question which compels consideration of the nature of the activity, apart from the mere creation of offices for conducting it, and of the fundamental reason for denying federal authority to tax. That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. \* \* \* The principle of immunity thus has inherent limitations.”

Obvious limitations preclude any exhaustive and extensive review of the judicial vicissitudes of intergovernmental tax immunities. It must suffice to say that the trend of recent United States Supreme Court decisions requires direct ownership of, or direct participation by, the Federal Government in the thing or transaction taxed as prerequisite to any application of the doctrine of implied immunity. In other words, the test for the application of the doctrine of implied immunity has shifted from one of whether the burden of the tax falls upon the United States to one of whether the Government is the party involved in the transaction which is taxed, or has technical legal title to the thing taxed.

In such connection, it should be noted that this change is entirely consistent with the desire to permit state taxation wherever possible to the end that the revenue of the states may be preserved, and that undue concentration of the burden of state taxation on progressively fewer taxpayers—the result of an ever-increasing encroachment of tax-exempt federal business and property—may be avoided and prevented. (4 *Vanderbilt Law Review* 195, 197; 58 *Harvard Law Review* 633 et seq., 756 et seq.)

As stated in *Alabama v. King & Boozer*, 314 U.S. 1, p. 8 et seq., 86 L.Ed. 3, p. 6 et seq.:

Congress has declined to pass legislation immunizing from state (Ed., sales) taxation contractors under “cost-plus” contracts for the construction of governmental projects. Consequently the participants in the present transaction enjoy only such immunity as is afforded by the Constitution itself, and we are not now concerned with the extent and the appropriate exercise of the power of Congress to free such transactions from state taxation of individuals in such circumstances that the economic burden of the tax is passed on to the national government. The Government, rightly, we think, disclaims any contention that the Constitution, unaided by congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as

such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed . . . we think it no longer tenable. (Cases cited.)

The contention of the Government is that the tax is invalid because it is laid in such manner that, in the circumstances of this case, its legal incidence is on the Government rather than on the contractors who ordered the lumber and paid for it, but who, as the Government insists, have so acted for the Government as to place it in the role of a purchaser of the lumber. .

.. The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. The taxing statute . . . makes the "purchaser" liable for the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law. . . .

And at 314 U.S. p. 14, 86 L.Ed. p. 9:

We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L.Ed. 155, 58 S.Ct. 208, 114 A.L.R. 318, *supra*. . . . (See Annotation, 140 A.L.R. 621 et seq. for another critical review of cases pertaining to the problem.)

Admittedly, the *King & Boozer* case, *supra*, involved application of Alabama's "sales" tax. However, *Curry v. United States*, a companion case, reported at 314 U.S. 14-18, 86 L.Ed. 9, also held Alabama's "use" tax applicable under a similar factual situation.

That the *King & Boozer* case, *supra*, did not involve any congressional statutory exemption or immunity, such as Section 548, 12 U.S.C.A. 5-6, is also conceded. However, as we shall hereafter show, said conferred congressional exemption does not expressly or clearly support the claim for tax immunity of national banks from a state's sales or use tax. And, in such absence or silence, it is our considered opinion that the same may not be validly presumed or implied. In this connection, the Land Bank Cases (e.g., *Federal Land Bank v. Bismark Lumber Co.*, 62 S.Ct. 1, 86 L.Ed. (Adv) 46, 314 U.S. 95) are clearly distinguishable inasmuch as express immunity exists by reason of Section 26 of the Federal Farm Loan Act, as amended, Chapter 245, 39 Stat. At L. 360, 380, 12 U.S.C.A., Sections 931-933, as noted in *O'Neil v. Valley National Bank* (Ariz. 1942) 121 P.2d 646.

\* \* \* \* \*

Preliminarily, it has been indicated that the Nevada Tax Commission has registered Recordak as a "collector of the use tax," such registration apparently having been based on representations made and available information that said Corporation's Nevada activities, being confined to solicitation only, do not constitute a sufficient nexus to warrant registration of said Corporation as a "retailer" or "seller," maintaining a place of business in this State.

We suggest that the Nevada Tax Commission review and reconsider its determination in such respect. In our opinion, Recordak Corporation may well be a "retailer maintaining a place of business" in Nevada, for purposes of this State's sales and use tax, under the rulings of *General*

*Trading Co. v. State Tax Commission*, 322 U.S. 355, 64 S.Ct. 1028 (1944) and cases therein cited; and *Scripto Inc. v. Carson* 362 U.S. 207, 80 S.Ct. 619 (1960).

If (as we believe and have above indicated) Recordak, in legal contemplation, is a “retailer maintaining a place of business” in this State within the meaning of the Nevada Sales and Use Tax Act (Chapter 372 of NRS), then said Corporation is liable to the Nevada “sales” tax (rather than the Nevada “use” tax) as to the sale-purchase transactions had with the First National Bank of Nevada.

Under such circumstances, namely, that it is the Nevada “sales” tax which is applicable, the incidence of the said tax could not, in any conceivable sense, be held to fall upon the United States or the First National Bank of Nevada, one of its instrumentalities, and the instant matter would be readily and conclusively governed and determined by the decisions in the following cases, and citation therein contained: *Western Lithograph Company v. State Board of Equalization*, 78 P.2d 731, 11 C2d 156 (1938); *Federal Reserve Bank of Chicago v. Department of Revenue*, 64 N.W.2d 639, 339 Mich. 587 (1954); *National Bank of Detroit v. Department of Revenue*, 66 N.W. 2d 237, 350 Mich. 573 (1954); *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. (Adv 1), 140 A.L.R. 615.

However, even apart from such view that Recordak may well be a “retailer” “doing business in Nevada” for purposes of the Nevada Sales Act (Chapter 372 of NRS), we are compelled to similar conclusions on the basis of the application of this State’s “use” tax to the transactions here involved.

“The power of taxation belongs to every independent sovereignty, and is of necessity essential to the support and maintenance of the government.” (*Liberty Mut. Ins. Co. v. Johnson Shipyards Corp.*, 300 F. 952 (1924); *Providence Bank v. Billings*, 29 U.S. 514, 4 Pet. 514, 7 L.Ed. 939; *Dobbins v. Erie County Com’rs*, 41 U.S. 435, 16 Pet. 435, 10 L. Ed. 1022.)

“(T)he national banks located in this state stand, in reference to taxation, upon precisely the same footing with the state banks.” (*City Nat. Bank of Paducah v. City of Paducah*, 9 S.W. 218, citing *City of Covington v. The National Banks of Covington*, 21 Fed.Rep. 484; see also *First National Bank of Guthrie v. Anderson*, 269 U.S. 341, 70 L.Ed. 295 (1926), wherein the United States Supreme Court states that the immunity and protection afforded to national banks by the provisions of Section 548 of 12 U.S.C.A. 5-6, as amended, is to secure and maintain parity and equality in competition as between national and state banks.

Section 548, 12 U.S.C.A. 5-6 manifestly constitutes a restriction on the sovereign power of the states in the field of taxation and, therefore, is subject to the rule of strict construction. (*See Note, Taxation of Sales to national Banks*, 27 California Law Review 91, and cases therein cited.) As we have indicated, exemption from taxation, federal or state, especially where, as here, it pertains to a nondiscriminatory tax, is not to be presumed or implied. The above-mentioned federal law neither expressly nor clearly exempts or confers upon national banks any immunity from a state’s sales or use tax.

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with

respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity. (*Graves v. New York*, 306 U.S. 466, 479-480, 83 L.Ed. 927, 932-933, 59 S.Ct. 595.)

In the instant matter, there has been no levy upon or exaction of the tax by the Nevada Tax Commission upon the First National Bank of Nevada. Collection of the tax has been made form Recordak, based upon the sale-purchase transactions between it and said Bank, wholly contractual in nature, which the Bank was free to abstain from.

Certainly, national banks may not validly claim greater tax immunity than the Federal Government which has created them. Regardless of the limited congressional tax immunity conferred upon them by the *express* restrictions on their taxation by the states (12 U.S.C.A. Section 548), national banks do not have the status of agents of the Federal Government to enter into contracts or to pledge its credit. Only where the existent factual situation properly supports the conclusion that national banks are performing functions in such status for the attainment of national purposes may they properly contend that they are entitled to immunity from state “sales” or “use” taxes (*Alabama v. King & Boozer*, *supra*; *Curry v. United States*, *supra*).

The exemption from this State’s “sales” and “use” taxes, under the provisions of [NRS 372.265](#) and [372.325](#), are expressly limited to “[T]he United States, its unincorporated agencies and instrumentalities” and “[A]ny incorporated agency or instrumentality of the United States wholly owned by the United States.” (Emphasis supplied.) There is a marked difference between a corporation wholly owned by the United States and a corporation owned by private persons or corporations and operated, in part (as is the First National Bank of Nevada), for their benefit. Such difference provides a valid basis for differences in classification for tax purposes; and exemption of proceeds from sales to the former type of instrumentality, while including the latter, in the computation of a retailer’s sales tax, has been judicially sustained as entirely proper (*Federal Reserve Bank of Chicago v. Department of Revenue*, *supra*). Even as to Federal Land Banks, which are given a greater *express* immunity than that conferred upon national banks, sales and other types of excise taxes have generally been sustained (*see* Annotation, 140 A.L.R. 621) on the basis that the immunity congressionally intended was from “direct and discernible taxes, and . . . not . . . taxes imposed upon and collected from other persons with whom the bank might transact business, which might indirectly result in some slight increase in the operating expenses of the bank. . . .” (140 A.L.R. 647, citing *Federal Land Bank v. Bismarck Lumber Co.*, *supra*.)

Moreover, it should be noted that any attempt to extend the mantle of governmental immunity from state and local taxation to private businesses simply because of contractual relations with the United States, or their nominal or alleged status as instrumentalities of the Federal Government, would be unconstitutional, as an invalid invasion of the reserved constitutional powers of the states to levy and collect nondiscriminatory taxes.

We have carefully reviewed the various authorities advanced on behalf of the First National Bank of Nevada. Many are clearly distinguishable on their facts or on the basis of applicable law. Others, decided long before the advent of sales and use taxes, are clearly reflective of the “free use of absolutes,” traceable to the doctrine of *McCulluch v. Maryland*, *supra*, conceded generally as no longer the imperative and conclusive authority that it once was. The remainder, even though in point, are either reflective of the minority view, and, in any case, contrary to present law as contained in recent United States Supreme Court decisions (*Alabama v. King & Boozer*, *supra*; *Curry v. United States*, *supra*; Notes, 58 Harvard Law Review 633 and 757).

We conclude, therefore, that the First National Bank of Nevada, as to the herein-described transactions with Recordak Corporation, was, and is, subject to and liable for the Nevada sales or use tax, and that said Bank is not entitled to any refund of any such taxes collected by Recordak Corporation which have been remitted to the Nevada Tax Commission.

Respectfully submitted,



ROGER D. FOLEY  
Attorney General

By: John A. Porter  
Chief Deputy Attorney General

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**OPINION NO. 61-264 NEVADA TAX COMMISSION; NET PROCEEDS OF MINES TAX (CHAPTER 362 OF NRS CONSTRUED)**—Held: Payments denominated “royalties” in a lease-option-to-purchase agreement, and paid to the lessor (or his assignee) of nonoperated mining properties, but applicable to the purchase price upon exercise of the option, constitute a deductible item to the lessee under the provisions of [NRS 362.120](#), subparagraph 2(k), but is taxable to the lessor (or assignee) receiving payment of such “royalties.” “Royalties” defined as including any payment for the privilege of mining and removing ore, whether any mining does nor does not take place, and the State is not concerned as to who, as between the lessor (or his assignee) and the lessee, is contractually liable for payment of the tax. Minimum annual payments of “royalties,” by a lessee, in such circumstances, are deemed advance royalty payments in lieu of minimum output or production of the mining property involved, which, for whatever reason, may, in fact, never be effected by the lessee. Claim for refund of taxes paid under protest by lessor’s assignee held, therefore, to be without merit, and should be denied. (Accord: Attorney General Opinion letters dated September 30, 1937, March 3, 1945, and June 4, 1945; also Attorney General Opinion No. 49, dated April 25, 1951.)

Carson City, December 13, 1961

Mr. R. E. Cahill, Secretary, Nevada Tax Commission, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. Cahill:

It appears that the Columbia Iron Mining Company is the assignee of a lease between Mineral Materials Company, lessee, and Nevada Iron Ore Company, Inc., lessor, relative to certain mineral properties located in Pershing and Churchill Counties, Nevada. Pursuant to said lease, the lessee is required to pay annually to the lessor the sum of \$4,000 as a minimum royalty which, upon exercise of a purchase option (also contained in the lease) shall be applicable in reduction of the purchase of the properties, fixed in the amount to \$40,000.

The taxpayer-assignee of the lease contends that there is no provision in the lease agreement for application of the \$4,000 annual payments against the value of the production or output of the involved mining properties for the term of the lease, and submits that, in fact, there has been no production whatsoever, or extraction of any ore tonnage, at least for the year in which the questions tax has been imposed; and that the annual payments should be strictly construed to relate to the purchase price solely, insofar as the lessee seeks to benefit therefrom. In other words, that said annual payments, though denominated “royalties” are not tax-deductible to the *lessee* under the provisions of [NRS 362.120](#), subparagraph 2(k).

The assignee and protesting taxpayer, in this connection, invite our attention to the provisions of [NRS 362.100](#), [362.110](#), [362.190](#) and [362.230](#) as authority for the proposition that the jurisdiction and power of the Nevada Tax Commission to levy and exact a net proceeds of mines tax presupposes an “operating” mine, and that where a mine is not in actual operation and, therefore, unproductive, no proper basis for any such tax exists; in short, the \$4,000 annual payments, it is alleged, are merely “minimum amounts paid as required by the lease” and not “royalties” in actual fact, albeit so denominated in the lease.

Columbia Iron Mining Company, having paid its taxes under protest, now demands refund thereof.

## QUESTIONS

1. Are payments denominated "royalties" which are paid by a lessee to a lessor of nonoperated mining property (or his assignee) and which are applicable to the purchase price thereof in the event of an exercise of an option to purchase, also contained in the lease agreement, a deductible item under applicable law relating to the net proceeds of mines tax?
2. If the answer to the foregoing question is in the affirmative, are such "royalties" taxable to the lessor-optionor, or his assignee?

## CONCLUSIONS

Question No. 1: Yes.  
Question No. 2: Yes.

## ANALYSIS

As here pertinent, [NRS 362.120](#) (Computation of gross yield and net proceeds: Deductions) provides as follows:

1. The Nevada tax commission shall, from the statement and from all obtainable data, evidence and reports, compute in dollars and cents the gross yield and net proceeds of each semiannual period.
2. The net proceeds shall be ascertained and determined by subtracting from the gross yield the following deductions from costs incurred during such 6-month period, and non other:  
\* \* \*

(k) All moneys paid as royalties by a lessee or sublessee of a mine, or by both, shall constitute a deductible item for such lessee or sublessee in determining the net proceeds of such lessee or sublessee or both; but the royalties so deducted by the lessee or sublessee shall constitute part of the gross yield of the mine for the purpose of determining the net proceeds upon which a tax shall be levied against the person, corporation, association or partnership to which the royalty has been paid.  
\* \* \*

On the basis of the facts presented to us, and hereinbefore set forth, the Nevada Tax Commission has scrupulously applied existing law consistently with the above provision. The Commission is not concerned with the question as to who shall pay the tax; this is a matter of contract solely, as between the lessor (or, in the instant case, his or its assignee) and the lessee.

The interest of the lessee in said mining properties is based upon contract. At the time of execution of the contract, it was assumed that the lessee would enter upon the mining claims and begin active mining operations thereon. For such mining privilege, the lessee was required to make a *minimum* annual payment, apparently in the said sum of \$4,000 which would be applied to the total purchase price of the involved properties, represented to have been fixed in the amount of \$40,000. Whether or not the lessee (optionee) intends to exercise the option to purchase is conjectural; certainly, the lessee's intention in such respect is not presently known and will not be known until long after payments of annual royalties are, in fact, made. If the ultimate purchase of the involved properties is in fact not made through exercise of the option contained in the lease agreement, then the royalties constitute compensation to the lessor (here, the assignee) for the exclusive *privilege* of mining and removing mineral-bearing ores from the involved properties.

It is to be noted that the provided annual payments of \$4,000 were *minimum*; that the contract further provides for payment of an additional 25 cents royalty per long ton for all iron ore extracted and removed, which additional payment would be credited to the *minimum* annual payment; and that “[A]ny and all payments made by the Lessee to the Lessor up to the time of the exercise by the Lessee of the Option . . . shall apply upon and form a part of the purchase price hereinabove mentioned.”

In view of such understanding and contractual agreement between the parties, we are compelled to the conclusion that the minimum annual payments must be deemed advance royalty payments in lieu of minimum output or production. This circumstance brings the matter within the rule laid down in *State ex rel. Susquehanna Ore Co. v. Bjornson*, 194 Minn. 649, 259 N.W. 392, wherein the Court held as follows:

“Royalty” is a share of the product of a mine reserved to the owner, *or the payment made him, for the privilege or mining and removing ore, the compensation paid for that privilege*, and is rent and not the purchase price of ore in place, *and if the grant of the privilege of mining and taking the ore from the land is the consideration for the payments, they are “royalties.”* (Emphasis supplied.)

*See also State ex rel. Susquehanna v. Bjornson* 262 N.W. 574; *State ex rel. Inter-State Iron Co. v. Wallace* 264 N.W. 774; *State ex rel. Burnquist v. Commissioner of Taxation*, 295 N.W. 653.

We conclude, therefore, that imposition and collection of the net proceeds of mine tax was proper and valid in the described circumstances, and that the demand for refund must be rejected. (Accord: Letter Opinions from this office dated September 30, 1937, March 3, 1945, June 4, 1945; Attorney General Opinion No. 49, dated April 25, 1951.)

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: JOHN A. PORTER  
Chief Deputy Attorney General

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**OPINION NO. 61-265 FOREST FIRE PROTECTION DISTRICTS**—A fire protection district organized under the provisions of Chapter 473 of NRS is authorized to secure funds by an ad valorem levy under the provisions of [NRS 473.050](#), and expend the same, from the State Treasury for the prevention and suppression of fires within structure as well as upon the watershed areas. Such district may equip itself to combat fires in structures or it may contract with the county or cities or both to provide such services. [NRS 472.040](#), [473.050](#) and Sec. 2 of Article X of the Constitution construed.

Carson City, December 13, 1961

Mr. George Zappettini, State Forester Firewarden, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. Zappettini:

The “Clarke-McNary Act,” as amended, makes provisions for contributions of the Federal Government to the states, through the agency of the United States Forest Service, in amounts not

to exceed one-half of the cost of the state agency in maintaining its department engaged in the function of preventing, suppressing and extinguishing forest, range and watershed fires upon government, state and privately owned land. Nothing contained in this act would prevent the state agency from also being authorized to combat fires in structures, and if so authorized, Clarke-McNary funds would, nevertheless, be available, but only in respect to the fire responsibilities upon forest and range lands. (Vol. 43, U.S. Stats. At Large, Ch. 348, p. 653, Title 16 U.S.C.A. Sec. 471 et seq.)

Chapter 473 of NRS makes provision for the creation and government of fire protection districts receiving federal aid under the Clarke-McNary Act. Section 473.050 of NRS makes provision for the collection of budgetary sums to support such a district through an ad valorem tax upon all property lying within the district.

The Carson Fire Protection District is a district formed and functioning under the provisions of Chapter 473 of NRS. It qualifies under the Clarke-McNary Act. It is comprised of a portion of three counties, namely, Washoe, Ormsby and Douglas. Municipalities lying within its boundaries are, of course, not included.

Pursuant to the provisions of [NRS 473.040](#) the Boards of County Commissioners of such counties constitute the Board of Directors of the Fire Protection District. However, the Chapter provides for certain cooperative effort between the State Forester Firewarden and the Board of Directors of the District. See [NRS 473.020](#) et seq.

For a number of years the cities of Reno and Sparks have undertaken, pursuant to private contracts made with Washoe County, to protect the structures in defined areas adjacent to the cities. The contracts have expired, however, and the governing bodies have not been able to reach an accord providing for a renewal. The District, which has heretofore confined its operations to the prevention and combating of fires in forest and range areas, therefore, finds that it is necessary to provide structural protection in the areas within the county lying beyond the city limits.

## QUESTIONS

1. May a fire protection district, now or later organized under the provisions of chapter 473 of NRS, expend its funds obtained by an ad valorem levy under the provisions of [NRS 473.050](#) for both watershed and structural protection?
2. If so, could a portion of the funds so collected be assigned to the county in consideration of its undertaking to combat fires in structures, with the remainder being deposited in the State Treasury?

## CONCLUSION

We have concluded that Question No. 1 may be answered in the affirmative. Such a district may expend a portion of its funds to upgrade its equipment to fit it for combating fires in structures or it may purchase equipment designed for such purpose, and may train its men to use such equipment to combat fires in structures, in addition to combating fires in watershed areas.

Or, in the discretion of the district it may contract with the county and/or cities to provide fire protection in structures and may expend a portion of its funds deposited with the State Treasury in discharge of such contracts.

We have concluded that Question No. 2 must be answered in the negative. The funds obtained in this manner must be deposited with the State Treasury. The district must be primarily responsible for the services for which the moneys are exacted, although, as formerly stated, contracts may be let.

## ANALYSIS

[NRS 473.050](#) provides:

1. With the approval of the state board of forestry and fire control, the state forester firewarden shall:

(a) Prepare a budget estimating the amount of money which will be needed to defray the expenses of the district organized under the provisions of [NRS 473.020](#) and [473.030](#).

(b) Determine the amount of a special tax sufficient to raise the sum estimated to be necessary.

2. When so determined, the state forester firewarden shall certify the amount of the estimated sum and the estimated tax to the board of county commissioners in the county or counties wherein such district or a portion thereof is located. At the time of making the levy of county taxes for that year, the board of county commissioners may levy the tax certified, or a tax determined by the board of county commissioners to be sufficient for the purpose, upon all the real property, together with improvements thereon, and all telephone liens, powerlines and other public utility lines which are defined as personal property within the provisions of [NRS 361.030](#), in the district within its county. Any tax levied on interstate or intercounty telephone lines, powerlines and other public utility lines as authorized herein shall be based upon valuations as established by the Nevada tax commission pursuant to the provisions of [NRS 361.315](#) to [361.330](#), inclusive.

3. If levied, the tax shall be entered upon the assessment roll and collected in the same manner as state and county taxes.

4. When collected, the tax herein provided for *shall be deposited in the state treasury* in the forest protection fund created by [NRS 472.050](#), and shall be used for *the sole purpose of the prevention and suppression of fires in such organized fire protection district*. All claims against the fire protection fund shall be *certified by the state forester firewarden, approved by the state board of examiners*, and paid out of the fire protection fund as other claims against the state are paid. (Emphasis supplied.)

It will be observed that funds obtained under the provisions of this section “shall be deposited in the state treasury.” Also that such funds “shall be used for the sole purpose of the prevention and suppression of fires in such organized fire protection districts.” It is not provided that such funds shall be used for the prevention and suppression of fires upon range, forest and watershed areas. The use of the funds in the prevention and suppression of fires in structures is not forbidden or precluded. Such a narrow construction for the exercise of a power for police measures in the protection of health and welfare would be unwarranted. Such matters should receive a broad and liberal construction.

It must also be observed that a “tax” collected under the provisions of [NRS 473.050](#) is not limited by the provisions of Section 2 of Article X of the Constitution, wherein it is provided that taxes for all combined purposes shall not exceed \$5 per \$100 of assessed valuation. This levy is not a tax in the constitutional sense, for the proceeds are not for the general governmental purposes. See Attorney General Opinion No. 187 of July 19, 1956.

However, since the “tax” levied pursuant to [NRS 473.050](#) is upon the assessed valuation of all property within the district, it would manifestly be most unfair if the proceeds thereof be determined to be available only to prevent and combat fires upon the range and watershed areas.

The law in respect to the powers and duties of the State Forester Firewarden appears to authorize this office to administer all fire control work within the district (exclusive of areas within townsite and municipal boundaries), both within structures and otherwise. [NRS 472.040](#), in part, provides:

1. The duties of the state forester firewarden shall be to:

(a) Supervise or coordinate all forestry and watershed work on state and privately owned lands, *including fire control, in Nevada, working with federal agencies, private associations, counties, towns, cities or private individuals*.

(b) *Administer all fire control laws and all forestry laws in Nevada outside of townsite boundaries, and to perform such other duties as might be designated by the director of the state department of conservation and natural resources, the state board of forestry and fire control or by state law.*

(c) Assist and encourage county or local fire protection districts to create legally constituted fire protection districts where they are needed and offer guidance and advice in their operation. (Emphasis supplied.)

From the foregoing we deduct that the State Forester Firewarden is directed and authorized to direct fire prevention and suppression work upon watershed areas as well as in structures. Also to administer all fire control laws within his designated areas, and to assist in the organization and administration of fire protection districts.

We, therefore, conclude that funds obtained under the provisions of [NRS 473.050](#) may be expended by the fire protection district partially for fire range control and partially for structural fire control; that the district may contract as it sees fit with the county or cities in this respect, and that sums obtained under this statute must be deposited with the State Treasury and expended in the manner provided.

We recommend careful record-keeping in respect to expenditure of funds for the prevention and suppression of range and watershed fires, in order that the Federal Government agency may be convinced of the expenditures for such purpose and provide the matching funds in respect to such expenditures under the provisions of the Clarke-McNary Act.

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: D. W. Priest  
Deputy Attorney General

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**OPINION NO. 61-266 PRISON, NEVADA STATE**—[NRS 201.230](#) as amended by Chapter 82, 1961 Statutes of Nevada, relating to parole of persons imprisoned for lewd and lascivious acts, includes prisoners who committed such an offense before amendment was enacted.

Carson City, December 29, 1961

Mr. Jack Fogliani, Warden, Nevada State Prison, Carson City, Nevada.

### STATEMENT OF FACTS

Dear Mr. Fogliani:

Inquiry is made concerning the right of an inmate to parole when such person was sentenced to the Nevada State Prison to serve a term of five (5) years for the crime of “A Lewd Act With a Child Under the Age of Fourteen Years.” Under the terms of the sentence such person would ordinarily be eligible for parole on the 27th day of March, 1962.

### QUESTION

Is [NRS 201.230](#), as amended by Chapter 82, 1961 Statutes of Nevada, to be given retroactive effect?

## CONCLUSION

Yes.

## ANALYSIS

[NRS 201.230](#), as amended by Chapter 82, 1961 Statutes of Nevada, provides, in part, as follows:

\* \* \*

3. No person convicted of violating any of the provisions of subsection 1 of this section may be:

(a) Paroled unless a board consisting of the superintendent of the Nevada state hospital, the warden of the Nevada state prison and a physician authorized to practice medicine in Nevada who is also a qualified psychiatrist certify that such person was under observation while confined in the state prison and is not a menace to the health, safety or morals of others.

(b) Released on probation unless a psychiatrist licensed to practice medicine in the State of Nevada certifies that such person is not a menace to the health, safety or morals of others.

This statute, as amended, applies to persons seeking parole or probation, and includes the person sentenced to the Nevada State Prison on October 13, 1958.

Parole is an act of grace and favor and not a right. (*Pinana v. State* (1960), 76 Nevada 274, 352 P.2d 824.)

A statute denying a prisoner parole is not an ex post facto law. (Sutherland Statutory Construction, Vol. 2, p. 170.)

Respectfully submitted,

ROGER D. FOLEY  
Attorney General

By: David G. Parraguirre  
Deputy Attorney General

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