

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1962

OPINION NO. 62-267 SILICOSIS; HEALTH, STATE DEPARTMENT OF—Estate of widow of applicant for benefits under silicosis law, who had done everything required to secure such benefits, may not be denied the benefits provided for, by reason of the fact that applicant died before the laboratory tests were completed and conclusions respecting eligibility communicated to the Department. Chapter 311, Stats. 1961, construed.

Carson City, January 22, 1962

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

STATEMENT OF FACTS

Dear Doctor Hurley:

An act in respect to occupational diseases, of 1947, amended in 1949 and 1953, provided for compensation by the Nevada Industrial Commission in certain cases to persons suffering from silicosis. (*See* Chap. 44, Stats. 1947, Chap. 177, Stats. 1949, Chap. 221, Stats. 1953, [NRS 617.460](#).) Under the provisions of the original silicosis law, certain silicotics residing in Nevada could not qualify.

A special silicosis law as then enacted with terms more liberal, but without repealing the original law. Persons able to qualify under the special silicosis law were also to be compensated by the Nevada Industrial Commission. (*See* Chap. 433, Stats. 1955, Chap. 219, Stats. 1957, Chap. 218, Stats. 1959, Chap. 197, Stats. 1960, [NRS 617.480](#).) It is not necessary for this opinion to detail the particulars in which the special silicosis law, which brought in persons not able to qualify under the original law, liberalized the original silicosis law.

Chapter 311, Statutes 1961, effective July 1, 1961, repealed [NRS 617.480](#) and provided that those silicotic persons who had received benefits thereunder should be continued in benefits and set out provisions under which persons formerly not able to qualify might qualify for benefits. This chapter changed the responsibility of administration in such cases from the Nevada Industrial Commission to the State Department of Health and appropriated \$348,000 for the payment of such benefits.

Pursuant to the provisions of Chapter 311, Statutes 1961, the State Department of Health examined, in August, 1961, persons who applied for benefits under the act. These applicants, some twenty in number, stayed at the Washoe Medical Center approximately five days and received a thorough examination, including X-ray and laboratory tests. Specimens of sputum and gastric contents were taken and submitted to the State Health Department for culture. This "culture" process takes a minimum of six weeks to complete in order to reach definite conclusions upon items hereinafter mentioned to determine eligibility for benefits under the law.

After the completion of this examination, with nothing further to be done on his part, under the requirements of the law, one of the applicants, a Mr. E. S. Holderman, died in Ely on the 11th day of September, 1961. A careful examination of the file of Mr. Holderman, supplied by the State Department of Health, shows that although he had applied for benefits under the provisions of [NRS 617.480](#), he had not been qualified and had not received benefits.

In due time the laboratory process, including the development of cultures, was completed and it was determined that Mr. Holderman was when examined entitled to benefits under the law. The State Department of Health advises that if Mr. Holderman had lived to the date of the receipt

of the reports of his medical, bacteriological and radiological examinations (presumably in late September or early October, 1961), he would at that time have been declared eligible to receive \$200 per month, retroactive as of the date August 1, 1961. Also that if his death had occurred after the beginning of those monthly payments and if silicosis was the cause of death, his estate would be entitled to receive funeral expenses to a maximum of \$500 and the actual cost not to exceed \$100 for transportation of the corpse, and Mr. Holderman's widow would have been eligible to receive compensation at the rate established by the NIC for a single person of \$162.50 per month. We are also informed that silicosis was the cause of his death.

QUESTIONS

1. May the State Health Officer authorize the payment of compensation benefits of \$200 per month to Mr. Holderman's estate for the period beginning August 1, 1961, to the date of his death, namely September 11, 1961?
2. May the State Health Officer authorize the payment of the mortuary, costs not to exceed \$500 and the actual cost of transportation of remains not to exceed \$100, in respect to Mr. Holderman's funeral and burial?
3. May the State Health Officer authorize the payment of compensation benefits to Mr. Holderman's widow in the sum of \$162.50 per month, retroactive and accumulating from the date September 12, 1961?

CONCLUSION

We have concluded that all three questions are to be answered in the affirmative.

ANALYSIS

It being conceded that if Mr. Holderman had lived to the date of receipt by the State Department of Health of the laboratory returns and findings in respect to his condition at the time of examination, all of the questions propounded would be answered in the affirmative, our sole question becomes whether or not his estate and widow are to be deprived of these benefits by the fact that his death occurred before the results of the examination were known to the department.

Significant and pertinent sections of Chapter 311, Statutes 1961, provide:

Sec. 2. 1. There is hereby created in the state treasury the special silicosis fund. The special silicosis fund shall be administered by the department, and moneys in such fund shall be expended only for the purposes of this act on claims approved by the department and paid as other claims against the state are paid.

2. The board may adopt reasonable regulations to carry out the provisions of this act.

Sec. 3. 1. Every person found by the board to be suffering from silicosis shall be entitled to the benefits provided for in this act if he:

(a) Is not eligible for compensation under the provisions of [NRS 617.460](#).

(b) Applied, before January 1, 1961, for compensation under the provisions of [NRS 617.480](#), or under section 1 of Chapter 433, Statutes of Nevada 1955, and qualified for such compensation or was denied such compensation for any reason.

(c) Is not infected with active tuberculosis.

(d) Files with the board before August 1, 1961, an application for benefits accompanied by a written statement subscribed and sworn to or affirmed before a notary public or other person authorized to administer oaths declaring that he is unable to pay for his own care and maintenance.

(e) Submits to a physical examination by a physician approved by the board to determine his condition.

Section 4 of this act provides that if an applicant is found eligible under this statute his compensation shall be as provided for those found qualified under [NRS 617.470](#), and provides that the Nevada Industrial Commission shall make their records available to the State Department of Health to assist the department to determine eligibility.

Although this act contemplates that others not able to qualify under [NRS 617.480](#) may qualify under the tests of eligibility contained in Section 3, it also contemplates and provides that those qualified under the provisions of [NRS 617.480](#) should be re-examined under the tests provided in Section 3 and if qualified thereunder, benefits hereunder should date from the date of termination of benefits formerly received under [NRS 617.480](#), and should be paid from said date without reference to the date of receipt of the report of processing. Section 4 thereof so provides in the following language:

Sec. 5. Any person who was receiving compensation under the provisions of [NRS 617.480](#) prior to the effective date of this act, and is found eligible to receive benefits under the provisions of this act, shall be entitled to receive such benefits from the date of termination of such compensation *regardless of the date upon which processing of his application was completed*, but no benefits shall be paid for any period of which compensation was paid. (Emphasis supplied.)

It follows, under the provisions of Section 5 above quoted, that if Mr. Holderman had been a recipient of benefits under the provisions of [NRS 617.480](#) (which he was not), his death on September 11, 1961, would not have precluded his estate and his widow from benefits available under the act, even though his death occurred before the "processing of his application was completed."

It is, therefore, clear that the Legislature intended all benefits under the act to be available to those found entitled and qualified, without reference to life continuing to the date of receipt of reports of the processing of "cultures."

This conclusion is supported by the rule of statutory construction that welfare measures are to be liberally construed to effectuate their purposes.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. PRIEST
Deputy Attorney General

OPINION NO. 62-268 PRISON, NEVADA STATE—The amendment of [NRS 201.230](#) effected by Chapter 82, Statutes of Nevada 1961, relating to the parole and release upon probation of persons convicted of the offense of lewdness with a child under 14 years, does not apply to a prisoner seeking release upon the expiration of his sentence for such offense.

Carson City, January 25, 1962

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

STATEMENT OF FACTS

Dear Mr. Fogliani:

On October 13, 1958, a prisoner was sentenced to serve a term of 5 years in the Nevada State Penitentiary for the offense of lewdness with a child under 14 years, a violation of subsection 1 of [NRS 201.230](#). His sentence will expire, and he is scheduled for release, on March 27, 1962. An addition to [NRS 201.230](#), by Chapter 82, Statutes of Nevada 1961, prohibits the parole or release upon probation of a person convicted of a violation of such subsection unless there is a certification that such person is not a menace to the safety, health or morals of others.

QUESTION

Does the amendment effected by Chapter 82, Statutes of Nevada 1961 apply to a person convicted of violating subsection 1 of [NRS 201.230](#) who is seeking release upon the expiration of his sentence?

CONCLUSION

No.

ANALYSIS

The subsection added to [NRS 201.230](#) by Chapter 82, Statutes of Nevada 1961 provides:

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.

Such amendatory legislation prohibits parole or release upon probation unless the certification specified is given. By its terms, it is limited to offenders seeking release upon parole or probation and makes no reference to one seeking release upon the expiration of his sentence.

The terms “parole” and “probation” have settled and specific legal meanings, of which the Legislature was presumably aware when it enacted the amendment in question.

The word “parole” has come to signify the release of a prisoner from actual custody before expiration of his term of imprisonment, conditioned on his continuing good behavior during the remainder of his term. (39 Cal.Jur.2d, Prisons and Prisoners, 116, p. 719.) Parole does not interrupt, vacate, set aside or affect the sentence, but is a procedure whereby the prisoner is allowed to serve the final portion of his sentence outside the prison. A parolee remains in legal custody and constructively a prisoner. (See *Pinana v. State*, [76 Nev. 274](#), 352 P.2d 824 (1960); *People ex rel. Rainone v. Murphy*, 135 N.E.2d 567, 1 N.Y.2d 367, 153 N.Y.S.2d 21; *Wooden v. Goheen*, Ky., 255 S.W.2d 1000; *Application of Clover*, 111 A.2d 910, 34 N.J. Super. 181; *State ex rel. Murray v. Swenson*, 76 A.2d 150, 196 Md. 222; *Ex parte Anderson*, 229 P.2d 633, 191 Or. 409; *Sellers v. Bridges*, 15 So.2d 298, 153 Fla. 586; *Commonwealth ex rel. Lerner v. Smith*, 30 A.2d 347, 151 Pa. Super. 265; *Crooks v. Sanders*, 115 S.E. 760, 123 S.C. 28.)

As opposed to parole, probation is granted before commitment to serve a prison term (*Ex parte Anderson*, 229 P.2d 633, 191 Or. 409; *People v. Taylor*, 3 Cal. Rptr. 186, 178 C.A.2d 472), but, like parole, one released upon probation is not a free man and is subject to the restraints and conditions imposed by the court. It is also a substitute for imprisonment. (*Gordon v. Zangerle*, 26 N.E.2d 190, 136 Ohio St. 371; *People v. Robinson*, 235 N.W. 236, 253 Mich. 507; *Cooper v. United States*, C.C.A. La., 91 F.2d 195.)

Patently, a release upon parole or probation, as those terms are defined, is inconsistent with a release upon expiration of sentence. Because this is so, and because the enumeration of acts, things or persons as coming within the operation or exception of a statute precludes the inclusion by implication in the class covered or excepted of other acts, things or persons, the restriction in the amendment of the requirement of certification to those seeking release upon parole or probation, would appear to exclude its application to any other class. The language of the amendment seems sufficiently clear and unambiguous to make further statutory construction unnecessary.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Kaye Richey
Deputy Attorney General

OPINION NO. 62-269 PUBLIC LANDS; LAND GRANTS TO NEVADA FROM UNITED STATES—Chapter 103, 1887 Statutes of Nevada, and Chapter 172, 1921 Statutes of Nevada, construed. Attorney General Opinion No. 263 of June 18, 1953, reversed.

Carson City, January 31, 1962

Mr. Hugh A Shamberger, Director, Department of Conservation and Natural Resources, Carson City, Nevada.

OPINION

Dear Mr. Shamberger:

Allied Properties, a corporation, owns lands in Nevada obtained from the state of Nevada, which lands the State, in turn, had obtained by virtue of grants made by the United States to Nevada.

Richfield Oil Corporation desires to lease from Allied Properties certain of these lands for the exploration of oil.

Several years ago Richfield was advised by private counsel in Nevada that the State, acting on the advice of the Attorney General of Nevada in 1953 (*see* Attorney General Opinion No. 263 of June 18, 1953), took the position that neither this State nor its transferee, Allied Properties, had, or has, any mineral rights, but that the same are vested in the United States by virtue of the legislative disclaimer in 1887, whereby Nevada disclaimed to the United States, for itself and its transferees, all interests in mineral lands theretofore or thereafter selected by Nevada on account of grants from the United States.

Richfield applied to the Bureau of Land Management of the United States Department of Interior for an oil and gas lease on the property previously transferred to Allied Properties by this State. The Bureau of Land Management refused to issue the lease and on appeal the Department of Interior rejected Richfield's application, holding that mineral as well as surface rights in the said lands were vested in the State of Nevada and not in the United States, that since said lands when selected by Nevada were determined by the United States to be nonmineral, the approval of the selection by the United States served to convey the entire fee to the State of Nevada.

Although Richfield Oil Corporation desires to spend approximately \$250,000 in oil exploration, this company finds itself in a dilemma and is presently unwilling to proceed with

drilling operations for fear that if valuable oil or gas deposits are discovered, their title may be in jeopardy, despite a lease from Allied Properties.

A history of the various grants made by the United States to Nevada must be considered in order to fully understand the problem.

There is attached hereto, as Exhibit A, an outline of all of the applicable federal and Nevada statutes having to do with land grants made by the United States to Nevada that are pertinent to this problem.

From Exhibit A it can be seen that in the enabling act of Congress of 1864, pursuant to which Nevada gained statehood in that same year, that:

1. By Section 7 of the enabling act, the 16th and 36th sections in every township were granted to Nevada, in fee simple, without mineral reservations, subject to certain exceptions not pertinent to this problem.

2. By Section 8 of the enabling act, 20 sections to be selected by Nevada were granted by the United States, in fee simple, with no mineral reservations, for the purpose of erecting capital buildings.

3. By Section 9 of the enabling act, 20 sections were granted, in fee simple, with no mineral reservations, to be selected by the Nevada Legislature for the purpose of erecting a State Prison.

As appears on Exhibit A, by an act of Congress of July 5, 1866, entitled, "An Act concerning certain lands granted to the State of Nevada," in Section 1 of said act the United States approved and confirmed to Nevada 500,000 acres granted to all states for internal improvement by act of congress of 1841.

By Section 2 of the said act of 1866, the United States granted 72 entire sections to Nevada for a State University, and by Section 3 of the said act of 1866, the United States extended to Nevada the grant made to the several states by act of Congress of 1862, thereby specifically granting to Nevada 90,000 acres to be selected for the teaching of agriculture, mechanic arts and mining.

By Section 5 of said 1866 act of Congress, it was provided that all lands valuable for mines of gold, silver, quicksilver, or copper, shall be reserved from sale.

As set forth on Exhibit A, on February 13, 1867, the Nevada Legislature accepted all grants of public lands theretofore made by the United States to Nevada upon the terms and conditions so granted as modified by the act of July 4, 1866.

The Nevada Supreme Court in *Heydenfeldt v. Daney*, [10 Nev. 291](#) (1875), affirmed United States Supreme Court, 23 L.Ed. 995, 93 U. S. 634, held that when Nevada accepted, by the said act of 1867, all grants of public lands heretofore made by the United States subject to the said act of July 4, 1866, that thereby lands valuable for gold, silver, quicksilver and copper, were reserved to the United States and not included in any grants made by the United States to Nevada.

Based on this decision, and on Section 5 of the act of Congress of July 4, 1866, the following itemized grants to Nevada did not pass title to lands valuable for mines of gold, silver, quicksilver or copper.

The grants affected are:

1. The 16th and 36th sections grant (Section 7 of the Nevada enabling act of 1864).
2. The 20-acre grant for capital buildings (Section 8 of the Nevada enabling act of 1864).
3. The 20-section grant for State Prison (Section 9 of the Nevada enabling act of 1864).
4. The 500,000-acre grant (Section 1, act of Congress, July 4, 1866).
5. The 72-section grant (Section 2 of act of Congress, July 4, 1866).
6. The 90,000-acre grant (Section 3 of the act of Congress, July 4, 1866).

Thus, by virtue of the July 4, 1866 act of Congress, and the Nevada acceptance act of February 13, 1867, all of the said grants from the United States itemized above reserved all lands valuable for gold, silver, quicksilver and copper. It should be noted that there was no reservation of any other valuable minerals.

Since the original 16th and 36th sections grant fell on barren mountain and desert wastes, the Nevada Legislature from 1866 to 1879 repeatedly memorialized Congress to make more useful lands available to Nevada.

In 1879, as reflected on Exhibit A, in enacting Chapter 100, 1879 Statutes, Nevada agreed to accept from the United States a grant of 2,000,000 acres to be selected by Nevada and to relinquish to the United States all of the 16th and 36th sections as had not been sold or disposed of by Nevada. At this time approximately 62,000 acres had been sold or disposed of by Nevada from the 16th and 36th sections grant, which grant, incidentally, aggregated approximately 3,925,333 acres.

By act of Congress of June 16, 1880, as indicated on exhibit A, the United States granted to Nevada 2,000,000 acres to be selected from any unappropriated nonmineral public lands in Nevada, in lieu of the 16th and 36th sections of land previously granted that had not been sold or disposed of by the State prior to the passage of the act of 1880.

In 1887 the Nevada Legislature (*see* Exhibit A) provided that in all transfers thereafter made by Nevada of state selected lands, the documents of transfer shall expressly reserve all mines of gold, silver, copper, lead, cinnabar, *and other valuable minerals*, and, in the same act, the Nevada Legislature purported to disclaim to the United States, for the State and its transferees, all interests in mineral lands theretofore or thereafter selected by the State on account of any grant from the United States, and directed all persons desiring titles to mines upon such state selected lands to obtain the same from the United States under the laws of Congress, notwithstanding state selection.

Despite the purported disclaimer of mineral rights to the United States in state selected lands in 1887, the Nevada Legislature in 1921 (*see* Exhibit A) conveyed to all Nevada transferees of state selected lands, previously or thereafter transferred, the fee simple title to all such lands, including oil, gas and coal deposits, reserving to Nevada a royalty of 5 percent of the net proceeds from the production of oil, gas and coal.

The Nevada Supreme Court has never construed or attempted to reconcile the 1887 and 1921 Nevada acts. However, in *Stanley v. Hirsching*, [26 Nev. 55](#) (1901), the Nevada Supreme Court discussed and applied the reservation of minerals clause of the 1887 act, but did not deal with the clause purportedly disclaiming mineral rights to the United States.

On June 18, 1953, the Attorney General of Nevada, in Opinion No. 263 (Exhibit B hereto), ruled that since the 1887 act disclaimed all mineral rights to the United States in state selected lands, the State had no mineral rights in such lands and, therefore, in 1921 could not convey such mineral rights. The Attorney General concluded that the 1921 act was a nullity.

On April 4, 1957, a trial court in Nevada, in a mandamus action seeking to compel the state of Nevada to issue an oil lease, held that the 1887 act had disclaimed to the United States all mineral rights in lands obtained by grants from the United States and, therefore, the 1921 act was a nullity. Mandamus was refused. This case was to be appealed to the supreme Court of Nevada.

It should be noted at this point that the mineral rights contemplated by the 1887 and 1921 acts, and discussed herein, did not, of course, include any mineral rights reserved by the United States in the various grants, but only those mineral rights that were not reserved which passed to Nevada by the grants. The mineral rights contemplated by the 1887 and 1921 acts, and discussed herein, also include those valuable minerals that were later discovered in lands selected and granted to the State of Nevada from the unappropriated nonmineral public lands. The law is well established that upon application for state selection of unappropriated nonmineral public lands, the Department of Interior must make a determination as to whether or not the lands are mineral in character. In the absence of fraud, once a determination that the lands are nonmineral in character is made, and the United States makes its grant to the State, the fact that minerals are thereafter discovered does not render the title to valuable minerals subsequently discovered subject to attack. Such determination of the nonmineral character of the lands by the Department of Interior is conclusive. Thus, in the absence of fraud, any after discovered minerals passed to the State by the Federal grant following the Department of Interior determination that the lands were nonmineral in character. *See Southern Development Company v. Enderson*, 200 Fed. 272 (1912, U. S. District Court, Nevada); *Burke v. Southern Pacific Company*, 234 U. S. 58 L.Ed. 1527 (1914).

On May 18, 1950, in *United States v. Ernest L. Rink* (Exhibit C hereto), the Solicitor of the United States Department of Interior held that the attempt of Nevada in 1887 to disclaim mineral

rights to the United States had no effect on the ownership of mineral deposits on Nevada land granted by the United States, since the United States had granted the fee in said lands to Nevada with no reservation of minerals and that the disclaimer by Nevada in the 1887 act was ineffective and title to the minerals remained in Nevada, since Congress had not provided for the reacquisition of the minerals, and the 1887 Nevada disclaimer act could not operate to subject the mineral deposits in such lands to the United States mining laws.

On April 14, 1961, in Richfield Oil Corporation's appeal to the Department of Interior from the Bureau of Land Management (Exhibit D hereto), the appeals officer, relying on the said Rink decision and other decisions of the Interior Department, held that Nevada's disclaimer in 1887 of the mineral rights could not affect the title or status insofar as the United States is concerned, or the jurisdiction of the department of Interior, and affirmed the rejection by the Bureau of Land Management of Richfield's application for an oil and gas lease.

Thus, as stated at the outset, Richfield Oil Corporation finds itself in the dilemma of being unable to obtain a lease of oil and gas rights from the United States or from the State of Nevada. Nevada has said the mineral rights are in the United States and the United States, through its Department of Interior, holds that the mineral rights are in the State of Nevada or its transferees.

Despite the position of the Attorney General of Nevada in 1953 and the Nevada trial court's decision in 1957, above referred to, it is the view of the incumbent Attorney General that the position of the Department of Interior is sound. Attorney General Opinion No. 263 of June 18, 1953, is reversed.

We believe that the 1887 act was ineffective to disclaim mineral rights to the United States, there being no Congressional acceptance (*see* Lindley on Mines, Exhibit E hereto).

We feel that, although the disclaimer clause of the 1887 act was ineffective, this said act did validly provide for the reservation of mineral rights when transfers were thereafter made by the State of Nevada lands to transferees. And we, therefore, conclude that from 1887 until at least 1921 such mineral rights were vested in the State of Nevada. When, in 1921, the Nevada Legislature transferred all mineral rights that had been reserved since 1887 to all former as well as future transferees, including oil, gas and coal rights, it is our position that the 1921 act passed title to the mineral rights reserved since 1887. We feel that the 1921 act was not a nullity and that the State of Nevada should now and in the future receive royalties, as provided in the 1921 act, from the production of oil, gas and coal.

A letter dated May 26, 1961, that had your approval, was submitted by me to Senators Alan Bible and Howard W. Cannon, and Representative Walter S. Baring, in substantially the same form as this opinion, requesting a Congressional disclaimer of any mineral rights that may have been acquired by the United States by virtue of Chapter 103, Statutes of Nevada 1887. The request for such legislation was made since the Department of Interior concurred with the view of this office that the 1887 act was ineffective to disclaim mineral rights to the United States, there being no Congressional acceptance. Senator Bible introduced S. 2272, which, after amendment, was approved by the Solicitors of the Department of Interior, passed by the Congress, and signed by the President in the first session of the 87th congress. This disclaiming act reads:

That the United States hereby disclaims any interest in lands which it may have, prior to the date of approval of this Act, acquired by virtue of chapter 103 Stat., Nevada 1887, or by any revisions and reenactment thereof. (This act may now be found in Public Law 87-340, 75 Stats. 751.)

Now there can be no question of any interest in the United States in mineral rights purportedly disclaimed by Nevada to the United States in 1887.

If the disclaimer clause and the reservation clause of the 1887 act are not severable, as we believe them to be, and a court should hold that where one failed the other failed, the legal consequence would be the same, since the 1921 act, as indicated above, purportedly transferred all mineral rights reserved since 1887, both prospectively and retroactively, to all transferees from the State of Nevada.

It would follow, then, that all patentees, transferees, and their successors in interest, hold title to the mineral rights by virtue of the 1921 act, providing the 1887 reservation was effective or took title at the time of their patent or transfer to their successors in interest, if the 1887 reservation was ineffective.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

EXHIBIT A
OUTLINE OF APPLICABLE FEDERAL AND STATE STATUTES
IN RE LANDS GRANTED BY THE UNITED STATES
TO THE STATE OF NEVADA

1. Act of 1864

An Act to enable the people of Nevada to form a Constitution and State Government, and for the Admission of such State into the Union on an equal Footing with the original States.

(Approved March 21, 1864)

Sec. 7. And be it further enacted, That sections numbers sixteen and thirty-six, in every township, and where such sections have been sold or otherwise disposed of by an act of congress, other lands equivalent thereto in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby granted to said state for the support of common schools.

Sec. 8. And be it further enacted, That provided the state of Nevada shall be admitted into the Union, in accordance with the foregoing provisions of this Act, that twenty entire sections of the unappropriated public lands within said State, to be selected and located by direction of the Legislature thereof, on or before the first day of January, anno Domini eighteen hundred and sixty-eight, shall be, and they are hereby, granted in legal subdivisions of not less than one hundred and sixty acres, to said State, for the purpose of erecting public buildings at the capital of said State, for legislative and judicial purposes, in such manner as the legislature shall prescribe.

Sec. 9. And be it further enacted, That twenty other entire sections of land, as aforesaid, to be selected and located, as aforesaid, in legal subdivisions, as aforesaid, shall be, and they are hereby, granted to said State for the purpose of erecting a suitable building for a penitentiary or state prison in the manner aforesaid.

EXHIBIT A

2. Act of 1866

An Act concerning certain lands granted to the State of Nevada.

(Approved July 4, 1866)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the appropriation by the constitution of the State of Nevada to educational purposes of the five hundred thousand acres of land granted to said State by the law of September fourth, eighteen hundred and forty-one, for purposes of internal improvement, is hereby approved and confined.

Sec. 2. And be it further enacted, That land equal in amount to seventy-two entire sections, for the establishment and maintenance of a university in said State, is hereby granted to the State of Nevada.

Sec. 3. And be it further enacted, That the grant made by law of the second day of July, eighteen hundred and sixty-two, to each State, of land equal to thirty thousand acres for each of

its senators and representatives in Congress, is extended to the State of Nevada, and the diversion of the proceeds of these lands in Nevada from the teaching of agriculture and mechanic arts to that of the theory and practice of mining is allowed and authorized without causing a forfeiture of said grant.

* * *

Sec. 5. And be it further enacted, That in extending the surveys of the public lands in the State of Nevada, the Secretary of the Interior may, in his discretion, vary the lines of the subdivisions from a rectangular form, to suit the circumstances of the country; but in all cases lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale.

3. Nevada Act of 1867

An Act in relation to and accepting the land granted to the State of Nevada by the Government of the United States.

(Approved February 13, 1867)

Section 1. The State of Nevada hereby accepts the grants of lands made by the Government of the United States to this State, in the following Acts of Congress, to wit: "An Act donating Public Lands to the several States and Territories which may provide colleges for the benefit of Agriculture and the Mechanic Arts," approved July 2d, 1862, as amended and approved April 14th, 1864, and as extended July 4th, 1866, by an Act entitled "An Act concerning certain lands granted to the State of Nevada," upon the terms and conditions in said Act expressed, and agrees to comply therewith.

Sec. 2. The State of Nevada hereby accepts the grants of lands made by the Government of the United States of this State, in the Act of Congress entitled "An Act concerning certain lands granted to the State of Nevada," approved July 4th, 1866, upon the terms and conditions in said Act expressed, and agrees to comply therewith.

Sec. 3. The State of Nevada hereby accepts all grants of Public Lands heretofore made by the Government of the United States to the State, upon the terms and conditions so granted, as modified in the Act of July 4th, 1866, above in this Act referred to.

4. Nevada Act of 1879

An Act accepting from the United States a grant of two million or more acres of land, in lieu of the Sixteenth and Thirty-sixth Sections, and relinquishing to the United States all such Sixteenth and Thirty-sixth Sections as have to been sold or disposed of by the State.

(Approved March 8, 1879)

Section 1. The State of Nevada hereby accepts from the United States not less than two millions of acres of land in the State of Nevada, in lieu of the Sixteenth and Thirty-sixth Sections heretofore granted to the State of Nevada by the United States; provided, that the title of the State and its guarantees to such Sixteenth and Thirty-sixth Sections as may have been sold or disposed of by the State, prior to the enactment of any such law of Congress granting such two millions or more acres of land to the State, shall not be changed or vitiated in consequence of, or by virtue of, such Act of congress, granting such two millions or more acres of land, or in consequence of, or by virtue of this Act, surrendering and relinquishing to the United States the Sixteenth and Thirty-sixth Sections, unsold or undisposed of at the time such grant is made by the United States.

Sec. 2. The State of Nevada, in consideration of such grant of two millions or more acres of land by the United States, hereby relinquishes and surrenders to the United States all its claim and title to such Sixteenth and Thirty-sixth Sections, in the State of Nevada, heretofore granted by the United States, as shall not have been sold or disposed of subsequent to the passage of any Act of congress that may hereafter be made, granting such two millions or more acres of land to the State of Nevada; provided, that the State of Nevada shall have the right to select the two millions or more acres of land mentioned in this Act.

5. Act of 1880

An Act to grant to the State of Nevada lands in lieu of the sixteenth

and thirty-sixth sections in said State.

(Approved June 16, 1880)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and are hereby, granted to the State of Nevada two million acres of land in said State in lieu of the eighteenth and thirty-sixth sections of land heretofore granted to the State of Nevada by the United States: Provided, That the title of the State and its grantees to such sixteenth and thirty-sixth sections as may have been sold or disposed of by said State prior to the passage of this act shall not be changed or vitiated in consequence of or by virtue of this act.

Sec. 2. The lands herein granted shall be selected by the State authorities of said State from any unappropriated, non-mineral, public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this act the same shall be duly certified to said State by the Commissioner of the General Land Office and approved by the Secretary of the Interior.

Sec. 3. The lands herein granted shall be disposed of under such laws, rules, and regulations as may be prescribed by the legislature of the State of Nevada: Provided, That the proceeds of the sale thereof shall be dedicated to the same purposes as heretofore provided in the grant of the sixteenth and thirty-sixth sections made to said State.

6. Statutes of Nevada 1887, Chapter 103

An Act to encourage mining.

(Approved March 3, 1887)

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

Section 1. The several grants made by the United States to the State of Nevada reserved the mineral lands. Sales of such lands made by the State were made subject to such reservation. Any citizen of the United States, or person having declared his intention to become such, may enter upon any mineral lands in this State, notwithstanding the State's selection, and explore for gold, silver, copper, lead, cinnabar, or other valuable mineral, and upon the discovery of such valuable mineral may work and mine the same in pursuance of the local rules and regulations of the miners and the laws of the United States; provided, that after a person who has purchased land from the State has made valuable improvements thereon, such improvements shall not be taken or injured without full compensation. But such improvement may be condemned for the uses and purposes of mining in like manner as private property is by law condemned and taken for public use. Mining for gold, silver, copper, lead, cinnabar, and other valuable mineral, is the paramount interest of this State, and is hereby declared to be a public use.

Sec. 2. Every contract, patent or deed hereafter made by this State, or the authorized agents thereof, shall contain a provision expressly reserving all mines of gold, silver, copper, lead, cinnabar and other valuable minerals that may exist in such land, and the State, for itself and its grantees, hereby disclaims any interest in mineral lands heretofore or hereafter selected by the State for itself and its grantees hereby disclaims any interest in mineral lands heretofore or hereafter selected by the State on account of any grant from the United States. All persons desiring titles to mines upon lands which have been selected by the State, must obtain such title from the United States under the laws of Congress, notwithstanding such selection.

(The above act of 1887 is now found in Nevada Revised Statutes 516.010-516.020.)

7. Statutes of Nevada 1921, Chapter 172

An Act granting to contractors for, patentees of and purchasers of lands from the State of Nevada, the oil, gas, coal and oil shales lying within such lands and repealing such acts and parts of acts as are in conflict herewith.

(Approved March 22, 1921)

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

Section 1. Every person, corporation, or association, his, her, or its heirs, assigns or lawful successors, who has a subsisting contract with the State of Nevada for the purchase of any lands of the State of Nevada or who may hereafter contract with the State of Nevada for the purchase of any of its public lands, and every patentee of lands purchased from the State of Nevada, shall, subject to the royalty provision hereinafter reserved, be deemed and held to have the right to the exclusive possession of the lands described in such contract, including all gas, coal, oil and oil shales that may exist in such lands; and every person, corporation, or association, his, her, or its heirs, assigns, or lawful successors, who has heretofore received or shall hereafter receive or be entitled to receive any patent or deed from this state granting to him, her or it any such lands, shall, subject to the royalty provision hereinafter reserved, be deemed to have the fee simple title to the lands described in such patent or deed, including all gas, coal, oil and oil shales which may exist therein; provided, however, that any such contract holder or patentee shall pay to the State of Nevada for the fund which was the original beneficiary of such lands a royalty fee of five (5%) per cent of the net proceeds of all gas, coal, or oil mined or extracted therefrom.

Sec. 2. Nothing in this act contained shall be construed as impairing any rights heretofore acquired under existing laws to any such lands or rights therein.

Sec. 3. All acts or parts of acts in conflict herewith are hereby repealed.

(This act may now be found in Nevada Revised Statutes 321.300.)

7(a). Statutes of Nevada 1921, Chapter 183

An Act to provide for the leasing of coal and oil-bearing lands by the state.

(Approved March 22, 1921)

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

Section 1. The surveyor general of the State of Nevada is hereby authorized to lease any land now or hereafter owned by the State of Nevada, or which may hereafter be granted it by the United States of America, except contract lands, upon terms as hereinafter provided in this act.

Sec. 2. Such leases shall be in blocks of not less than forty nor more than twelve hundred and eighty acres each and shall conform to governmental subdivisions.

Sec. 3. Such leases shall be based upon a fixed rental of one dollar per acre annually for each and every acre contained therein, and shall further provide for a fixed royalty of five per cent of the net proceeds, of all oil, coal or gas extracted therefrom.

Sec. 4. Such leases shall be executed upon a form to be prepared by the attorney general, which form shall contain all of the covenants and agreements usual and necessary to leases for the extraction of coal, oil and gas.

(This act is not found in Nevada Revised Statutes 322.010-322.040.)

EXHIBIT B

STATE OF NEVADA

DEPARTMENT OF ATTORNEY GENERAL

CARSON CITY, June 18, 1953.

OPINION NO. 53-263 SURVEYOR GENERAL; OIL ROYALTIES—Chapter 172, 1921 Statutes of Nevada, of no force nor effect.

Honorable Louis D. Ferrari, Surveyor General, Carson City, Nevada.

Dear Mr. Ferrari:

This will acknowledge receipt of your letter of March 5, 1953 in which you request the opinion of this office with respect to Chapter 172, 1921 Statutes of Nevada, the same being Sections 5545-5547, N.C.L. 1929, in two particulars, as follows:

1. Does said act cover land patents issued prior to March 22, 1921, insofar as oil royalties paid to the State of Nevada are concerned?
2. If a private corporation, or individual, leased a tract of state contract land, or patented land, which produced oil, and the lease was drawn up on a percentage of one-eighth royalty to be paid to the lessor by the lessee, could the lessee deduct the one-eighth paid to the lessor in computing the net proceeds?

OPINION

Section 5545, N.C.L. 1929, being Section 1 of Chapter 172, 1921 Statutes, provides as follows:

“Every person, corporation, or association, his, her, or its heirs, assigns or lawful successors, who has a subsisting contract with the State of Nevada for the purchase of any lands of the State of Nevada or who may hereafter contract with the State of Nevada for the purchase of any of its public lands, (and every patentee of lands purchased from the State of Nevada) shall, subject to the royalty provisions hereinafter reserved, be deemed and held to have the right to the exclusive possession of the lands described in such contract, including all gas, coal, oil and oil shales that may exist in such lands; and every person, corporation, or association, his, her, or its heirs, assigns, or lawful successors, who has heretofore received or shall hereafter receive or be entitled to receive any patent or deed from this state granting to him, her or it any such lands, shall, subject to the royalty provision hereinafter reserved, be deemed to have the fee-simple title to the lands described in such patent or deed, including all gas, coal, oil and oil shales which may exist therein; *provided, however*, that any such contract holder or patentee shall pay to the State of Nevada for the fund which was the original beneficiary of such lands a royalty of five (5%) per cent of the net proceeds of all gas, coal, or oil mined or extracted therefrom.”

The selection and sale of lands granted by the United States to the State of Nevada are governed by the provisions of Chap. LXXXV, 1885 Stats. of Nevada, and act amendatory thereof and supplementary thereto.

Chapter CIII, 1887 Stats., being Sections 4154 and 4155, N.C.L. 1929, and entitled “An Act of encourage mining,” is an act supplementary to the Act of 1885, and provides as follows:

“Section 4154. The several grants made by the United States to the State of Nevada reserved the mineral lands. Sales of such lands made by the state were made subject to such reservation. Any citizen of the United States, or person having declared his intention to become such, may enter upon any mineral lands in this state, notwithstanding the state’s selection, and explore for gold, silver, copper, lead, cinnabar, or other valuable mineral, and upon the discovery of such valuable mineral may work and mine the same in pursuance of the local rules and regulations of the miners and the laws of the United States; provided, that after a person who has purchased land from the sate has made valuable improvements thereon, such improvements shall not be taken or injured without full compensation. But such improvement may be condemned for the uses and purposes of mining in like manner as private property is by law condemned and taken for public use. Mining for gold, silver, copper, lead, cinnabar, and other valuable mineral, is the paramount interest of this state, and is hereby declared to be a public use.”

“Section 4155. Every contract, patent or deed hereafter made by this state or the authorized agents thereof, shall contain a provision expressly reserving all mines of gold, silver, copper, lead, cinnabar and other valuable minerals that may exist in

such land, and the state, for itself and its grantees, hereby disclaims any interest in mineral lands heretofore or hereafter selected by the state on account of any grant from the United States. All persons desiring titles to mines upon lands which have been selected by the state must obtain such title from the United States under the laws of Congress, notwithstanding such selection. As amended, Stats. 1897, 36.”

In compliance with Section 4155, the state patents issued prior to 1921 included the following: “provided, that all mines of gold, silver, copper, lead, cinnabar and other valuable minerals, that may exist in said lands, are hereby expressly reserved.” After the passage of the Act of 1921, the state patents included, in addition to the above-quoted words, the following: “except gas, coal, oil and oil shales (Chap. 172, Stats. 1921).”

It will be noted that Section 5545, N.C.L. 1929, very definitely includes in the oil royalty provision all persons to whom patents were issued prior to the passage of the act. At first glance, and reading said statute alone, such provision would seem to answer your first question, and there could be no objection on the part of any such patentee, since the act purports to give to such patentees the exclusive possession of all gas, coal, oil and oil shales, a right previously reserved under the reservation of “other valuable minerals,” and then provided for the 5 percent royalty. In other words, the state granted a right not previously enjoyed and qualified such right with the royalty provision. We have stated, in effect, that gas, coal, oil and oil shales are valuable minerals, because the Legislature obviously considered them to be such, and for the further reason that the general rule on the subject, as stated in C. J., Mines and Minerals, Sections 7 and 12, is to the effect that, in the broader sense of the word, gas, coal, oil and oil shales are considered to be, and treated as, minerals. Decisions of the United States Department of the Interior Relating to Public Lands, which have been held to have the same force and effect as court decisions, have also held gas, coal, oil and oil shales to be minerals. However, when Sections 4154 and 4155, being Sections 1 and 2 of the Act of 1887, are read in conjunction with said Section 5545, as they must be, it will be seen that the State of Nevada could not grant away the mineral rights in such lands, it having been stated and recognized in Section 4154 that the several grants made by the United States to the State of Nevada reserved the mineral lands and provided further that sales of such lands by the United States, and in Section 4155, the State, for itself and its grantees, having disclaimed any interest in mineral lands “heretofore or hereafter” selected by the State on account of any grant from the United States. Since the State did not own the mineral rights, including gas, coal, oil and oil shales, in such lands, it obviously could not grant such to patentees and contract holders, nor could it validly provide for a royalty on the net proceeds of all gas, coal or oil mined or extracted therefrom.

It is the considered opinion of this office that the Act of 1921, being Chapter 172, 1921 Statutes, Sections 5545-5547, N.C.L. 1929, is a nullity and of no force nor effect, for the reason that the State of Nevada has not, and has never had, the title to the mineral lands included in those lands granted to it by the United States for selection and sale. Having held that the Act of 1921 is a nullity and of no force nor effect, it is not necessary to directly answer your questions.

Respectfully submitted,

W. T. MATHEWS
Attorney General

By: John W. Barrett
Deputy Attorney General

EXHIBIT C

UNITED STATES v. ERNEST L. RINK
Decided May 18, 1950

A-25820

74935

Mining Claim—Patented Land—Disclaimer of Minerals by State—Discovery of Minerals.

A mining claim cannot be located on land which has been patented in fee, without a reservation of minerals to the United States.

Where title to public land has passed to a State by a grant from the United States, without a reservation of the mineral deposits to the United States, a State statute purporting to disclaim the interest of the State in the minerals and to provide that title to the minerals must be secured from the United States cannot operate to subject the mineral deposits in such land to the United States mining laws.

A mining claim cannot be validly located on the public domain unless a valuable mineral deposit has been discovered within the limits of the claim.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D.C.

A-25820

May 18, 1950

United States v. Ernest L. Rink

Carson City, 1918175
Mining claim canceled.
Affirmed.

Appeal from the Bureau of Land Management

Ernest L. Rink has brought this appeal from a decision of the Associate Director of the Bureau of Land Management which canceled his mining claim, the Lemon Gold lode claim, situated in the SW 1/4 section 4, T. 20 N., R. 19 E., M.D.M., Nevada.

Mr. Rink located the Lemon Gold Mining claim on January 10, 1934. On June 22, 1942 the Commissioner of the General Land Office¹ ordered that adversary proceedings be instituted against this claim. A hearing was held on April 21 and May 11, 1948. A decision ordering the cancellation of the claim was rendered by the Acting Manager of the district land office. That decision was affirmed by the Associate Director of the Bureau of Land Management.

The claim was located under Revised Statutes sec. 2319, as amended (30 U.S.C., 1946 ed., sec. 22), which provides for the exploration and purchase of valuable mineral deposits on lands belonging to the United States, and for the occupation and purchase of the lands in which the deposits are located. Revised Statutes sec. 2320 (30 U.S.C., 1946 ed., sec. 23) provides with respect to lode claims that “* * *no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * *.”

There was considerable dispute at the hearing as to the value of the mineral discovered on this claim. There is no question, however, that a portion of the claim embraces land which was patented to the State of Nevada in 1887, with no reservation of mineral rights to the United States, and that the discovery was made on this portion of the claim.

Mr. Rink contends that even though the land on which his discovery was made was patented by the United States to the state of Nevada, rights to the minerals in that land remained vested in the United States, and, hence, the mineral deposits are open to discovery and location under the mining laws of the United States. He bases this contention on a Nevada statute (Nev. Comp. Laws, 1929, sec. 4155) which disclaims all interest of the State in mineral land selected by the State as the result of any grant from the United States and provides that all persons desiring to obtain title to mines upon such selected land must obtain such title from the United States under acts of Congress. This statute can have no effect, however, on the ownership of the mineral deposits in this particular land, since the United States granted the fee in the land, with no reservation of minerals, to Nevada, and Congress has not provided for the reacquisition of the minerals in the land by the United States. Clearly, the State cannot force the United States to accept jurisdiction of the mineral deposits in the land for purposes of the mining laws, and until the United States accepts such jurisdiction or until the State of Nevada divests itself of title to the minerals in some other way, the title remains in the State (*see* 3 Lindley on Mines, 3d ed., p. 2452).

It is clear that, as the mining laws of the United States do not apply to land owned in fee by the State of Nevada, the appellant improperly located that portion of the claim on which the discovery was made, involving State-owned land.

It is also clear that, as no valuable mineral deposit has been discovered on the portion of the claim embracing public domain of the United States, the claim is invalid and subject to cancellation. A mineral discovery by the appellant on adjacent land owned by the State of Nevada is irrelevant in considering the validity of a mining claim located on the public domain.

Therefore, in pursuance of the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associated Director of the Bureau of Land Management is affirmed, and the claim is canceled.

MASTIN G. WHITE, *Solicitor*.

¹Effective July 16, 1946, the General Land Office was abolished and its functions were transferred to the Bureau of Land Management by section 403 of Reorganization Plan No. 3 of 1946 (11 F.R. 7875, 7876, 7776).

EXHIBIT D

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

April 14, 1961

In reply refer to: Nevada 056101 through 056107 5.04g

Certified Mail. Return Receipt Requested

DECISION

Richfield Oil Corporation (Oil and Gas)

DECISION AFFIRMED

Richfield Oil Corporation has appealed from a decision of January 12, 1961, rejecting its above-noted oil and gas lease offers because the Government does not own the mineral interest in the lands applied for.

Offer 056102 described, among others, lands which were included in desert land entry Carson City 04368 and which were patented without any mineral reservation to the United States under patent number 936026 on April 8, 1924. It also described lands which were included in homestead entry Carson City 01963 and patented on April 12, 1917, under patent number 577170 without mineral reservation. As to the remaining lands described in offer 056102 and the other offers subject of this appeal the Bureau records disclose the lands were included in approved selections to the State of Nevada under the act of June 16, 1880 (21 Stat. 287). That statute provided for the selection of two million areas by the State which "shall be selected by the State authorization of said State from any unappropriated, nonmineral, public land in said State." The Bureau records fail to indicate any of the lands were known to be mineral in character at the time of the approval of the selection.

If the lands involved were mineral in character and such fact was known at the time of selection or approval, the approval of the State selection would be a nullity and would not serve to convey title under the act of June 16, 1880. *Cf. Patricia T. Zebal et al.*, 65 I.D. 293 (1958). However, since the lands were not then known to be mineral in character, the approval of the selection served to convey the Government's entire interest therein, i.e., it conveyed both the surface and mineral estates to the State of Nevada. That approval, under authority of law, vested title in the State and removed from the jurisdiction of the Department inquiry into and consideration of all disputed rights in the land. *Everett Elvin Tibbets*, 61 I.D. 397 (1954). The State's disclaimer to the mineral estate cannot otherwise effect the title or status of the land,

insofar as the United States is concerned, or the jurisdiction of the Department. *U. S. v. Ernest L. Rink*, A-25280 (May 18, 1950).

The decision appealed from is affirmed.

Richfield Oil Corporation is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of \$5 for each lease offer included in the appeal. If the appeal covers all offers adversely affected by this decision the total filing fee is \$35. In taking an appeal there must be strict compliance with the regulations.

A. H. FUN, *Appeals Officer*.

3 Lindley on Mines, Third Edition, page 2452

III. Regulating Sale of Mineral Lands Belonging to the State.

A law was passed in 1874 providing for the disposal of sixteenth and thirty-sixth sections belonging to the state which were found to be mineral in character. Stats. 1873-1874, p. 766; Amended Stats. 1875-1876, p. 20; Amended Stats. 1880, p. 26.

This act and those amendatory thereof were repealed by the act of April 1, 1897 (Stats. 1897, p. 438). The repealing act contained the following provisions:

Sec. 2. When it shall be shown by affidavits or otherwise, to the satisfaction of the surveyor-general, that any portion of a sixteenth or thirty-sixth section belonging to the state is valuable for its mineral deposits, the surveyor-general shall not approve any application to purchase the same, nor shall the register of the state land office issue a certificate of purchase therefor until the question of the character of the land has been referred, for determination, to a court of competent jurisdiction, in the manner provided by section thirty-four hundred and fourteen of the Political code, and adjudged not to be valuable as mining land.

Sec. 3. The sixteenth and thirty-sixth sections belonging to the state, in which there may be found valuable mineral deposits, are hereby declared to be free and open to exploration, occupation, and purchase of the United States, under the laws, rules, and regulations passed and prescribed by the United States, for the sale of mineral lands.

Sec. 4. This act shall take effect from and after its passage.

The peculiarity of these provisions deserves notice. Formerly mineral lands within 16th and 36th sections were sold by the state under special laws, which are repealed by this act. Title of the state to these sections vests upon approval of the survey if at that date the lands were not known to be mineral (*ante*, sec. 142). If they were then known to be mineral, the state received no title. The act, therefore, can have no possible application to any lands except 16th or 36th sections wherein mineral has been discovered subsequent to the approval of the survey and vesting of title in the state. What is the object of the act? The title gives no clue. It does not purport to re-vest title in the federal government. If it did it would not be effectual for any such purpose without the consent of Congress. States have no power to compel the United States to resume sovereignty over such lands nor impose upon the national government the obligation to include such lands within its public land system without some concurrent congressional legislation, accepting the burden. In re State of Montana, 27 L. D. 474. If the intent of the act is to provide a method of location upon the theory of the retention of the title by the state, it is open to several constitutional objections. No act of a state legislature which should declare that the law of another state, without re-enacting it, should be the rule of civil conduct on a certain subject, could be upheld. We see no difference in principle when a federal statute is named. Nevada has a similar law (*see post*, Nevada), which is open to the same objection.

Consult *Stanley v. Mineral Union*, 63 Pac. 59.

A statute of somewhat similar purport was passed also by the legislature of Alabama regulating the disposal of grants made by congress to the state in aid of railroad construction. *See Miller's Executors v. Swann*, 150 U.S. 132.

The Secretary of the Interior, referring to this act, says: "This would seem to be a waiver of claim on the part of the state to such of the sections 16 and 36 in place as were shown to be mineral in character *after* their identification, presumably with the intention of encouraging the

exploration and development of mineral lands and indemnifying itself for any loss on account thereof through selection under the act of 1891.” State of California, 33 L. D. 356. (Emphasis supplied.)

The Supreme Court of California, in an opinion involving the taxability of a mining right, says *arguendo* of this statute: “It is a matter of common knowledge and a thing recognized by legislative enactments, that such mining rights and privileges may exist on lands belonging to the state of California.”

(Citing this statute.)

Graciosa Oil Co. v. County of Santa Barbara, California.

OPINION NO. 62-270 CARSON CITY; CITY ATTORNEY—Local building codes’ applicability to construction work projects involved in lease-purchase agreements between private owner-builders and state agencies. Held: Exemption from local building codes and payment of building permit fees generally applicable to State when it has asserted and exercised its sovereign jurisdiction and power concerning public works construction projects, does not apply or extend to private owner-builders constructing buildings or other facilities to be leased, used, and (possibly) eventually purchased, by state public agencies, parties to the involved lease-purchase agreements. (Accord: Attorney General Opinion No. 201, January 19, 1961; Attorney General Opinion No. 234, July 21, 1961.)

Carson City, February 12, 1962

Honorable John Tom Ross, District Attorney, Ormsby County, Ormsby County Court House,
Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Ross:

A private construction corporation purchased real property from the State of Nevada, pursuant to legislative authority for sale thereof. Thereafter, said private construction corporation entered into a lease-purchase agreement with the Employment Security Department of the State of Nevada, providing for the construction of an office building to be leased and occupied by the said state agency for a 20-year period, predicated upon payment of a fixed rental and compliance with other terms and conditions usual in such agreements. At the end of the 20-year term, the state agency shall be entitled to exercise its option for purchase of the building and the site on which it stands.

We have heretofore stated our opinion that assertion and exercise by the State of its jurisdiction and power respecting public construction work which is of direct concern or interest to it, preemptively supersedes and excludes any encroachment by counties or cities which would subject any such state construction to local building code regulations or requirements, or the exaction, from contractors engaged on such state construction projects, of any building permit fees. (Attorney General Opinion No. 234, July 21, 1961.)

We have been informed that, predicated apparently on our aforesaid legal opinion, the private construction corporation above-mentioned has claimed exemption from the general obligation to make payment of building permit fees to the City of Carson City, where the involved office building for the Employment Security Department is under construction; at any rate, said construction corporation has made payment of the entailed building permit fee under protest, and claims refund thereof.

Because lease-purchase agreements to meet the increasing need of the State, and its political subdivisions, for additional plan facilities, are likely to become more usual henceforth, we are asked to supplement and clarify our previous legal opinions (Attorney General Opinion No. 201,

January 19, 1961; Attorney General Opinion No. 234, July 21, 1961) by further definition of the jurisdiction and authority of counties and cities, as applicable to lease-purchase construction situations such as that of the "Employment Security Building."

QUESTION

May counties and municipalities of the State, as applicable, require compliance with their respective Building Codes on the part of private owner-builders of construction projects intended for use and occupancy by state agencies under lease-purchase agreements executed between such private owner-builders and state public agencies, inclusive of subjection to usual inspection requirements and payment of scheduled permit fees?

CONCLUSION

As herein stated, yes.

ANALYSIS

Citing 62 C.J.S. 319, our previous opinion (Attorney General Opinion No. 234, July 21, 1961) noted as follows:

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 won property; and such waiver will not be presumed * * *.

It is true that as regards the "Employment Security Building," here involved, the State is the beneficial user of *lessee* and the potential vendee is *optionee* under the particular lease-purchase agreement here involved. However, the State, in this case, is not (at least presently) actually the owner of the land on which said "Employment Security Building" is under construction, nor is the State (again at least presently) actually the owner of the said building under construction. The said land is, in fact, presently legally owned by a *private* corporation; the financing for construction of the said building came from *private* funds or *sources* (rather than the Legislature or taxes); and the obligation for the construction costs involved rests upon the owner-builder, the *private construction corporation*, rather than the State.

Unless and until the Employment Security Department actually exercises the option contained in the lease-purchase agreement pertaining to the described building, therefore, the legal situation and relationship which exists is that of a public agency using and occupying private property under a contractual (lease-purchase) agreement, and nothing more.

On this view of the actual and legally significant facts, it is quite clear that the claimed exemption from application of Carson City's Building Code and from payment of the entailed scheduled permit fees finds no support in applicable law, and is without legal merit. This conclusion is inescapable, once it is remembered that only when the State (or its political subdivisions) itself owns the property is exemption from local regulatory measures and taxes presumed. In such instance, waiver of such exemption on the part of the State will not be assumed. Contrariwise, where the State (or its political subdivisions) does not itself own the property, the rule of strict construction applies to any claim for exemption from local regulatory measures (police powers) and taxes; in short, unless such claimed exemption is predicated upon express or explicit provision of law, it may not be granted. This result and conclusion fully accords with our previous opinion, contained in Attorney General Opinion No. 234, July 21, 1961.

For specific answer to the inquiry before us, therefore, it is our considered opinion and advice that Carson City's Building Code is applicable in all respects to the construction of the "Employment Security Building," inclusive of required inspections and payment of building

permit fees, as scheduled. Refund of building fees paid under protest, in our view, is not indicated.

It may, perhaps, be proper to note that our foregoing opinion and advice is predicated upon the particular facts involved in the situation of the "Employment Security Building." A different result might, perhaps, be justified if the land site had been owned, and the said building was being constructed, by a public corporate instrumentality of the State, designated a public works or building "authority," composed of a specified number of state officials. In such circumstances, it would be manifest that the State's legal interest would not be the limited one of lessee and beneficial user, but, in fact, the State would be owner of both land site and building, even though on an equitable basis and derivatively. (*See note, "Lease-Financing by Municipal Corporations as a Way Around Debt Limitations," George Washington Law Review, 1957, Vol. 25, p. 377, for a critical appraisal of such arrangements or methods of financing needed public works in the fact of "debt limitations."*)

We trust that the foregoing sufficiently answers your inquiry.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Chief Deputy Attorney General

OPINION NO. 62-271 VETERAN'S PROPERTY TAX EXEMPTION, ELIGIBILITY FOR—Unless sooner discharged because of a service-incurred disability, a taxpayer must serve a minimum of 90 days on active duty in the Armed Forces of the United States in order to qualify for the property tax exemption allowed veterans by [NRS 361.090](#), and one discharged from the Army 4 days after his enlistment because of a physical disability which was not so incurred may not claim such exemption.

Carson City, February 15, 1962

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

STATEMENT OF FACTS

Dear Mr. Demetras:

A resident of Nevada for more than 3 years entered the Army Engineers Corps on July 14, 1918. Four days later he was given a "discharge from draft" certifying that he was discharged from the services of the United States "by reason of physical disability." Apparently there is no claim that such disability was incurred during, or as a result of, his military experience.

QUESTION

Is such person eligible for a property tax exemption under the provisions of [NRS 361.090](#), which allows a tax exemption to veterans who meet certain specified qualifications?

ANSWER

No.

ANALYSIS

The pertinent statutory provision is subsection 1 of [NRS 361.090](#) which, in its present form, provides:

1. The property, to the extent of \$1,000 assessed valuation, of any actual bona fide resident of the State of Nevada for a period of more than 3 years who has served a minimum of 90 days on active duty (unless sooner discharged or retired by reason of service-incurred disability) in the Armed Forces of the United States in time of war, or who has served a minimum of 90 days on active duty (unless sooner discharged or retired by reason of service-incurred disability) in the Armed Forces of the United States after June 1, 1950, and prior to January 31, 1955 (the date of the executive order of the President terminating combatant activities in the campaign against the North Koreans and Chinese Communists in Korea), and upon severance of service has received an honorable discharge or certificate of satisfactory service from the Armed Forces of the United States, or who, having so served, is still serving in the Armed Forces of the United States, shall be exempt from taxation. "Service in time of war" shall mean service in the Armed Forces of the United States during a war declared by Congress.

Taxpayer apparently contends that the phrase "by reason of service-incurred disability" should be construed to modify only the word "retired" and that one who is discharged before serving 90 days is eligible to receive the exemption even though the cause of discharge was not a service-incurred disability.

As pointed out in *Hendel v. Weaver*, [77 Nev. 16](#) (1961), 359 P.2d 87, [NRS 361.090](#) has had a long history. It commenced in 1917 with passage of a statute granting a property tax exemption to a resident of Nevada who had received an honorable discharge from certain branches of the Armed Forces for service during time of war, provided his income did not exceed \$900 annually and he did not own property exceeding the value of \$3,000. The statute was frequently amended by subsequent legislature, and, in the process, the income and property ownership limitations were deleted and requirements of 3 years' residence and a minimum length of service were added.

The condition of service for "a minimum of 90 days on active duty (unless sooner discharged or retired by reason of service-incurred disability)," in respect to those serving in time of war, was first inserted in subsection 1 of [NRS 361.090](#) by Section 1, Chapter 13, Statutes 1954, at page 30. Prior to that time, eligibility for the exemption was not conditioned upon any length of military service, and the 1954 Legislature presumably intended to change the law by their action in this particular. Moreover, although the subsection was later amended by chapter 217, Statutes 1955, p. 340, and Chapter 229, Statutes 1957, p. 320, these legislatures did not see fit to alter the language in question.

In order to qualify the taxpayer for the exemption, it is necessary to construe the phrase "by reason of service-incurred disability" as limiting the word "retired" only and not the word "discharged." Under such a construction, the 90-day minimum requirement would not apply if the veteran were sooner discharged. But this is a strained construction which makes the language "a minimum of 90 days on active duty" superfluous so far as it relates to a discharged veteran, and it cannot be presumed that the Legislature intended to enact a useless and meaningless provision.

The rule that constitutional and statutory provisions for tax exemptions are to be strictly construed is applied to provisions for veterans' tax exemptions. *Oglesby v. Poage*, 45 Ariz. 23, 40 P.2d 90; *Lockhart v. Wolden*, 17 Cal.2d 628, 111 P.2d 319; *Mechanics Falls v. Millet*, 121 Me. 329, 117 A. 98; *Remus v. Grand Rapids*, 274 Mich. 577, 265 N.W. 755; *Crawford v. Burrell Twp.*, 53 Pa. 219. This means that the claim of exemption must rest upon language as to which there can be no doubt. Here the taxpayer contends there is a doubt which should be resolved in

his favor. But if the Legislature meant to allow an exemption under the circumstances here involved, it was required to do so in terms too plain to be mistaken.

As a corollary to this rule of strict construction, one who claims an exemption must show his right to it by indisputable evidence. This requirement has statutory sanction in Nevada by virtue of subsection 6 of [NRS 361.090](#), which prohibits county assessors from allowing the veteran's exemption unless he gives proof of status by production of an honorable discharge or certificate of satisfactory service. In our opinion, the taxpayer in this case has not presented such evidence.

In addition, there may be a question as to whether the "discharge from draft" received by the taxpayer in this case qualifies as "an honorable discharge" or "certificate of satisfactory service" within the requirements of the subsection. In *Zearing v. Johnson*, 10 Cal.App. 2d 654, 52 P.2d 1019, discussed in 116 A.L.R. 1441, one who reported at a military camp pursuant to an order from his local draft board and who, about a week later, was discharged because of physical unfitness, receiving a "discharge from draft" very similar to the one received by the taxpayer in this case, was held not to have been honorably discharged within the meaning of a constitutional provision granting an exemption to those who had received an honorable discharge. (*Also see Lamb v. Kroeger*, 233 Iowa 730, 8 N.W.2d 405, 149 A.L.R. 1475, on this.) However, because of the position taken regarding the 90-day service requirement in the statute, a determination of this point is unnecessary to this opinion.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Kaye Richey
Deputy Attorney General

OPINION NO. 62-272 PERFORMANCE OF AUTOPSIES AT VETERANS ADMINISTRATION HOSPITAL; CONFLICT BETWEEN FEDERAL REGULATIONS AND STATE STATUTE; EXCLUSIVE FEDERAL JURISDICTION; INTERFERENCE BY STATE WITH FEDERAL FUNCTION—A pathologist who performs an autopsy at the Veterans Administration Hospital in Reno, Nevada, pursuant to regulations promulgated by the Administrator of Veterans Affairs, upon the bodies of patients of the hospital who die therein under normal circumstances, is not subject to the penal provisions of [NRS 451.010](#), which limits the right to dissect human bodies to certain enumerated cases and makes it a gross misdemeanor to perform such dissections in other cases.

Carson City, February 15, 1962

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

STATEMENT OF FACTS

Dear Mr. Raggio:

Regulations promulgated by the Administrator of Veterans Affairs authorize managers of hospitals operated by the Veterans Administration to cause autopsies to be performed in situations not sanctioned by [NRS 451.010](#), which limits the right to dissect a human body to certain enumerated causes and makes it a gross misdemeanor to make, cause or procure any such dissection in other cases.

Certain Reno pathologists, working under contract with the Veterans Administration, have performed autopsies at the Veterans Administration Hospital in Reno, Nevada, at the direction of its manager, in cases authorized by the regulations but not by [NRS 451.010](#).

The site for the hospital in question was deeded to the United States by the city of Reno for a recited consideration of \$1. The deed was executed pursuant to a resolution of the 1937 Legislature (Chap. 2, Stats. 1937; [NRS 328.310](#)), empowering, authorizing and directing the Reno City Council to make, execute and deliver to the United States a deed conveying fee simple absolute title to the land for the purpose of erecting a veterans hospital, and other purposes.

The Nevada Legislature did not expressly cede or reserve any jurisdiction over this particular site, and there was then in effect no general legislation pertaining to cession or reservation of jurisdiction over lands acquired by the United States within Nevada. No federal legislation relating specifically to the site has been found.

QUESTION

Is a pathologist who performs an autopsy at the Veterans Administration Hospital in Reno, Nevada, pursuant to regulations issued by the Administrator of Veterans Affairs, upon the body of a patient of the hospital who died in the hospital under normal circumstances, subject to the penal provisions of [NRS 451.010](#)?

CONCLUSION

No.

ANALYSIS

The general rule is that an unauthorized autopsy constitutes a tort (52 A.L.R. 1447), and under a statute so providing, the unauthorized dissection of a dead body is a specific criminal offense. *Darcy v. Presbyterian Hospital*, 95 N.E. 695, 202 N.Y. 259.

[NRS 451.010](#) provides:

1. The right to dissect the dead body of a human being shall be limited to cases:
 - (a) Specially provided by statute or by the direction or will of the deceased.
 - (b) Where a coroner is authorized to hold an inquest upon the body, and then only as he may authorize dissection.
 - (c) Where the husband, wife or next of kin charged by law with the duty of burial shall authorize dissection for the purpose of ascertaining the cause of death, and then only to the extent so authorized.
2. Every person who shall make, cause or procure to be made any dissection of the body of a human being, except as provided in subsection 1, shall be guilty of a gross misdemeanor.

As pointed out in Attorney General Opinion No. 138, dated January 23, 1952, that language of such section which makes dissection of a dead body a gross misdemeanor, except as permitted in the section, is clear and unmistakable. The conclusion of that opinion was that the State Board of Health had no authority to adopt a regulation enlarging the scope of [NRS 451.010](#) so as to authorize the administrator of a county hospital, a friend or the person or organization paying the funeral expenses of a person without relatives to grant permission for a post-mortem examination of the body of such person.

The Administrator of Veterans Affairs is directed to prescribe "limitations in connection with the furnishing of hospital and domiciliary care" by section 621(2) of Title 38, U.S.C., and regulations within the authority of such section have the effect of law. *U.S. v. St. Paul Mercury Indemnity Co.*, D.C. Neb. 1955, 133 F.Supp. 726, affirmed 238 F.2d 594.

Paragraphs (a) and (b) of 38 CFR 17.155, as amended, 24 F.R. 8330, Oct. 14, 1959, provide:

(a) Except as provided in this section, no autopsy will be performed by the Veterans Administration unless there is no known surviving spouse or known next of kin; or without the consent of the surviving spouse, or, in a proper case, the next of kin, unless the patient or domiciled person was abandoned by the spouse, if any, or, if no spouse, by the next of kin for a period of not less than 6 months next preceding his death. Where no inquiry has been made for or in regard to the decedent for a period of 6 months next preceding his death, he shall be deemed to have been abandoned.

(b) If there is no known surviving spouse or known next of kin, or if the decedent shall have been abandoned or if the request is sent and the spouse or, in proper cases, the next of kin fails to reply within the reasonable time stated in such request of the Veterans Administration for permission to perform the autopsy, the Manager is hereby authorized to cause an autopsy to be performed if in his discretion he concludes that such autopsy is reasonably required for any necessary purpose of the Veterans Administration, including the completion of official records and advancement of medical knowledge.

Such regulations authorize the manager to cause an autopsy to be performed where there is no known surviving spouse or known next of kin; where the spouse, or next of kin if there is no spouse, has made no inquiry regarding the decedent for 6 months preceding his death; and where the spouse or next of kin fails to reply within a reasonable time stated in a request for permission to perform the autopsy. Performance of an autopsy in such cases is not permitted by the provisions of [NRS 451.010](#) and would ordinarily subject the violator to criminal prosecution.

However, the matter is complicated by the involvement of a federal agency operating in a federally owned area under a presumably valid regulation having the force of federal law. If the Federal Government has exclusive jurisdiction over the hospital, Congress has the combined powers of a general and state government in such area (*Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, 318 U.S. 285, 87 L.Ed. 761, 63 S.Ct. 628), including the power to regulate and control such matters as ordinarily fall within the police power of the state (*Oklahoma City v. Sanders, C.C.A. 10th*, 94 F.2d 323, 115 A.L.R. 363). Moreover, regardless of the jurisdictional status of such area, if a power or authority vested in the Federal Government by any provision of the United States Constitution is here involved, the state may not impinge upon such power or authority.

Since the state did not expressly cede jurisdiction over the hospital site to the United States, the latter could have acquired exclusive jurisdiction over such area only by virtue of that provision of U.S. Art. I, Sec. 8, cl. 17 which gives Congress power to exercise exclusive legislation “over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings.”

The requirements for acquisition by the United States of exclusive jurisdiction under this clause of the United States Constitution are (1) consent of the Legislature of the state in which is located the area subject to jurisdictional transfer; (2) acquiescence or acceptance by the Federal Government; (3) “purchase” of the area by the Federal Government; (4) acquisition of the fee by the Federal Government; and (5) acquisition of the property by the Federal Government for a purpose contemplated by cl. 17.

1. Consent of State Legislature: Here the Nevada Legislature did not expressly consent to a transfer of or reserve any jurisdiction. It merely authorized and directed the Reno City Council to execute a deed to the property. Nor was there then in effect any general consent statute such as [NRS 328.030](#) to [328.150](#), inclusive, which, under the provisions of subsection 2 of [NRS 328.130](#), does not apply to property whose recorded title stood in the name of the United States on March 27, 1947. In view of the rule that it will not be presumed that states have relinquished sovereignty in the absence of a clearly expressed intent (*Six Cos. Inc. v. DeVinney, D.C. Nev.*, 2 F.Supp. 693; *State v. Mendez*, [57 Nev. 192](#), 61 P.2d 300), there is some question whether the

Nevada Legislature consented to a transfer of exclusive jurisdiction within the requirements of U.S. Art. I, Sec. 8, cl. 17. However, no particular phraseology is necessary to express such consent in the opinion of the Attorney General of the United States (39 Ops. A.G. 99, 1937); it has been held that where the United States purchases land in a state with the consent of the legislature for one of the purposes contemplated by the Federal Constitution, it acquires exclusive jurisdiction although cession of its jurisdiction by the state is not declared unequivocally (*Commonwealth v. King*, 68 S.W.2d 45, 252 Ky. 699 (1934)); and the Nevada Legislature expressly reserved jurisdiction of some sort in other cases in which the United States acquired lands in Nevada near the time of the transfer in question.

2. Acceptance by Federal Government: Prior to 1940, when a statute was enacted requiring a formal acceptance of jurisdiction by the United States (40 U.S.C. 255), its acceptance of jurisdiction over the purchase area was presumed in the absence of a showing of contrary intent (*State v. Blair*, 238 Ala. 377, 191 So. 237), and such statute is not applicable to land acquired by the Federal Government prior to its enactment (*Markham v. United States* 215 F.2d 56, C.A. 4th, 1954, cert. den., 348 U.S. 939). In addition to such presumption, here the United States has affirmatively indicated its acceptance of jurisdiction by constructing the hospital and operating it for a period of more than 20 years.

3. Acquisition of the fee: The Nevada Legislature directed transfer of title in fee simple absolute to the United States, and the executed deed conforms to this direction.

4. "Purchase:" The recited consideration for the transfer is only \$1, but a conveyance for such a consideration is regarded as a purchase within the meaning of cl. 17 (39 Ops. A.G. 99, 1937, *supra*) and, apparently, even donations meet this requirement. *See Pothier v. Rodman*, 285 Fed. 632, D.R.I., 1923, *aff'd*, 264 U.S. 399.

5. Purpose of acquisition: The words "forts, magazines, arsenals, dockyards, and other needful buildings," as they appear in cl. 17 generally have not been construed according to the rule of ejusdem generis. The words "other needful buildings" have been construed to include structures not of a military character and any buildings or works necessary for governmental purposes. *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L.Ed. 155, 58 S.Ct. 208, 114 A.L.R. 318. Such words have been held to include homes for disabled volunteer soldiers (*State v. Intoxicating Liquors*, 73 Me. 401, 6 At. 4; *Sinks v. Reese*, 19 Ohio St. 306, 2 Am.Rep. 397; *State ex rel. Lyle v. Willett*, 117 Tenn. 334, 97 S.W. 299) and would clearly seem to encompass a veterans hospital.

It is our conclusion that all of the requirements for acquisition by the United States of exclusive jurisdiction over the Veterans Administration Hospital have been met and that therefore the penal provisions of [NRS 451.010](#) do not apply to such site. In *U.S. v. Essex Trust Co.*, D.C. Mass. 1942, 44 F.Supp. 476, it was held that state law did not control the question of the validity of a veteran's contract by which his personalty became the property of the board of managers of the national soldiers' home in such state upon his death and while an inmate of the home, since the federal statute under which the contract was executed became the supreme law in the territory ceded by the state to the United States as a site for the home *See also Ohio v. Thomas*, 173 U.S. 276, 43 L.Ed. 699, 19 S.Ct. 453; *Bank of Phoebus v. Byrum*, 110 Va. 708, 67 S.E. 349, 27 L.R.A. (NS) 436, 135 Am.St.Rep. 953; *Sinks v. Reese*, 19 Ohio St. 306, 2 Am.Rep. 397.

Nor is the regulation in question rendered invalid by adoption of [NRS 451.010](#) by section 13 of Title 18, U.S.C. commonly referred to as the Assimilative Crimes Act, even though [NRS 451.010](#) was in effect when the United States acquired the hospital site. This is so because the Assimilative Crimes Act will not operate to adopt any penal statutes which conflict with federal policy as expressed by acts of Congress or by valid administrative regulations. *Air Terminal Service v. Rentzel*, 81 F.Supp. 611.

Apart from the matter of exclusive jurisdiction in the United States, a strong case may be made for precedence of the federal regulation over the state statute by virtue of the supremacy clause of the United States constitution (U.S. Art. VI, cl. 2). A 1961 decision of the United States Supreme Court, *United States, Trustee v. Oregon*, is sharply persuasive on this point. In that case, an Oregon resident died in a Veterans Administration Hospital in Oregon without a will or legal

heirs, leaving personal property. He had not entered into a contract with the United States concerning such property and was mentally incompetent to do so. Oregon claimed such property under its escheat law, and the United States under 38 U.S.C. (1952 ed.) section 17, which provides that, when a veteran dies in such a hospital without a will or legal heirs, his personal property "shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund." The United States, as trustee, was awarded the property. The Court held that the statute was within the powers of Congress and not violative of the Tenth Amendment of the United States Constitution, relating to the reserved powers of the states, since the United States could build hospitals and homes for veterans under its constitutional powers to raise armies and navies and conduct wars. The Court so held notwithstanding that succession to property has traditionally been a state matter.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Kaye Richey
Deputy Attorney General

OPINION NO. 62-273 HOSPITALS; DEPARTMENT OF HEALTH, STATE—The State Department of Health by recommendation of the hospital advisory council has authority to adopt licensing standards for maternity homes, nursing and convalescent homes, medical hospitals, and other nursing and medical institutions. The licensing would then be in accordance with the facilities provided in accordance with the promulgated standards.

Carson City, February 16, 1962

Nevada State Department of Health, Carson City, Nevada.

Attention: Mr. Donald A. Baker, Director, Division of Hospital Services.

STATEMENT OF FACTS

Dear Mr. Baker:

A certain convalescent facility in Nevada has heretofore been licensed from 1959, under the title "..... Convalescent Center." (We have intentionally omitted a part of the name which can have no bearing upon the problem presented.)

During the latter part of 1961 the owner of this private medical facility has expressed a desire to change the name to "..... Medical Hospital." Application has been made for the renewal license to be issued in the name last designated. The management has in fact used and is using the proposed new designation. Since this institution has fewer facilities than are normally provided by medical hospitals, the state Department doubts its authority to license in the name proposed, and has requested a discontinuance of the name, stating that the new name misleads the public. The State Department has licensed on a temporary basis and has propounded to this Department a question.

QUESTION

It is proper under Nevada law for a facility designated, constructed and operated as a nursing home, or convalescent home, to be assigned the name of, and licensed by the Department as “medical hospital?”

CONCLUSION

It is not proper if the State Department of Health has adopted or will hereafter adopt licensing standards for each class of hospital covered by [NRS 449.020](#) to [449.240](#), in accordance with the recommendations of the Hospital Advisory Council.

ANALYSIS

[NRS 449.020](#) defines the term “hospital.” The term is broad enough to include a nursing or convalescent home.

[NRS 449.030](#) requires all hospitals in Nevada to be licensed.

[NRS 449.080](#) provides that a license shall in a proper case be issued by the State Department of Health, while [449.040](#) provides the minimum information that shall be supplied in application for a license, and [449.050](#) provides the fees that are to be charged for licensing of hospitals of varying capacities.

[NRS 449.100](#) provides the qualifications and appointment by the governor of a hospital advisory council, and the subsequent sections make provision for the meetings, compensation and filling of vacancies in such council.

[NRS 449.160](#) and subsequent sections make provision for the denial, suspension and revocation of licenses, by the State Department.

[NRS 449.150](#) provides the following:

449.150 The state department of health shall have the following powers.

1. To make or cause to be made inspections of institutions which apply for or hold hospital licenses.
2. *To adopt licensing standards for each class of hospital covered by [NRS 449.020](#) to [449.240](#), inclusive, in accordance with the recommendations of the hospital advisory council.*
3. *To adopt rules and regulations governing the licensing of such institutions in accordance with the recommendations of the hospital advisory council.*
4. To employ such clerical and inspecting assistants as it deems necessary or convenient to carry out the provisions of [NRS 449.020](#) to [449.240](#), inclusive.
5. To adopt such other rules and regulations as it deems necessary or convenient to carry out the provisions of [NRS 449.020](#) to [449.240](#), inclusive.
(Emphasis supplied.)

It is therefore clear that the State Department of Health in accordance with the recommendations of the hospital advisory council may “adopt licensing standards for each class of hospital,” now or hereafter operating in the State of Nevada.

It is recommended that the State Department of Health and the hospital advisory council adopt licensing standards for different types of hospitals, maternity homes, as well as nursing and convalescent homes and other types of hospitals. After such licensing standards are promulgated, the present licensee and others in the future that apply for licenses will fall into one category or another by the facilities that it provides.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 62-274 LIQUEFIED PETROLEUM GAS BOARD; NEVADA—When an LPG business and license is held by a corporation the sale or exchange of stock in such licensee corporation will not of itself require an application for a new license. However, if the corporation sells the business or changes its business location or changes its president, vice president, secretary or other managing officers, it will become necessary for it to obtain a new license.

Carson City, February 21, 1962

Mrs. Ivy M. Shannon, Executive Secretary, Nevada Liquefied petroleum Gas Board, P.O. Box 338, Carson City, Nevada.

STATEMENT OF FACTS

Dear Mrs. Shannon:

A Class 1 license as an LPG dealer has formerly been issued to a corporation, which license is presently in full force and effect. Recently, a substantial portion of the outstanding stock (over 51 percent of the licensee corporation) has been sold to a person or persons who formerly held no stock in the corporation.

QUESTION

When a controlling interest of the voting stock of a corporation licensed as an LPG dealer passes by a completed sale to persons who formerly held no interest in the corporation, must the corporation make application for the issuance of a new license?

CONCLUSION

With exceptions and limitations, as hereinafter noted, the question is answered in the negative.

ANALYSIS

At the outset it is fitting to remark that Liquefied Petroleum Gas (LPG) is a highly explosive volatile liquid, requiring knowledge and care in its confinement and sale, thus making it proper in the public interest, under the police powers of the State, that authority to deal with and dispense it be protected by license.

Accordingly, the Legislature has made provision for the creation of an LPG Board and has authorized the Board to make rules and regulations in respect to the licensing of dealers, the supervision of licensees and the revocation of licenses for cause. The Legislature in its wisdom has seen the danger inherent in the LPG business, and has shown a disposition by the provisions of [NRS 590.465](#) to [590.645](#) to protect the public from irresponsible, careless, negligent, indifferent and dishonest dealers. Such are the principal purposes of the statute.

Under the rule-making power ([NRS 590.515](#)), we understand the LPG Board has required and does require by appropriate rules:

- a. That every licensed dealer have constantly associated with the said licensee a qualified LPG man, who shall be authorized to serve in an administrative capacity, and
- b. That every licensed dealer shall maintain in full force and effect upon its operation, insurance, adequate in amount to protect the public.

The “qualified LPG man” is one who is so certified by the Board after he has successfully passed a written and oral examination given by the Board upon matters showing “that the applicant is qualified by experience, education or knowledge, to install equipment in a satisfactory and safe manner or is qualified by experience, education or knowledge, to sell, transport or deliver the gas.” ([NRS 590.565](#), subsection 2.)

As a general rule, since a corporation is an individual entity, existing separate and apart from the entities or natural persons who own it, its rights and duties under its contracts are not affected by changes in ownership of its stock, and this would normally be true in cases in which a substantial part of its outstanding capital stock changed ownership.

However, there are exceptions in which the business of the corporation is “coupled with a public interest” and public officials may look beyond the “corporate veil” to determine responsibility. Examples are individual criminal responsibility of directors who commit crimes in the names of their corporations; also cases in which particular skills are required of persons who are connected with and who serve the corporation which holds the license. Examples of this latter illustration are (a) brokers licenses running to real estate corporations, in which one of the corporate officers must have successfully passed the brokers examination as provided by [NRS 645.370](#); and (b) insurance agents licenses running to a corporation under [NRS 684.090](#), in which all persons, officers or directors who are authorized to act must have qualified for the issuance of an individual license. Examples of this principle are numerous.

Under the provisions of [NRS 590.555](#) it is clear that a corporation may be licensed as an LPG dealer. In part, this section provides:

1. Applications for any licenses required by [NRS 590.465](#) to [590.645](#), inclusive, shall be made to the board prior to conducting any business or installing equipment for the use of LPG or prior to engaging in the business of selling LPG, and no person may install or conduct any business of installing equipment for the use of LPG or engage in the business of selling LPG until such person has obtained a license from the board.
2. The application shall include the name and address of the applicant, and, if a partnership, the names and addresses of all partners, and *if a corporation, association or other organization, the names and addresses of the president, vice president, secretary and managing officers.* (Emphasis supplied.)

It would appear from the content of [NRS 590.555](#), subsection 2, that every time there is a change in any of the officers named of the licensee corporation, there should be a report of the same to the Board and an application should be made for another license.

A change in the ownership of a substantial portion of the outstanding voting capital stock of the licensee corporation might result in a change in the officers and directors of the corporation, but it would not necessarily have this effect.

[NRS 590.595](#) provides:

1. Any license issued under the provisions of [NRS 590.465](#) to [590.645](#), inclusive, shall not be transferable by the licensee or licensees to any other person, firm, association, partnership or corporation, and shall be valid only for the particular premises and particular persons described therein.
2. Whenever there is any transfer or change in the ownership such change must be reported to the board within 30 days.
3. No license fee paid under [NRS 590.465](#) to [590.645](#), inclusive, shall be refunded whenever any license issued has ceased to be valid either because of a voluntary transfer of any nature, revocation under the provisions of [NRS 590.465](#) to [590.645](#), inclusive, death, insolvency, assignment for the benefit of creditors, or for any other reason.

An LPG license “shall be valid only for the particular premises and particular persons described therein.” ([NRS 590.595](#), subsection 1.) Applications for a license running to a corporation shall show “the names and addresses of the president, vice president, secretary and managing officers.” ([NRS 590.555](#), subsection 2.)

It follows that if a corporate licensee has a transfer in ownership of a small or large portion of its stock, and does not change its location or any of the officers whose names were filed with the Board in application for license, and continues to hold its “qualified man” and its insurance, the existing license remains unaffected. However, if after such a sale of stock of the licensee corporation, the licensee does change its business premises, or changes any of the officers designated in [NRS 590.645](#), subsection 2, the corporation will then, and in such case, be required to apply for and to be again licensed.

Subsection 2 of [NRS 590.595](#) has reference to ownership of the business, and not to ownership of the stock in the corporation. Under this subsection, if the licensee corporation entered into a contract to sell the business to any person, firm, association, partnership or other corporation, it would require a report to the Board within 30 days and an application for a new license.

In summary, if there is a transfer of stock in a licensee corporation, and none of the other changes mentioned in the statute occurs, there would be no need for a change of any of the records of the Board or an application for another license.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 62-275 RESIDENCE REQUIREMENTS FOR ADMISSION OF MINORS TO THE NEVADA STATE HOSPITAL; “CHILDREN OF THE STATE OF NEVADA” CONSTRUED AS CHILDREN RESIDING IN NEVADA; DOMICILIARIES AND RESIDENTS OF NEVADA—Under the provisions of chapter 433 of NRS, relating to the Nevada State hospital, a mongoloid child in a hospital in another state is ineligible for admission to the Nevada State Hospital where such child has never been physically present in Nevada and his parents have been absent from the State for more than 1 year.

Carson City, February 22, 1962

Jules Magnette, M.D., Superintendent, Nevada State Hospital, P.O. Box 2460, Reno, Nevada.

STATEMENT OF FACTS

Dear Dr. Magnette:

The parents of a 4-year-old mongoloid child, who is presently a patient at a United States Army hospital in Massachusetts, seek to have their child admitted to the Nevada State Hospital.

The father of the child volunteered for and is in the regular service of the United States. Both parents were actual residents of Nevada before the enlistment of the father, claim now to be legal residents of Nevada, and have voted in Nevada by absentee ballot for the past 10 years.

The child was born in Japan and has never been physically present in this State. Apparently both parents have been absent from the State for more than 1 year.

QUESTION

Is such child eligible for admission to the Nevada State Hospital?

ANSWER

No.

ANALYSIS

Since a judicial commitment is not contemplated, admission of the child in question to the Nevada State Hospital must be sought under the provisions of paragraph (b) of subsection 1 of [NRS 433.300](#), authorizing the Superintendent of the Hospital to receive and care for mentally deficient, noneducable “children of the State of Nevada”; or subsection 1 of [NRS 433.330](#), permitting the Superintendent to receive in the hospital as a voluntary patient any person, including a minor, in need of care and treatment where such person is a “resident of this State as defined in this chapter”; or subsection 2 of [NRS 433.580](#), empowering the Superintendent to give written permission for the return and admission to the hospital of “any resident of this State.” (Quotation marks supplied.)

[NRS 433.030](#) establishes the criteria for determining residence for the purposes of Chapter 433 of NRS, relating to the Nevada State Hospital, and provides:

In determining residence for the purpose of this chapter, a person who has lived continuously in the state for a period of 1 year, and who has not thereafter acquired a residence in another state, or abandoned his residence in this state or has not been absent from this state after acquiring such residence in this state for more than 1 year, shall be deemed to be a resident of this state. Time spent in a public institution or on parole therefrom or as a parolee from an institution in another state, shall not be counted in determining the matter of residence in this state.

Under this section, the sole condition precedent to the acquisition of residence is living continuously in Nevada for 1 year. But such residence is lost if, after its acquisition, the resident (1) acquires a residence in another state, or (2) abandons his residence in Nevada, or (3) is absent from Nevada for more than 1 year.

Although the parents of the child in question became residents of Nevada by complying with the condition precedent established by the section, and, presumably, neither acquired another residence nor abandoned their Nevada one, still their absence from Nevada for more than 1 year precludes their having the status of residents under the provisions of [NRS 433.030](#). The third proviso relating to absence for more than 1 year was added to the section by a 1957 amendment, and it must be presumed that the Legislature deliberately intended an additional limitation to the section by such amendment.

Even if it is assumed that the residence of the child for the purposes of Chapter 433 of NRS is constructively that of the father, which is a questionable assumption, the child is clearly ineligible for admission to the hospital under the provisions of [NRS 433.330](#), relating to voluntary admissions, or of [NRS 433.580](#), relating to repatriation. Those sections specifically require the applicant for admission to be a resident of the State as such residence is defined by [NRS 433.030](#), and the absence of the father from Nevada for more than 1 year defeats his claim to residence under the provisions of [NRS 433.030](#).

It is true that [NRS 433.300](#), which authorizes the Superintendent to receive and care for mentally deficient, noneducable children of the State of Nevada, does not specifically employ the term “resident” in reference to such children. But the language “children of Nevada” is ambiguous, and the words “of Nevada,” as used in such statute, may logically be construed as denoting “residing in Nevada.” (See *Winters v. Municipal Capital Corporation*, D.C. N.Y., 26 F.Supp. 330, at 332, where the word “of” was construed to mean “residing.”) Such a construction

seems particularly plausible since chapter 433 of NRS, as a whole, displays a legislative intent that the Nevada State Hospital be operated primarily for the benefit of Nevada residents. (See Attorney General Opinion No. 207, dated February 6, 1961 and Attorney General Opinion No. 159, dated May 27, 1960.)

Prior to its amendment in 1957, section 161 of the California Welfare and Institutions Code was similar to [NRS 433.030](#). Section 161 then provided that a person who had lived continuously in California for 1 year and had not acquired residence in another state by living continuously therein for at least 1 year subsequent to his residence in California should be deemed a resident for purposes of entitlement to hospitalization and repatriation. In 5 Ops. Cal. Atty. Genl., 162, it was held that such statute required actual and continuous physical presence in California for 1 year and did not contemplate constructive residence, such as is derived by a minor child from the residence of the father. Probably as a result of this opinion, the California legislature amended their statute by adding provisions that residence acquired in California was not lost by reason of military service and that the residence of minor children during the period of such military service should be determined by the residence of the parent in such service or by the residence of the child. (Sec. 1, Ch. 489, Stats. 1957.) Perhaps the Nevada Legislature will consider that an amendment such as that adopted by California is warranted in order to cover a case such as this, which is admittedly a hard one.

Although it is our conclusion that the parents and child in question are not residents of Nevada for the purposes of admission of the child to the Nevada State Hospital, such determination is not inconsistent with their being domiciliaries and residents of Nevada for other purposes. In fact, [Nev. Art. 2 expressly prevents the loss](#) of residence for voting purposes by reason of absence while employed in the service of the United States, and, apart from statutory limitation, removal or absence from a domicile once acquired does not ordinarily result in loss of domicile if there is a bona fide intent to return to it and no intent to acquire a domicile elsewhere. The words “domicile” and “residence,” which are at times convertible and at times not convertible terms, are frequently given different meanings even in the same jurisdiction, depending upon the legislative purpose of the statute involved and the context in which the word is used. In Chapter 433 of NRS, the word “residence” has a carefully defined and limited meaning. As used in other Nevada statutes, and for other purposes, the usage and interpretation of the word may well be broad enough to encompass the parents and child in question.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Kaye Richey
Deputy Attorney General

OPINION NO. 62-276 ELECTIONS; RESIDENCE FOR ELECTION PURPOSES; REQUIREMENT OF DOMICILIARY INTENT PLUS PHYSICAL PRESENCE FOR REQUISITE PERIODS; ACQUISITION OF VOTING RESIDENCE BY MEMBERS OF ARMED FORCES STATIONED IN NEVADA—Under provisions of [NRS 293.497](#), the residence for voting purposes of one who is employed in one county of the state but who permanently resides with his family in another county of the state is the county of residence, providing such person has the prescribed periods. Under provisions of [NRS 293.497](#), Nevada is the residence for voting purposes of one who permanently resides and is employed within the state, although his family resides in another state, provided such person has the necessary domiciliary intent and actual residence for the prescribed periods. A member of the Armed Forces stationed in Nevada may acquire a domicile in

Nevada for voting purposes if he is able to prove an intent to make Nevada his domicile by evidence which is sufficiently clear and unambiguous.

Carson City, March 7, 1962

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

STATEMENT OF FACTS

Dear Mr. Koontz:

1. A is employed in X County, Nevada, but has his home and family in Y County, Nevada.
2. B is employed in X County, Nevada, but his home and family are outside the State.
3. C, a member of the Armed Forces now stationed in Nevada, entered military service while a resident of another state.

QUESTIONS

1. Where is the residence of A for voting purposes?
2. Where is the residence of B for voting purposes?
3. May C acquire a residence for voting purposes in Nevada?

CONCLUSIONS

Question No. 1: Y County, as qualified in this opinion.

Question No. 2: The State of Nevada, as qualified in this opinion.

Question No. 3: Yes, as qualified in this opinion.

ANALYSIS

Question Nos. 1 and 2: The Constitution and statutes of Nevada make residence a prerequisite to the privilege of voting. Section 1 of Article 2 of the constitution of Nevada requires actual, as opposed to constructive, residence in the State for 6 months and in the district or county for 30 days preceding the election, and [NRS 293.485](#) requires continuous residence in the State 6 months, in the county 30 days, and in the precinct 10 days preceding the election.

While such provisions might seem to contemplate no more than bodily presence in the State, county and precinct for the specified periods of time, it is generally conceded that the term "residence," when used in constitutional and statutory provisions pertaining to elections, is synonymous with the term "domicile." This means that in order to acquire residence for voting purposes in a locality, an intention to make such locality home, and to abandon any former one, must concur with physical presence for the periods prescribed by the Constitution and statutes. (The provisions relating to length of time of residence are mandatory, and in this opinion it will be assumed that the persons in question have been physically present in the State, county and precinct for the requisite periods. The terms domicile and residence will be used interchangeably in this opinion.)

This additional requirement of intent admittedly makes measurement of the residence requirements of one seeking to vote difficult since there is no absolute criterion by which such intent may be ascertained. Each case must be determined upon its own facts, so that it would be improper and dangerously misleading to attempt to set forth any criteria in the abstract. About all that should be stated generally is that a person must have a domicile somewhere; that he cannot be domiciled in two places at once; and that one domicile is presumed to continue until a new one is established. In determining whether the necessary intent exists, declarations of the person seeking to vote are not controlling, and probably more consideration should be given to his

intention as manifested by his acts, conduct and other factors which serve to connect him with a given locality, such as payment of taxes and ownership of property.

According to the facts given, A and B are both married men employed, in the case of A, in a county other than that in which his family resides, and, in the case of B, in a state other than that in which his family resides. The facts related show that B resides where he is employed, but there is no indication whether A resides in the county of employment or commutes to work from the family residence. Moreover, in each case it is stated that the persons in question have their “home” at the place where their families reside, but it is not clear whether “home” refers to the family dwelling place in a physical sense, or the place to which A and B, when absent, intend to return. For the purposes of this opinion, it will be assumed that A lives with his family and commutes to work, and that “home” is used in the physical sense to designate the family dwelling.

In the absence of statute, the domicile of a married man for voting purposes is presumed to be at the place where his wife and family reside. But such presumption is rebuttable, since a husband may establish a legal residence apart from his wife and family. For example, in *Hill v. Niblett*, 187 At. 869, 171 Md. 653, a saloon keeper, who slept and kept his clothes in a room over his saloon and ate his meals at a restaurant he operated in conjunction with the saloon, and who regarded the saloon as his real home, was held to be a resident for election purposes of the precinct in which the saloon was located, notwithstanding that his wife and family, with whom he stayed two evenings a week, resided in another precinct and that he was listed in the police census as living at the residence of his family. The Court there held that the presumption of domicile at the residence of his family was overcome by the actual facts and circumstances, one of which was the intention of the voter.

By [NRS 293.497](#), the Nevada Legislature has prescribed a rule for determining residence for voting purposes which appears applicable to the situations of both A and B. It provides:

If a man has a family residing in one place and he does business in another, the former is his residence, unless his family is located there only temporarily, but if his family resides without the state and he is permanently located within the state, with no intention of removing therefrom, he shall be deemed a resident for election purposes.

The first clause of such section indicates that, for election purposes, the residence of A is Y County, the county in which his family lives, and the residence of B is the State of Nevada, provided he is permanently located here and has no intention of leaving. The second clause of the section clearly requires a domiciliary intent, and the first one states the presumption already mentioned.

This statute provides a useful guidepost, and, under the facts related, we advise its application to A and B to determine their residence for voting purposes. You should be cautioned, however, that the element of intent should always be kept in mind, since, in other jurisdictions which have established statutory rules for determining residence for voting purposes, it is held that the intention of the prospective voter remains a circumstance to be considered, although the statute is silent on that subject. (*McBride v. Cantu*, 143 S.W.2d 126.)

Question No. 3: Both Section 2 of Article 2 of the Constitution of Nevada and [NRS 293.487](#) contain a provision to the effect that residence for the purpose of voting is not gained nor lost by reason of presence or absence while employed in the service of the United States, and [NRS 293.105](#) declares persons in the Armed Forces of the United States to be in the “service of the United States.”

No Nevada cases construing these cases have been found, but several opinions of former attorneys general indicate that, unless a member of the Armed Forces was a Nevada resident prior to his entering military service, he may not establish a voting residence here because he is subject to the will of superior officers and consequently has no power to select his domicile. (For example, see Attorney General Opinion No. B 962, dated October 27, 1950; and Attorney General Opinion No. 339, dated August 6, 1946.)

It is now felt that these opinions should be overruled, for, while it is true that the rule that the fact of actual residence in a place is prima facie evidence of domicile there in the absence of other evidence does not apply to a serviceman because a change of his domicile is not by his volition, still the weight of authority holds that constitutional and statutory provisions such as those of Nevada do not absolutely preclude a person in the military service from gaining a voting residence (29 A.L.R., 1387, 140 A.L.R. 1101, 148 A.L.R. 1415, 17 Cal.Jur.2d, section 12, page 259). Under these authorities, presence in a locality by reason of employment in the service of the United States is not to be taken into account in determining residence, but a change of domicile may be effected by a person in the military service if his actions sufficiently indicate his intention to change his permanent residence.

But it is also held that an intention of a person in the military service to change his domicile must be shown by clear and unequivocal evidence (129 A.L.R. 1389, 148 A.L.R. 1416). Because a person in such service does not have the benefit of the presumption that the place where one actually lives is his domicile, residence in an area is no evidence of an intention to make such place his home, and his burden of proof is very great. Although it is perilous to generalize in this area of the law, the difficulty of meeting this burden may well mean, as a practical matter, that the majority of servicemen stationed in Nevada, if they were not residents prior to their entry into service, will be unable to qualify as residents for voting purposes here.

As to the kind of proof necessary to establish the intention to effect a change of domicile, it has variously held that such intention must exist, concur with, and be manifested by resultant acts independent of the presence of the soldier in the new locality (Re Cunningham, 45 Misc. 206, 91 NYS 974); that it must be clear and associated with something fixed and established as indicating the purpose of change (*Ex parte White*, 228 F. 88); that it must be established by independent evidence (*Harris v. Harris*, 105 Iowa, 180, 215 NW 661); that it must be to make a home at the moment and not in the future (*Smith v. Smith*, 194 Miss. 431, 12 So.(2d) 428); that it must be of remaining in the area apart from military service (*Kennedy v. Kennedy*, 205 Ark. 650, 169 SW(2d) 876). For example, in *In re Seld*, 269 App.Div. 235, 51 NYS(2d) 1, it was held that a voting residence had been established in an area in which a naval officer was stationed where, in addition to this testimony that he intended to make the voting district his permanent abode, there was evidence that he had no other home, he lived with his wife in a rented apartment in the area although they could have lived at the naval base, his wife taught in the local high school, they maintained a bank account in the area, and they used the residence as their mailing address and registered their automobile at such address.

The facts of this case are given merely by way of example and are not intended to serve as an inflexible yardstick for the determination of residence for voting purposes. It should be noted that what constitutes sufficient evidence to prove a change of domicile by a person in the military service varies from jurisdiction to jurisdiction and that some other courts would require more or stronger evidence of an intent to make such a change. Again, each case must be resolved upon its own facts by application of the general principles enunciated, and it is the function of the county clerk, as ex officio county registrar, to make the factual determinations.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Kaye Richey
Deputy Attorney General

OPINION NO. 62-277 MANNER OF FILLING VACANCY IN THE OFFICE OF A MEMBER OF THE BOARD OF REGENTS OF THE UNIVERSITY OF NEVADA; CONFLICT BETWEEN STATUTE AND CONSTITUTIONAL PROVISION—

Section 22 of Article 17 of the Constitution of Nevada and [NRS 283.110](#), rather than 396.060, govern the manner in which a vacancy in the office of a member of the Board of Regents of the University of Nevada is to be filled and do not authorize an appointment of the successor for the unexpired term, but require an election of such successor at the next general election.

CARSON CITY, March 8, 1962

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

STATEMENT OF FACTS

Dear Mr. Koontz:

In 1960 Mr. Newton Crumley was elected to a four-year term as a member of the Board of Regents of the University of Nevada, but his office on such board became vacant as a result of his death in February of 1962.

QUESTION

May the Governor appoint a successor to fill the unexpired term of Mr. Crumley, or is it necessary that his successor be elected at the next general election in 1962?

CONCLUSION

Such vacancy must be filled by election at the general election in 1962.

ANALYSIS

[NRS 396.060](#) authorizes the filling of a vacancy in the Board of Regents by appointment of a qualified person to serve until the expiration of the term of office of the regent originally elected, which, in this case, would be 1964.

However, Section 22 of Article 17 of the Constitution of Nevada provides that if the office of any state officer becomes vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the Governor until it *shall* be filled by election for the residue of the unexpired term. And [NRS 283.110](#) provides that whenever any vacancy occurs in the office of any state officer, the Governor shall fill the same by granting a commission which shall expire at the next general election by the people and upon the qualification of his successor, at which election such officer shall be chosen for the balance of the unexpired term. (Emphasis supplied.)

It is arguable that Section 8 of Article 5 of the Constitution of Nevada is authority for enactment of [NRS 396.060](#) because such section permits appointment until the next general election only if no mode is provided by the Constitution and laws for filling such vacancy, and [NRS 396.060](#) is a law which provides a different mode; that those provisions of Section 7 of Article 11 of the Constitution of Nevada directing the Legislature to provide for elections of members of the Board or Regents is broad enough to cover the matter of vacancies and authorizes enactment of [NRS 396.060](#) because it is specific and so takes precedence over Section 22 of Article 17; and that all of Article 17 is obsolete on the theory that it was intended to apply only during the transitional period from territorial status to statehood.

However, it seems that these arguments must fall under the decision of the Supreme Court of Nevada in *State ex rel. Dickerson v. Elwell*, [73 Nev. 187](#) (1957). In that case the Court held that, where the Legislature increased membership in the Board of Regents from five to nine members, vacancies which existed in the four new offices could be filled, until the next general election, only by appointment by the Governor, and, therefore, that the appointment by the Legislature of

persons to fill such vacancies was without constitutional authority. The Court referred to members of the Board of Regents as state officers, stated that section 22 of Article 17 applied to vacancies in such offices, and indicated that Section 8 of Article 5 applied to county officers. It failed to mention [NRS 396.060](#).

In addition, Section 8 of Article 5 refers to the Constitution as well as laws, and Section 22 does provide a mode for filling vacancies in state offices, and other Nevada cases have treated Section 22 as though it were operative and not a transitional provision. *See*, for example, *Clarke v. Irwin*, [5 Nev. 111](#), which holds that the Constitution prescribes the mode of filling vacancies in state offices. Moreover, it should be noted that the general policy seems to require the filling of vacancies in public office by election as soon as practicable after the vacancy occurs, and, in fact, in *Ex. rel. Penrose v. Greathouse*, [48 Nev. 419](#), it was specifically held that Section 22 of Article 17 manifested such a policy so far as the offices mentioned in such section are concerned.

Because of these considerations, and especially in the light of the Elwell case, we feel constrained to conclude that [NRS 396.060](#) violates Section 22 of Article 17 of the Constitution of Nevada, and that Section 22 and [NRS 283.110](#) govern the case under consideration.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: KAYE RICHEY
Deputy Attorney General

OPINION NO. 62-278 PUBLIC SERVICE COMMISSION WATER AND SANITATION DISTRICTS [NRS 311.130](#) (12) CONSTRUED—Rates fixed by the board of directors of water and sanitation districts organized under Chapter 311 of NRS must be approved by Public Service Commission, but that Commission is without authority to independently alter or amend approved existing rates.

Carson City, March 8, 1962

Public Service Commission, Carson City, Nevada.

STATEMENT OF FACTS

Gentlemen:

Clark County Sanitation District No. 2 is organized under the provisions of Chapter 311 of NRS. It provides sewer service at specified rates to persons encompassed within its boundaries. The Public Service Commission has received a complaint alleging that a service charge, heretofore established by the district and approved by that Commission, is discriminatory. The Commission has asked if it is authorized to act on the complaint.

QUESTION

Does the Public Service Commission have authority to independently alter or amend rates fixed by water and sanitation districts organized under Chapter 311 or NRS which have been approved by the Commission?

CONCLUSION

Rates fixed by the board of directors of water and sanitation districts organized under Chapter 311 of NRS must be approved by the Public Service Commission, but that Commission is without authority to independently alter or amend approved existing rates.

ANALYSIS

[NRS 311.130](#) provides, in part, as follows:

For and on behalf of the district the board shall have the following powers:

* * *

To fix and from time to time to increase or decrease water and sewer rates, tolls or charges for services or facilities furnished by the district, and to pledge such revenue for the payment of any indebtedness of the district. The board shall fix such rates, tolls or charges as shall be approved by the public service commission of the State of Nevada. Until paid, all rates, tolls or charges shall constitute a perpetual lien on and against the property served,

* * *

The cited provision empowers the board of directors of the district to fix rates, tolls and charges. The charges thus established must be “approved” by the Public Service Commission. Webster defines “approved” to mean: “To sanction officially; to ratify; confirm * * *.” *See Long v. Needhorn*, 37 Mont. 408, 96 P. 731. There is no language contained in the applicable legislation vesting the Public Service Commission with power to initially establish or modify approved rates and charges.

The limited scope of Commission jurisdiction over water and sanitation districts becomes apparent when the cited legislation is compared with the authority of the Commission to regulate public utilities as defined by Chapter 704 NRS. For example, [NRS 704.210](#)(1) states that the Commission shall have full power to “prescribe classifications of the service of all public utilities, and *fix and regulate the rates therefor.*” [NRS 704.450](#) requires the Commission to investigate complaints of unjust rate discrimination by public utilities. The statute governing water and sanitation districts does not impose a similar requirement upon the Commission.

Based on the foregoing reasons we are of the opinion that while utility rates, fixed by the board of directors of water and sanitation districts organized under Chapter 311 of NRS, must be approved by the Public Service Commission, that Commission is without authority to independently alter or amend approved existing rates. The power of the Commission to approve rates, tolls and charges fixed by the board of directors of the district is a discretionary one. *See State ex rel. Pilkington v. Bush*, 211 Ark. 28, 198 S.W.2d 1005. Persons dissatisfied with a rate schedule initially established in the manner prescribed by [NRS 311.130](#)(12) could properly urge the Commission to disapprove a proposed schedule but, after the Commission has acted, complaints should be addressed to the board of directors of the district who are endowed with the power to “fix and from time to time increase or decrease” rates.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

**OPINION NO. 62-279 PRISONS AND PRISONERS; INDETERMINATE SENTENCES;
CONSTRUCTION, VALIDITY, REMEDIES FOR INVALID SEN-TENCES—**

Where imposition of an indeterminate sentence is required, the court may not fix the minimum and maximum terms of the sentence to expire at the same time. Under the provisions of 176.180, providing for indeterminate sentences, the trial court is required to fix a maximum term of imprisonment where none is prescribed by the statute under which conviction was obtained, and failure to do so makes the sentence defective. Whether such a defective sentence is void or voidable will not be determined in view of a pending appeal.

Carson City, March 23, 1962

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

STATEMENT OF FACTS

Dear Mr. Fogliani:

On December 9, 1961, the Seventh Judicial District Court of the State of Nevada sentenced James Albert Carter to imprisonment in the Nevada State Prison for the term "of not less than 10 years, under the provisions of [NRS 207.010](#)." The defendant is presently confined in the prison under such sentence and is reportedly taking an appeal therefrom.

[NRS 207.010](#) constitutes an habitual criminal act, and subsection 1 of such section provides a minimum term of 10 years imprisonment for those covered by the subsection, but fails to specify a maximum term for such persons. Subsection 1 of [NRS 176.180](#) requires the trial court to direct that any person convicted of any felony for which no fixed period of confinement is imposed by law be confined in the State Prison for an indeterminate term, limited only by the minimum and maximum term prescribed for the offense of which such person is convicted, and subsection 2 of [NRS 176.180](#) provides that "where no maximum term of imprisonment is prescribed by law, the court *shall* fix such maximum term of imprisonment." (Emphasis supplied.) [NRS 176.190](#) authorizes the State Board of Parole Commissioners to release upon parole any prisoner confined in the State Prison at any time after expiration of the minimum term of imprisonment for which he was committed.

QUESTIONS

1. May the sentence in this case be construed as imposing a maximum, as well as a minimum, term of 10 years imprisonment?
2. Was the trial court required to fix a maximum sentence in this case?
3. If the answer to question No. 2 is in the affirmative, what is the appropriate remedy?

CONCLUSIONS

Question No. 1: No.

Question No. 2: Yes.

Question No. 3: The proper remedy depends upon whether the sentence is void or voidable, although appeal is available in either case.

ANALYSIS

An indeterminate or indefinite sentence is one for the maximum period imposed by the Court, subject to termination by the parole board after service of the minimum term. (*U.S. v. Heufield, D.C.D.C.*, 62 F.Supp. 600.) It is clear that where a Court is required to impose an indeterminate term, it may not fix a definite, determinate one, and the weight of authority is also to the effect that a Court cannot fix the minimum and maximum terms of a sentence to expire at the same time where an indeterminate sentence is called for (27 A.L.R.2d 1344). This is so because identical minimum and maximum terms constitute a determinate sentence, and the imposition of

such a sentence improperly restricts the exercise of powers of parole delegated exclusively to parole boards (*State v. Moore*, 91 A.2d 342).

It is true that [NRS 176.190](#) authorizes the state Board of Parole Commissioners to release prisoners on parole at any time after expiration of their minimum term, so that it might be urged that the Board may establish the maximum term and a provision for such term in the judgment is inconsequential. But the maximum term of an indeterminate sentence is the vital part of the sentence (*Monaghan v. Burke*, 82 A.2d 337), since a prisoner has an absolute right of discharge only when he has served the maximum term (*In the Matter of Melosevich*, [36 Nev. 67](#)), and the minimum term is merely an administrative notice by the Court to the executive department that a prisoner is then entitled to have the question of the propriety of granting a parole considered (*Com. Ex rel. Balles v. Pennsylvania Bd. of Parole*, 61 Dauph. 361). Moreover, a prisoner may be restrained no longer than the maximum term, and subsection 2 of [NRS 176.180](#) directs the Court, in mandatory terms, to fix a maximum term where none is prescribed by law.

We therefore conclude that the sentence in question may not be construed as imposing a maximum, as well as a minimum, term of 10 years imprisonment and that the failure of the sentence to specify a maximum term different from the minimum one imposed makes it defective.

The real question, however, is whether the defect in the sentence is one which makes it void, or merely voidable, for the answer to this question determines the appropriate remedy for correction of the sentence.

Void and voidable judgments alike may be reversed or corrected upon appeal, but it is generally conceded that one is entitled to discharge upon habeas corpus, and, absent a constitutional or statutory provision to the contrary, the trial court has the power to revise, modify or amend a partly executed sentence, even during the term of Court at which it was rendered, only if the sentence is void, as opposed to being merely erroneous or irregular. (*Ex parte Tani*, [29 Nev. 385](#); 76 A.L.R. 468; 44 A.L.R. 1203; 70 A.L.R. 822; 168 A.L.R. 706.) (The rule regarding the power of the trial court to alter a partly executed sentence is not to be confused with its power to correct formal or clerical errors in its records by nunc pro tunc orders, upon a proper showing, to make them conform to the facts of the case.)

It is stated generally that a judgment is not void if the Court had jurisdiction of the person, jurisdiction of the subject matter, and jurisdiction to render the particular judgment imposed (*see In the Matter of the Application of Weinroth*, [46 Nev. 103](#)), but the courts reach varying conclusions, even on similar facts, in applying this rule.

[NRS 176.180](#), and its statutory predecessors, have been construed on several occasions by the Supreme Court of Nevada, but no case whose facts coincide with those of the present one has been considered by it.

The leading case decided under such section in Nevada is *In the Matter of Melosevich*, [36 Nev. 67](#), which involved an original proceeding in habeas corpus in which it was contended that a judgment of imprisonment “for the period of not less than 2 years and not to exceed 3 years” was void under the statute providing for indeterminate sentences because the penalty provision of the statute under which conviction was obtained provided for imprisonment for not less than 1 year, nor more than 14 years. The Court held that the fixing of a greater minimum or a less maximum sentence than that prescribed by statute for the particular offense did not accord with the purpose designed to be accomplished by the indeterminate sentence statute and that the sentence should have been for not less than 1 year and not to exceed 14 years. But, although the sentence imposed was held to be improper, the Court refused to discharge the petitioner because it also held the judgment was not void and could not be declared so upon collateral attack. The Court resolved the problem by disregarding the improper portions of the sentence as surplusage and reading the appropriate statutory provisions into the sentence. Such a solution was possible because of its holding that the trial court had no discretion to fix a greater minimum or a less maximum term than that specified by the statute.

As to the proper remedy in such cases, the Court, at page 73, states that the judgment could have been amended to conform to the law upon suggestion to the trial court, or could have been so modified upon appeal. It would seem that the simplest way to avoid this problem in the future

is for the district attorney in charge of a prosecution to bring to the attention of the sentencing court any defect in the sentence imposed before the prisoner commences to serve such a sentence.

In *State v. More*, [48 Nev. 405](#), the Supreme Court, on appeal and without granting a new trial or remanding the case to the trial court, modified what it held to be an erroneous minimum sentence of “not less than 50 years,” to conform to the statute providing for imprisonment for not less than 5 years for the crime involved in the case. The Supreme Court held that the trial court had no discretion to fix a greater minimum than was provided by statute, and, again, red the pertinent statutory provision regarding such minimum into the judgment.

In the case of *In the Matter of Application of Weinroth*, [46 Nev. 103](#), the Supreme Court held entirely proper a sentence fixing only a minimum sentence where the statute defining the crime involved prescribed only a maximum term, once more, apparently, on the theory that the appropriate statutory provisions should be read into the judgment.

It will be noted that in all these cases, the statute supplied the term of imprisonment which the sentencing court omitted or erroneously imposed, and none deal with a situation such as this where the sentencing court fails to impose a minimum or maximum term when the statute is silent as to such term. In *State v. Squier*, [56 Nev. 386, at page 404](#), the Court declares that where the statute providing the penalty for the crime charged does not prescribe any minimum term of imprisonment, it is the duty of the trial court to fix such minimum, but failure of the trial court to fix a minimum term was not directly involved in that case, and the Supreme Court did not determine whether an omission to fix a minimum or maximum term in a case where such term is not prescribed in the statute, renders the judgment void or merely erroneous.

Holdings of courts in other jurisdictions as to whether a particular defective sentence is void or merely voidable are collected in the four A.L.R. articles already referred to and will not be reviewed in this opinion. As stated before, the conclusions in this area are frequently diverse, even on similar facts, and this applies to failure of a court to fix a minimum or maximum term in situations similar to the one under consideration. For example, in *Abt v. Walker*, 10 A.2d 596, it was held that failure to fix a maximum term left the period of the possible confinement entirely indefinite and called of reversal on appeal, where as in *State v. Clark*, 167 P. 84, and *Hawaii v. Armstrong*, 22 Hawaii, 526, failure of the court to fix a minimum term was held mere error correctable by remanding the cases for imposition of a proper sentence.

Since an appeal in the case in question is apparently pending, it would be improper for us to venture an opinion at this time concerning the extent of the defect in the sentence. That is a matter for the Supreme Court and should be resolved by it.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Kaye Richey
Deputy Attorney General

OPINION NO. 62-280 EMPLOYMENT SERVICE CREDIT FOR PURPOSES OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM (CHAPTER 286 OF NRS)—[NRS 286.330](#) specifically construed in respect of its application to agreed statement of facts. Held: That a person enrolled full time in a College of the University of Nevada, and who, during said enrollment, was employed by another unit of the University (full time during summers; part time when in attendance at College), is not entitled to credit for said employment service, nor may such employment service be considered in connection with membership, or membership rights as afforded by and under the Public Employees Retirement System. Retirement service credit for any period of military service in the

Armed Forces of the United States held unauthorized unless such military service was entered upon from employment (with a participating member of the Public Employees Retirement System) conformable to statutory definition and requirements, in addition to satisfying the other conditions provided in [NRS 286.500](#).

Carson City, March 26, 1962

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, State of Nevada,
Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Buck:

It is indicated that while a full-time student at the College of Agriculture of the University of Nevada, during the period from May 29, 1940 to June 2, 1942, a designated person was employed at the Agricultural Extension Service of the University of Nevada, working full time during the summer and part time when in attendance at the College of Agriculture.

The person referred to entered the Armed Forces in June of 1942, and it is noted that under the provisions of [NRS 286.500](#) credit may be allowed for said military service to the United States when the member entered thereon from employment with a participant in the Public Employees Retirement System (Chapter 286 of NRS).

It is also noted that the Public Employees Retirement System was not created until July 1, 1948; however, reference is made to [NRS 286.030](#), paragraph 1, the provisions of which sufficiently authorize the allowance of service credit to persons who may have been employed "in positions which would have been subject to this chapter." In short, it is recognized that the employment service here under consideration should be evaluated and determined in accordance with the current standards and requirements of the Public Employees Retirement Act (Chapter 286 of NRS).

QUESTIONS

1. Is employment with the University of Nevada, as above-described, entitled to service credit under the Public Employees Retirement System, in view of the provisions of [NRS 286.330](#)?
2. Since [NRS 286.500](#) authorizes service credit for military service in the Armed Forces of the United States, when the member entered upon such military services from employment with a participating member of the Public Employees Retirement System, is any service credit for purposes of the Public Employees Retirement System authorized in the event that Question No. 1 is answered in the negative?

CONCLUSIONS

Question No. 1: No.
Question No. 2: No.

ANALYSIS

[NRS 286.330](#) "Inmates, trainees of state institutions excluded from membership in system" provides as follows:

No inmate of a state institution and no person enrolled full time in a state institution principally for purposes of training, even though he receives compensation for services performed for the institution, may become a member of the system. (Emphasis supplied.)

The above statutory prohibition is unambiguous, and unmistakably clear, affording no basis for any exception when the facts are such as to fall within its express terms.

In the instant case, the person concerned was enrolled as full-time student in the College of Agriculture of the University of Nevada. The employment services admittedly performed by him, whether on a full-time basis during the summer, or on a part-time basis when he was required to be in attendance for studies or training at said College of Agriculture, were rendered to the Agricultural Extension Service, one of the units of the Public Service Division of the University of Nevada. In short, the University of Nevada, comprehending both the college of Agriculture and the Agricultural Extension Service (as a unit of the University's Public Service Division) in both instances constitutes the state institution in which the person (seeking service credit under the Public Employees Retirement System) was enrolled "full time" "principally for purposes of training," and where he received "compensation for services performed for the institution."

In our considered opinion, the statutory express prohibition against membership in the Public Employees Retirement System unquestionably contemplates and applies to the circumstances herein described. Hence, service credit and membership in the system for the involved period of employment and for the period of military service entered upon in June, 1942 is deemed unauthorized, as contrary to legislative intent and violative of applicable Nevada law herein considered.

The indicated employment service with the University of Nevada must be discounted because not conformable to statutory definition and requirement; also, it further follows that such employment service may not be deemed "employment" preceding entry upon military service in the Armed Forces of the United States for which service credit for purposes of the Public Employees Retirement System may be authorized.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Chief Deputy Attorney General

**OPINION NO. 62-281 PUBLIC SERVICE COMMISSION; [NRS 704.020](#) CON-
STRUED**—Contract air carriers are not public utilities as defined in [NRS 704.020](#) and are
not subject to regulation by the Public Service Commission.

Carson City, April 4, 1962

Public Service Commission, Carson City, Nevada.

STATEMENT OF FACTS

Gentlemen:

A California corporation, duly qualified to conduct business in the State of Nevada, proposes to enter into a contract with Bell Telephone Company to provide that company with manned and operated helicopters to be used in locating and selecting sites for the installation of microwave relay stations.

A letter directed to the Public Service Commission states that the company is "generally engaged in the business of private contract flying of aircraft, primarily helicopters."

We assume that the operations of the California corporation are confined to contract carriage as represented in the correspondence accompanying the commission's request for our opinion, and that the company does not engage in the business of a common carrier of persons or property by air. The Public Service Commission asks that we consider the question appearing below.

QUESTION

Are contract air carriers subject to regulation by the Public Service Commission?

CONCLUSION

Contract air carriers are not public utilities as defined by [NRS 704.020](#) and are not subject to regulation by the Public Service Commission.

ANALYSIS

It is well established that public service commissions possess only such powers as are expressly conferred by the statute creating them, or which may be necessarily or fairly implied therefrom. *Union Pacific R.R. Co. v. Public Service Commission*, 103 Utah 186, 134 P.2d 469; *State ex rel. Northeast Transportation Co. v. Schaff*, 198 Wash. 52, 86 P.2d 1112; 43 Am.Jur. 701. Our search of the relevant Nevada provisions indicates that the Public Service Commission has not been empowered to regulate contract air carriers.

The Public Service Commission is vested with power to supervise, regulate and control all "utilities" ([NRS 704.020\(2\)](#)). The phrase "public utility" is defined by [NRS 704.020](#). The pertinent portions of that statute are hereinafter quoted.

1. As used in this chapter, "public utility" shall mean and embrace:

(a) All corporations, companies, * * * that now, or may hereafter, own, operate, manage, or control any railroad or part of a railroad as a common carrier in this state, * * *.

(b) Any company or individual or association of individuals owning or operating automobiles, auto trucks or other self-propelled vehicles engaged in transporting persons or property for hire over and along the highways of this state as common carriers.

(c) Express companies, telegraph and telephone companies.

(d) Radio or broadcasting instrumentalities and airship common carriers.

* * *

2. "Public utility" shall also embrace:

(a) Every corporation, company, individual, * * * that now or hereafter may own, operate or control any ditch, flume, tunnel * * *.

(b) Any plant or equipment, or any part of a plant or equipment, within the state for the production, delivery or furnishing for or to other persons, firms, associations, or corporations, private or municipal, heat, light, power in any form * * *.

3. The provisions of this chapter and the term "public utility" shall apply to:

(a) The transportation of passengers and property and the transmission or receipt of messages, intelligence or entertainment, between points within the state.

(b) The receiving, switching, delivering, storing and hauling of such property, and receiving and delivering messages.

(c) All charges connected therewith, including icing charges and mileage charges.

(d) All railroads, corporations, airships, automobiles, auto trucks, or other self-propelled vehicles, express companies, car companies, freight and freight-line companies.

(e) All associations of persons, whether incorporated or otherwise, that shall do any business as a common carrier upon or over any lines of railroad or any public highway within this state.

(f) Any common carrier engaged in the transportation of passengers and property, wholly by rail, or partly by rail and partly by water, or by air.”

Airship common carriers are a public utility within the scope of the cited statute, but there is no specific reference to contract carriers. Subparagraph 3(d) of [NRS 704.020](#) quoted above states that the term “public utility” shall apply to “all railroads, corporations, airships, automobiles, auto trucks, or other self-propelled vehicles * * *.” The subparagraph as it appears in the Nevada Revised Statutes might be construed to mean that all of the modes of conveyance listed therein are public utilities, no matter what their use. On its face such interpretation seems unreasonable and reference to the act upon which the section is based shows that such was not the intention of the Legislature. The latest amendment to the original act defining public utilities appears at Chapter 28, Statutes of Nevada 1928 and reads in part as follows:

Section 7 * * * is hereby amended to read as follows:
* * *

(a) The provisions of this act and the term “Public Utility” shall apply to the transportation of passengers and property and the transmission or receipt of messages, intelligence or entertainment, between points within the state, and to the receiving, switching, delivering, storing and hauling of such property, and receiving and delivering messages, and to all charges connected therewith, * * * and shall apply to all railroads, corporations, *airships*, automobiles, auto trucks, or other self-propelled vehicles, express companies, car companies, freight and freightline companies, and to all associations of persons, whether incorporated or otherwise, *that shall do any business as a common carrier* upon or over any line of railroad or any public highway within this state, *and to any common carrier engaged in the transportation of passengers and property*, wholly by rail, or partly by rail and partly by water, *or by air*. (Emphasis supplied.)

The emphasized portions of the amendment disclose that only airships engaged in business as common carriers were declared to be public utilities. In case of ambiguity in a section of the Nevada Revised Statutes, “reference may be had to the acts from which the sections are derived, * * * for the purpose of resolving the ambiguity.” Sec. 4, subparagraph 2, Ch. 2, Stats. of Nev. 1957.

The Public Service Commission is expressly granted regulatory control over contract motor carriers. See [NRS 706.130](#). In *Southern Mississippi Airways v. Chicago & S. Airlines*, 26 S.2d 455, the Supreme Court of Mississippi held that the power to regulate air carriers could not be implied from a statute granting the Public Service Commission of the state power to regulate motor vehicle carriers. Indeed, the presence of an express provision in our statutes conferring jurisdiction on the Commission to regulate contract motor vehicle carriers and the absence of a similar grant with respect to contract air carriers strengthens the conclusion that the Commission is without jurisdiction.

In view of the absence of any legislation, express or implied, conferring power on the Public Service Commission to regulate contract air carriage, we are of the opinion that such carriers are not subject to regulation by that Commission and need not obtain a certificate of convenience or necessity before commencing operation.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 62-282 NATIONAL GUARD PERSONNEL, STATE EMPLOYMENT STATUS OF; PAYMENT OF STATE COMPENSATION FOR SERVICES RENDERED IN PUBLIC EMERGENCY—Full-time National Guard personnel, other than those regularly paid directly from state funds, are generally to be considered and treated as federal, rather than state, employees. Full-time state employees may not receive both their regular state salaries and additional compensation from the National Guard for work or services performed or rendered when called for duty in a public emergency. State employees, on accrued leave with pay from state employment, may receive compensation in addition to regular state salaries from National Guard for work or services performed or rendered when called for duty in a public emergency.

Carson City, April 6, 1962

Mr. Howard E. Barrett, Budget Director and clerk of Board of Examiners, Office of Budget Director, State of Nevada, Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Barrett:

Some question has apparently arisen relative to action by the Board of Examiners in connection with an allotment requested by the Adjutant General of the State for payment of compensation to National Guard volunteers who were involved in emergency work and services in the Battle Mountain flood.

It is indicated that the Board of Examiners approved payment of compensation for part-time state or National Guard employees, but withheld approval of payment to full-time state employees and full-time National Guard personnel because of some uncertainty as to whether or not such full-time employees are authorized to receive their regular salaries plus compensation for work connected with emergencies of the kind here involved. The State Personnel Department is said to have indicated that the involved situation does not appear to be contemplated in, or covered by, any rule or regulations of said Department.

QUESTIONS

1. Are full-time National Guard personnel, other than those regularly paid directly from state funds, federal or state employees?
2. May full-time state employees receive their regular salaries as well as compensation from the National Guard for work or services performed or rendered by them when called for duty in public emergencies?
3. May state employees, on accrued leave with pay, receive compensation in addition to said pay from the National Guard when called for duty in public emergencies?

CONCLUSIONS

Question No. 1: Full-time National Guard personnel, other than those regularly paid directly from state funds, are to be considered and treated as federal, rather than state, employees in the circumstances here involved.

Question No. 2: No.

Question No. 3: Yes.

ANALYSIS

Excepting civilian employees of the State's Adjutant General's Department who may be employed as provided in [NRS 412.150](#), and who receive compensation therefor from state funds, it is our considered opinion that full-time National Guard personnel or members, even though they may, for some purposes, be deemed to have dual employment (both federal and state), must be deemed to have dual employment (both federal and state), must be considered and treated as though federal (rather than state) employees in the circumstances here indicated. (Attorney General Opinion No. 337, dated June 21, 1954.)

Until called into federal service in the United States Army by reason of some emergency, National Guards of the several states are undoubtedly state organizations. It might, therefore, be inferred that civilian employees of National Guard units (including the Nevada National Guard) are state employees. However, whether or not particular civilian employees of National Guard units (including the Nevada National Guard) are, in fact, state employees, depends on each particular employment and whether or not an employer-employee relationship exists.

Whether or not an employer-employee relationship exists is essentially determined by whether or not the employer has the right to control the manner in detail as to how the work shall be done. Some other pertinent considerations and criteria are: the power to employ the power to discharge (closely connected with the power to control), and the obligation for payment of salaries or compensation.

In the instant case, the involved civilian employees of the Nevada National Guard are not employed under, or in accordance with the provisions of, the State Personnel Act (Chapter 284 of NRS). Also, at all times throughout their said employment they are paid solely out of federal funds, in no way requiring prior approval or certification of such salary payments by state agencies or officials (as generally required with respect to state employees), and they receive no state compensation in connection with their National Guard employment, service, or membership. Moreover, insofar as their duties are concerned, they are generally not subject to state supervision or control; in actual fact, required supervision and control are essentially exercised by federal and/or military authorities, in accordance with federal rules and regulations, and such employees are inducted into and separated from service or employment in the national Guard in accordance with federal rules and regulations. Their military service or employment is essentially predicated upon status, and the obligation as citizens to perform their duty and service to country and State, rather than upon voluntarily assumed contractual employer-employee rights and obligations.

Under such circumstances, the involved Nevada National Guard civilian employees cannot be said to be state employees under the provisions of [NRS 412.150](#), nor in the state's unclassified service under [NRS 284.140](#), paragraph 7.

Public funds may not be expended or disbursed except as authorized by law.

In the case of full-time state employees (apart from any question of accrued leave with pay), payment of salaries out of state funds assumes that it is conditioned upon actual performance or rendition of services to the State as contemplated in the employment relationship. Obviously, a full-time state employee cannot be discharging his employment duties for the State at the same time that he is rendering services in connection with some emergency situation, such as the Battle Mountain flood. (See [NRS 281.127](#), [284.185](#), AND [284.190](#).)

It has been indicated that federal regulations permit members or employees of the National Guard to receive compensation both from the National Guard and other employment, but such circumstance if true, is not necessarily controlling in the premises. The matter must be regulated and determined under state law, since disbursement of state funds is in question.

In connection with the Battle Mountain emergency flood situation, it is our understanding that the Governor of the State directed and ordered the Nevada National Guard into service therefor. If the Governor called the national Guard into active service under the provisions of [NRS 412.050](#), paragraph 1(c), then the provisions of [NRS 412.610](#) and [412.615](#) with respect to compensation of officers and enlisted men would apply, viz: officers would be entitled to receive

the same pay and allowances as officers of similar grade in the United States Army and the United States Navy, and enlisted men would be entitled to receive \$2 per day.

However, if as we infer, the governor of the State directed and ordered members of the Nevada National Guard into service in connection with the Battle Mountain emergency flood situation as a “mobile support unit,” under the provisions of [NRS 414.080](#), then compensation could be made as therein authorized under paragraph 2 thereof. In this connection it should be noted that [NRS 414.030](#) defines “civil defense” to include emergency functions, measures and services “to prevent, minimize and repair injury and damage resulting from disasters caused by * * * fire, flood, earthquake or other natural causes.”

[NRS 414.080](#), as here pertinent, provides as follows:

* * *

2. Personnel of mobile support units while on duty, whether within or without the state, shall:

(a) If they are employees of the state * * * receive the compensation incidental to their employment.

(b) If they are employees of a political subdivision of the state, and whether serving within or without such political subdivision * * * receive the compensation incidental to their employment.

(c) If they are not employees of the state or a political subdivision thereof, be entitled to compensation by the state at \$10 per day * * *.

A state employee may, of course, utilize any accrued leave with pay from his state employment in any legitimate manner that he sees fit; such use would include gainful employment or services with another employer, when not in conflict with loyal service to the State.

In the described situation, there can be no question concerning the right of a full-time state employee to receive additional state compensation (not *salary*) from the Nevada National Guard for emergency services rendered by him while on accrued leave with pay from his regular, full-time state employment ([NRS 281.127](#)).

We trust that the foregoing sufficiently clarifies the various aspects of the matter as suggested by the specific questions submitted to us for opinion and advice.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Chief Deputy Attorney General

OPINION NO. 62-283 MEASURE OF SALES TAX OR SALES TAX BASE; INCLUSION THEREIN OF STATE CIGARETTE AND LIQUOR EXCISE TAXES—Notwithstanding 1961 enactments imposing incidence of, and liability for, state cigarette and liquor excise taxes on consumers, their precollection by “retailers” constitutes them an unquestionable element in the ultimate cost or selling price of such commodities to purchasers, and Nevada Sales Tax Act requires inclusion of their amount in the tax base upon which the sales tax is computed; the sales tax is levied on retailers’ “gross receipts,” and exclusion of such state excise taxes from the measure of the sales tax is not authorized under the Nevada Sales Tax Act. In making it perfectly clear that legal, as well as economic, incidence of cigarette and liquor excise taxes is on consumers, the Legislature, through 1961 enactments ([NRS 370.375](#), [369.385](#)), has precluded any question concerning

the legal right of such consumers to take deductions therefor in the computation and payment of federal income taxes.

Carson City, April 23, 1962

Mr. R. E. Cahill, Secretary, Nevada Tax Commission, Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Cahill:

Chapter 233, 1961 Statutes of Nevada, amended Chapter 370 of Nevada Revised Statutes, relating to cigarette licenses and taxes, by adding a new section imposing liability for the tax on cigarettes on the consumer. It reads as follows:

The liability for, and the incidence of, the tax on cigarettes provided for in this chapter, is hereby declared to be a levy on the consumer. Distributors and retailers shall add the amount of the tax levied on cigarettes to the price of such cigarettes and may state the amount of the tax separately from the price of the cigarettes on all price display signs, sales or delivery slips, bills and statements which advertise or indicate the price of such cigarettes. The provisions of this section shall in no way affect the method of payment or collection of such tax on cigarettes as provided in this chapter ([NRS 370.375.](#))

Chapter 234, 1961 Statutes of Nevada, correspondingly amended Chapter 369 of Nevada Revised Statutes, relating to intoxicating liquor licenses and taxes, by adding a new section imposing liability for the excise tax on intoxicating liquors on the consumer. It reads as follows:

The liability for, and the incidence of, the excise tax on intoxicating liquors provided for in this chapter is hereby declared to be a levy on the consumer. Importers, dealers, manufacturers and retailers shall add the amount of the tax levied on liquor to the price of such liquor and may state the amount of the tax separately from the price of the liquor on all price display signs, sales or delivery slips, bills and statements which advertise or indicate the price of such liquor. The provisions of this section shall in no way affect the method of payment or collection of such tax on liquor as provided in this chapter ([NRS 369.385.](#))

It is indicated that ever since these taxes were first enacted into law, the economic incidence has undeniably been on the consumer, but collection was legislatively imposed upon the seller of convenience; such precollection by the seller was, however, passed on as part of the price to the ultimate consumer.

It is further indicated that the avowed and only purpose of the Nevada Legislature in enacting the above-cited acts was that of making the legal, as well as the economic, incidence of both involved taxes fall clearly upon the purchaser or consumer, so that such cigarette and liquor taxes could be claimed as deductions for federal income purposes.

Also, since passage of the Nevada Sales and Use Tax Act (Chapter 372 of NRS) in 1955, retailers of cigarettes and liquor have been required to use the full sales price (which includes the State's excise and license taxes) as the tax base upon which the 2 percent sales tax is levied and collected. Apparently, insofar as it has been possible to ascertain, such practice is still being followed by involved retailers, who are not separately computing and billing the tax to their customers, although such treatment is expressly permitted under the new legislative enactments.

QUESTION

In view of the provisions of Chapters 233 and 234, 1961 Statutes of Nevada (respectively [NRS 370.375](#) and [369.385](#)), should retailers continue to include Nevada state excise taxes on cigarettes and liquor in the sales tax bases of such items?

CONCLUSION

Yes.

ANALYSIS

[NRS 372.105](#), "Imposition and rate of sales tax," provides as follows:

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.

As here pertinent, [NRS 372.025](#) defines "Gross receipts" 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 * * *.

2. "Gross receipts" does not include any of the following:
* * *

(d) The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer. (Note: *State* excise taxes are not excluded.)

As here pertinent, [NRS 372.065](#), "Sales price," provides as follows:

1. "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money, or otherwise, * * *.

2. "Sales price" does not include any of the following:
* * *

(d) The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer. (Note: *State* excise taxes are not excluded.)

Nevada Tax Commission Rulings Nos. 46, "Federal Taxes," and 48, "Beer, Wine and Liquor Dealers," also have some relevancy herein. The provisions of Commission Ruling No. 48 are as follows:

The measure of tax with respect to retail sales of beer, wine and spirituous liquors is the entire amount charged therefor, inclusive of the amount of other state or federal taxes imposed with respect to the property.

Before we consider the foregoing provisions in connection with Chapters 233 and 234, 1961 Statutes of Nevada, a preliminary constitutional question should be noted. This constitutional question relates to the fact that the Nevada Sales and Use Tax Act (Chapter 397, 1955 Statutes of Nevada, now Chapter 372 of Nevada Revised Statutes) was given referendum approval by the people of the State of Nevada at the general election held on November 6, 1956, and Article XIX, Section 2 of the Nevada Constitution expressly provides that any state law so approved shall not

be “overruled, annulled, set aside, suspended or in any way made inoperative except by the direct vote of the people.” (See Attorney General Opinion No. 228, dated December 10, 1956.)

Such constitutional question has no legal merit, in our opinion. Chapters 233 and 234, 1961 Statutes of Nevada, in no way amend the Sales and Use Tax Act (Chapters 372 of NRS); they expressly respectively amend Chapters 370 and 369 of Nevada Revised Statutes only. Insofar as said 1961 acts impose the incidence of the cigarette and liquor excise taxes on the consumer, the Sales and Use Tax Act has, in no legal respect, whatsoever, been “overruled, annulled, set aside, suspended, or in any way * * * made inoperative * * *.” Actual economic incidence of both said excise taxes, under the 1961 acts, still continues to fall on the consumer, as it did prior to said acts. The retailers (as defined in the Sales and Use Tax Act), prior to said 1961 acts, were required to collect, and did collect, such excise taxes from consumers and included the same in the measure of the respective taxes which they reported and paid; the 1961 acts in no manner change such legal requirements. In short, the 1961 acts merely expressly provide for legal treatment of the incidence of both said involved excise taxes as theretofore required by the Nevada Tax commission under the Nevada Sales Tax Act.

In respect to the specific question here involved, statutory provision that the “incidence” of the excise taxes involved is a levy upon the consumer has little significance; the courts place primary importance on substance, namely, the economic impact of taxes, which consumers ultimately bear and pay anyhow. In short, the only changes effected by the 1961 acts are wholly administrative in nature, relating to record-keeping, billing, and tax reporting, and even in those respects the 1961 acts make such change entirely permissive with the retailer-taxpayer.

We, therefore, conclude that the 1961 acts involved do not constitute legislative amendment of the Sales and Use Tax Act, prohibited by Article XIX, Section 2 of the Nevada Constitution because said Sales and Use Tax Act was given referendum approval by the people of the State.

* * * * *

The excise taxes respectively imposed by Chapters 369 and 370 of Nevada Revised Statutes on liquor and cigarettes are quite different from the “transaction” tax levied on retailers under the Sales and Use Tax Act (Chapter 372 of NRS). [NRS 369.330](#) (as to liquors) and [NRS 370.170](#) (as to cigarettes) provide for levy and precollection of such excise taxes; they are unquestionable elements of the ultimate costs of such commodities to purchasers or consumers, and their actual economic incidence or impact should, both reasonably and properly, be reflected and included in the retail sales price upon which the sales tax is computed. (See *Leader v. Glander*, 77 N.E.2d 69 (Ohio Sup.Ct., 1948), citing *Lash’s Products Company v. United States*, 278 U.S. 175, 49 S.Ct. 100, 73 L.Ed. 25 and *Vause & Striegel, Inc. v. McKibbin*, Dir. 379 Ill. 169, 39 N.E.2d 1006, 1007.)

Leader v. Glander, supra, held that statutes levying a 3 percent tax on amounts received for admissions to theaters and shows impose a “gross receipts tax” required to be paid by the person receiving the admission charges on the total amount collected less the amount separately collected for federal taxes, and not on the amount collected less the amounts of federal, state, and city taxes. Regarding exclusion from the sales price and the tax base of a tax when separately billed, the Court approvingly quotes from *Lash’s Products Co. v. United States, supra*, as follows:

* * * Naturally, a delicate treatment of a tax on sales might seek to avoid adding a tax on the amount of the tax. But it is no less natural to avoid niceties and to fix the tax by the actual price received. * * *. The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price. * * *

It may properly be noted that while “double taxation” is not generally presumed, nevertheless a tax which results in double taxation may be levied unless there is some constitutional inhibition against it. (*Leader v. Glander, supra*, citing *State of Tennessee v. Whitworth*, 117 U.S. 129, 6 S.Ct. 645, 29 L.Ed. 830.) There is, of course, no such inhibition in the Nevada Constitution.

In our considered opinion, it is no longer open to question that the Legislature, in enacting the Nevada Sales and Use Tax Act, intended to tax the retailer, and not the consumer, and that the retailer thereunder is vested with the limited right to pass the tax applicable to each particular sale along to the consumer, only as specifically permitted in the act. It has been so held concerning the Sales and Use Tax Act of Maine (generally similar to the Nevada act), in the case of *W. S. Libbey Co. v. Johnson*, 94 A.2d 907 (1953). This case is additionally significant because the Court therein construed a statute virtually identical in wording to Chapter 233, 1961 Statutes of Nevada ([NRS 370.375](#)). The legislative declaration and amendment there was of the Maine Sales and Use Tax Act itself, instead of other excise tax laws, as here involved (Chapters 370 and 369 of NRS instead of Chapter 372 of NRS).

The amendatory statute construed in said Maine case was also intended to effect legislative purpose to give consumer-taxpayers the legal right to make deduction of the tax in connection with their payment of federal income taxes.

Construed in its entirety, as all statutes should be construed, Nevada's Sales and Use Tax Act (Chapter 372 of NRS) makes legislative intention entirely clear that all sales not specifically exempt shall be taxed ([NRS 372.185](#), [372.260-372.350](#)); that retailers shall pay the sales tax on "gross receipts" ([NRS 372.185](#), [372.155](#)); that retailers failing to make required payments are subject to tax liens, tax suits, and execution ([NRS 372.565-372.610](#)); and that consumers shall pay no more, insofar as taxes are concerned, than retailers are statutorily authorized to include in sales prices ([NRS 372.025](#), [372.065](#), 372.110-372.120), which, *as part of the price*, "shall be collected by the retailer from the consumer insofar as it can be done." ([NRS 372.110](#), [370.375](#), 369.385.)

There is no provision other than that carried in [NRS 372.185](#) and [372.190](#), *applicable to the use tax only*, which charges the consumer with the duty of paying the tax to the State, and even in such case, [NRS 372.195-372.200](#) provide that collection shall be made by the retailer and constitute "a debt owed by the retailer to this state." Similarly, Chapters 370 and 369 of Nevada Revised Statutes (respectively applicable to cigarette and liquor excise taxes) provide that precollection of such taxes of the consumer shall be made by manufacturer, distributor, or retailer, as the case may be, and that payment to the State of such excise taxes so collected shall be made by them, rather than by the consumers directly.

Since the Nevada Sales and Use Tax Act does not specifically authorize the exclusion of state cigarette and liquor excise taxes from the sales price of such items, they must be included in the measure or sales tax base, for purposes of computing the sales tax due and payable on "gross receipts" ([NRS 372.105](#), [372.025](#), 372.065), notwithstanding express legislative declaration that the incidence of such excise taxes is imposed on consumers ([NRS 370.375](#), [369.385](#)).

Leader v. Glander, supra; Lash Products Co. v. United States, supra; Vause & Striegel, Inc. v. McKibbin, Dir., supra; W. S. Libbey Co. v. Johnson, supra; Maine v. Hiscock, 107 A.2d 421 (Me., 1954); *Hoffman v. City of Syracuse*, 2 N.Y.S.2d 484, 141 N.E.2d 605 (N.Y., 1957); *Sun Oil Co. v. Gross Income Tax Div.*, 149 N.E.2d 115 (Ind., 1958).

It is also our considered opinion that the involved 1961 acts ([NRS 370.375](#) and [369.385](#)) have the legal effect only of precluding any question concerning the right of consumer-taxpayers of the involved cigarette and liquor excises, to claim deduction of same from their federal income taxes. In making it perfectly clear that said excise taxes are imposed on and collected from consumers, the Legislature has provided a legal basis for deduction of the same in the computation and payment of federal income taxes.

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

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Chief Deputy Attorney General

OPINION NO. 62-284 PUBLIC EMPLOYEES RETIREMENT BOARD—The Public Employees Retirement Board, under advice of investment counsel, may liquidate bonds prior to maturity (Attorney General Opinion No. 256 of November 3, 1961) and may pay all necessary costs incidental to such liquidation, including brokerage, and the cost of certification by bond counsel as to legality of issue.

Carson City, April 25, 1962

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, P.O. Box 637,
Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Buck:

The Legislature of 1959 enacted Chapter 498, under the provisions of which it authorized the Public Employees Retirement Board to invest and reinvest its funds in “bonds, debentures, notes, equipment trust obligations, stocks, shares, mortgages and other evidences of indebtedness,” under very specific limitations, and authorized the Board to employ investment counsel to professionally advise in the discharge of such functions. *See* [NRS 286.680](#) et seq.

Investment counsel subsequently employed, pursuant to the law, recommended that certain municipal bonds not yet matured, carried in the portfolio of the Public Employees Retirement Board, be liquidated to permit the proceeds thereof to be reinvested in securities to result in a better balanced portfolio, with greater earnings annually and capital growth.

These facts raised the question of whether or not the Board was authorized under the law to liquidate bonds held by it prior to maturity. On November 3, 1961, in official Opinion No. 256, this Department answered the question in the affirmative.

In the supervision of all proceedings required to be taken in the issuance of bonds by a political subdivision, a highly specialized type of law practice is involved. A few law firms in the nation have specialized in this practice. When a law firm has administered and supervised all of the legal proceedings taken by a political subdivision in the issuance of bonds, it normally certifies that the bonds so issued create a legal obligation of the legal entity that has issued the bonds and that the obligation created is required to be discharged by ad valorem taxation upon the taxable property lying within and taxable by the taxation district. Without such a certification the bonds would hardly be salable.

Fees of counsel in the original issuance of such bonds, prior to their purchase and delivery, are discharged by the legal entity that issues. This is termed a “preliminary opinion.”

QUESTION

If municipal bonds that have not matured are held by the Public Employees Retirement Board and, under the advice of investment counsel, the Board desires to liquidate such bonds in order that the proceeds may be reinvested in securities deemed more desirable, and if the certification of bond counsel as to the legality of the issue and the present legal obligation of the political subdivision is required to facilitate the sale of the bonds at a proper price, may the Board authorize such an expenditure?

CONCLUSION

We have concluded that the Board may under the given circumstances authorize such an expenditure.

ANALYSIS

If the Public Employees Retirement Board may, under the advice of investment counsel, sell bonds held by it prior to the maturity of such bonds (and we have formerly concluded that it may), it will be required to discharge all necessary costs of such sale. These necessary costs include the costs of brokerage as well as showing the quality of the merchandise. Nothing is more important in showing the quality of the bonds than the certification that they are legal and create a legal obligation and a lien against all taxable property lying within the taxable district, to be discharged by an ad valorem levy, and the other fact statements contained in the certification of counsel. This power is reasonably inferred as requisite to carry out the powers expressly conferred upon the Board. Without faith in the quality of the bonds, there will be no buyers. In determining whether to recommend the sale of specific bonds, this cost will, of course, be considered by the investment counsel.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 62-285 TAXATION; INSTRUMENTALITIES OF INTERSTATE COMMERCE; APPLICATION OF NEVADA'S STORAGE AND USE TAX OF OUT-OF-STATE PURCHASES INTENDED FOR USE IN INTERSTATE COMMERCE—Held: Tangible personal property, for conduct of business operations by a Nevada airline company constituting interstate commerce, is not immune or exempt from state nondiscriminatory storage and use excise tax, simply because purchase and transfer of legal title thereto was affected extra-state, if a taxable moment or event in connection therewith is shown to have occurred within the State before the same again was regularly placed in interstate commerce. Claim for refund of taxes so paid, on ground that same were violative of "due process" and "commerce" clauses of Federal constitution, determined to be without legal merit; recommendation made that said claim be denied.

Carson City, May 17, 1962

Mr. R. E. Cahill, Secretary, Nevada Tax Commission, Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Cahill:

Bonanza Air Lines, Inc., has filed a claim for refund of the sum of \$131,437.28, inclusive of interest, as provided in law, from date of payment of said sum on account of the Nevada use tax, alleged as having been erroneously made for the period 1958-1961.

The claimant, Bonanza, is a Nevada corporation with headquarters and principal place of business located at McCarran Field, Clark County, Nevada. It is an interstate air carrier transporting passengers, mail and cargo between points located in the States of Nevada, Arizona, California and Utah, pursuant to a certificate of public convenience and necessity granted by the United States Civil Aeronautics Board.

It is claimed that during the period 1958-1961, Bonanza acquired certain flight equipment known in the air line industry as “rotable equipment,” consisting of aircraft, engines, propellers, communication navigation equipment, and other appurtenances to aircraft, from out-of-state vendors, including the United Kingdom; that in each case delivery and possession of such equipment was taken outside the state of Nevada, at locations as specified in schedules submitted in support of the refund claim; that said flight equipment was not readily or otherwise available for purchase within the State of Nevada; and that, allegedly, said equipment was primarily or specifically designed for bonanza’s interstate operations.

Claiming that it took delivery and possession of said flight equipment outside the State of Nevada, Bonanza further states that it “subsequently brought such equipment into the State of Nevada for installation and assembly, as needed, and thereupon and forthwith placed such flight equipment in interstate service under its aforesaid certificate of public convenience and necessity.” Upon the advent of such flight equipment into the State of Nevada, Bonanza further states that it “* * * erroneously declared and returned the full purchase price of such equipment under various sales and use tax quarterly reports submitted to the State of Nevada and paid the use tax computed at the statutory rate, payment being made to the Nevada Tax Commission as provided by law.”

The submitted claim is supported by a detailed schedule of the involved personal property, additionally supplemented subsequent to an oral hearing granted Bonanza by the Nevada Tax Commission. Said schedule classifies the involved personal property in the following manner: (a) aircraft purchased from out-of-state vendors, delivery and possession of which was also effected elsewhere than in Nevada; (b) equipment purchased from out-of-state vendors and installed in aircraft elsewhere than in Nevada; (c) equipment purchased from out-of-state vendors and installed in aircraft in Nevada; and (d) equipment purchased from out-of-state vendors and held in stock in Nevada for replacement of original equipment delivered on aircraft as required.

At the oral hearing before the Nevada Tax Commission, Bonanza, through counsel, conceded that it had not been required to pay any sales or storage and use tax in any other state with respect to the involved personal property purchased outside the State of Nevada.

As one of the grounds for refund, Bonanza alleged discrimination, claiming to have information that similar flight equipment purchased by other interstate air carriers for use within the State of Nevada had not been subjected to the Nevada use tax. There was, however, no documentation or offer of any proof of such charge of discrimination. In any event, the Secretary of the Nevada Tax Commission specifically denied any knowledge or information of any such discrimination against Bonanza relative to application of Nevada’s use tax. At best, however, such charge of discrimination involves a question of fact, to be proven by claimant if able, and is here deemed irrelevant to the legal question as to whether Nevada use tax liability, in the above-circumstances, is discriminatory and invalid, or not.

Additionally, citing [NRS 372.630](#) to [372.720](#), and more particularly, [NRS 372.630](#), [372.635](#) and [372.645](#) in support thereof, Bonanza bases its refund claim on the following grounds:

1. That the purchases in question and any storage, use or other consumption in Nevada related thereto, were exempt under the Constitution and laws of the United States, and under [NRS 372.265](#), since the involved personal property was purchased for use and used in interstate commerce.
2. That Bonanza has been unlawfully discriminated against in the imposition of such use tax as to the involved purchases of personal property, since such Nevada use tax, as applied, fails to reflect interstate and out-of-state use, contrary to the Constitution and laws of the United States, and [NRS 372.265](#).
3. That the flight equipment so purchased, and heretofore described, was not stored, used or consumed in the State of Nevada within the meaning of the provisions of [NRS 372.185](#), so as to be subject to the Nevada use tax.

The Nevada Tax Commission has referred the matter to this office for review, and our opinion and advice as to the merits of the claim for refund.

While the matter has many legal aspects and implications, it is believed that all involved legal issues essential to the determination of the refund claim can properly and adequately be considered under the following question:

QUESTION

Does the fact that the involved personal property, purchased outside the State of Nevada, was primarily or specifically intended for use in interstate operations or commerce, entitle Bonanza, in the described circumstances, to exemption from Nevada's storage and use tax, under applicable federal or Nevada law?

CONCLUSION

No.

ANALYSIS

The facts in this matter conclusively show that Bonanza itself, even though it claims that it did so "erroneously," "declared and returned the full purchase price of such equipment under various sales and use tax quarterly reports submitted to the State of Nevada and paid the use tax computed at the statutory rate * * * to the Nevada Tax Commission as provided by law." In other words, the refund claimant, Bonanza, itself made the determination or assessment of the Nevada use tax which it concluded it owed or was liable for, and also voluntarily made payment of such amount as it had determined to be due and payable to the Nevada Tax Commission. The involved Nevada use taxes paid were not paid by Bonanza as the result of any Commission audit, or commission levy and execution for Nevada use taxes due and owing by said taxpayer.

Since the alleged "erroneous" payment, or "overpayment" was made by the taxpayer, Bonanza, "intentionally or by reason of carelessness" it would not, in any event be entitled to payment of any interest in connection with any refund, assuming any were properly allowable ([NRS 372.665](#)).

It does not appear that the Nevada Tax Commission has made any audit of any air carriers with respect to liability for use taxes as here involved. There is, therefore, no basis for assuming that the Commission would not make deficiency assessments for any use taxes due and owing by other air carriers, in the same tax position as Bonanza, if Commission audits hereafter established improper and insufficient use tax returns and payments. In such cases, assessment of penalties, as provided in law, would undoubtedly also be imposed or levied.

We see no merit to the contention made by Bonanza's attorney that the involved flight equipment was not readily or otherwise available for purchase within the State of Nevada. (*See* Attorney General Opinion No. 232, dated July 14, 1961, which specifically considered such matter; *People's Gas & Electric Co. v. State Tax Commission*, 238 Iowa 1369, 28 N.W.2d 799 (1947); *Connecticut L. & P. Co. v. Walsh*, 134 Conn. 295, 57 A.2d 128, 1 A.L.R.2d 453 (1948); *Douglas Aircraft Co., Inc. v. Johnson*, 13 Cal.2d 545, 90 P.2d 572 (1939).)

Before considering the other contentions made by Bonanza herein, some brief reference to applicable provisions of Nevada's Sales and Use Tax Act (Chapter 372 of NRS) is indicated.

[NRS 372.075](#) ("Storage") "includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use *solely* outside its state of tangible personal property purchased from a retailer." (Emphasis supplied.)

[NRS 372.100](#) ("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.” (Emphasis supplied.)

[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 372.265](#) (“Constitutional and statutory exemptions”) provides 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 the gross receipts from the sale of which, or the storage, use or other consumption 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 372.345](#) (“Use tax: Property on which sales tax paid”) provides as follows: “The storage, use or other consumption in this state of property, the gross receipts from the sale of which are required to be included in the measure of the sales tax, is exempted from the use tax.”

[NRS 372.225](#) and [372.255](#) create a statutory presumption 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,” and that “tangible personal property delivered outside this state to a purchaser known by the retailer to be a resident of this state was purchased from a retailer for storage, use or other consumption in this state and stored, used or otherwise consumed in this state.”

Basically, Bonanza’s claim herein is predicated upon its purchase of the involved aircraft and other rotatable equipment, and transfer of legal title thereto and delivery thereof outside the State of Nevada; that such tangible personal property was primarily so purchased for use in Bonanza’s interstate operations; that the advent of such personal property into the State of Nevada was by interstate commerce; and that it has been and is being used in interstate commerce, as instrumentalities thereof, and, therefore, that the same is beyond Nevada’s use tax jurisdiction and power.

In legal substance, the foregoing statement merely amounts to the challenge of Nevada’s use tax as applied to Bonanza under the particular circumstances indicated, on the grounds that said use tax is discriminatory and an unreasonable burden on its conduct of interstate commerce and, therefore, violative of both the “due process” and the “commerce” clauses of the Federal Constitution.

It is the Nevada Tax Commission’s position that there was a “taxable moment” after the interstate transportation of the aircraft and other rotatable equipment had ended in Nevada and before they were again placed in interstate commerce in this State that justifies application and imposition of Nevada’s storage and use tax.

A few preliminary observations must suffice in clarification of the bearing of “due process” and “commerce clause” conceptions relative to state taxation of multistate businesses, both generally and in the instant case.

It should reasonably be recognized that the words “interstate commerce,” in and of themselves, do not constitute the touchstone which insures or guarantees absolute immunity or freedom from state taxation. The real crux of the problem as to whether a state may levy a tax which impinges upon “interstate commerce” is the possible economic effect of the tax, and interstate commerce should be accorded equal treatment on such basis only. As elsewhere aptly stated:

The recurring problem is to resolve a conflict between the Constitution’s mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state’s rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received.

(*Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166 (1954); see also *McGoldrick v. Berwind White Coal Mining Co.*, 309 U.S. 33, 46 (1940), citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).)

It must also be conceded that coexistent with the commerce clause limitation on states to tax multistate operations there is the restriction of the “due process” clause of the Fourteenth Amendment to the Federal Constitution, as regards any attempted projection by a state of her power beyond her own borders: said “due process” clause has been held effective to keep the state’s taxing power at home, so to say, or to prevent a state from levying a tax on extraterritorial values.

In determining whether there is or is not compliance with “due process” requirements in connection with the levy of a tax on multistate businesses or commerce, the term “nexus” seems to be an indispensable part of the tax vocabulary and of the courts also. Thus, the absence of a sufficient “nexus” or connection in fact between the taxed business and the taxing state has, in some instances, been considered enough in itself to upset a tax on “due process” grounds. (See *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 74 S.Ct. 535 (1954); *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938); *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929); *Louisville & J. Ferry Co. v. Kentucky*, 188 U.S. 385 (1903).) And, consistently with such “nexus” requirements, states generally have only been permitted to exert their taxing powers “in relation to opportunities * * * given, to protection * * * afforded, to benefits * * * conferred * * *.” (*Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 444 (1940), approvingly quoted in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 465 (1959).)

We must, therefore, determine the merits of Bonanza’s claim herein with reference to the foregoing suggested factors or considerations, and the limitations stemming therefrom.

The general purpose, nature and constitutionality of the use tax have long been determined and require no discussion. The following cases, merely illustrative of many others, have clearly upheld the right of a state to assess a use tax against a resident thereof for the use therein of property transported to him in interstate commerce: *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937); *Douglas Aircraft Co., Inc. v. Johnson*, *supra*; *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488 (1939); *Brandtjen & Kluge v. Fincher*, 44 Cal.App.2d Supp. 939, 111 P.2d 979 (1941); *Monomotor Oil Co. v. Johnson*, 292 U.S. 86, 54 S.Ct. 575 (1934); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 61 S.Ct. 586 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 61 S.Ct. 593 (1941); *General Trading Co. v. State Tax Comm’n*, 322 U.S. 335, 64 S.Ct. 1028 (1944); *Southern Pac. Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1939); *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U.S. 182, 59 S.Ct. 396, 83 L.Ed. 595 (1939); *Atchison, Topeka & Santa Fe R. Co. v. State Board of Equalization*, 139 C.A.2d 411, 294 P.2d 181 (1956).

Admittedly, the “crucial question” in determining whether Nevada’s storage and use tax is properly applicable to Bonanza in the particular circumstances described, turns upon a substantive finding of presence or absence of “continuity of transit.” As stated in the leading *property tax* case of *Minnesota v. Blasius*, 290 U.S. 1, 54 S.Ct. 34 (1933):

If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State’s power to tax it. * * * If the interstate movement has begun, it may be regarded as continuing so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. * * * Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. * * *

Where property has come to rest within a State, *being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates*, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.” (Emphasis supplied.)

The case of *Atchison, Topeka & Santa Fe R. Co. v. State Board of Equalization, supra*, a relatively recent case, was concerned substantially with the legal question and issue which has here been presented by Bonanza. While application of California’s use tax therein was concerned with engines shipped into that state for use in that state in facilitating interstate and intrastate railroad transportation, rather than air carrier transportation, it is submitted that applicable principles of law are substantially the same. In said *Atchison* case, *supra*, the Court frankly acknowledged that its decision would depend upon whether the rules announced in *Southern Pac. Co. v. Gallagher, supra*, and *Pacific Telephone & Telegraph Co. v. Gallagher, supra*, or the rules announced in *Union Pac. R. Co. v. Utah State Tax Commission* (110 Utah 99, 169 P.2d 804) should be controlling. Counsel for Bonanza also has indicated reliance on this last-cited Utah case, and since the *Atchison* case, *supra*, reviews all of these cited cases, with differing factual distinctions and contrary holdings, such case is certainly relevant hereto.

The *Southern Pacific Co. v. Gallagher* case, *supra*, sustained the statute on storage and use tax (similar to Nevada’s) as applied to railroad equipment and supplies purchased outside and brought into the state for use in the operation of an interstate railroad. The taxpayer there was engaged wholly in interstate transportation, and the instrumentalities involved were used in such commerce. The court there found a taxable moment when the articles “had reached the end of their interstate transportation and had not begun to be consumed in interstate operation.” During this break, the privilege of “storage and use—retention and exercise of a right of ownership respectively—was effective” as a taxable event.

* * * “Practical continuity” does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. * * * The prohibited burden upon commerce between the states is created by a state interference with that commerce, a matter distinct from the expenses of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress.” (Quoted in the *Atchison* case, 294 P.2d 181, at p. 185.)

At the same term of court which decided the *Southern Pacific Co.* case, *supra*, California’s use and storage tax (similar to Nevada’s) was again sustained, over commerce clause objections, in *Pacific Telephone & Telegraph Co. v. Gallagher, supra*. There the questioned tax was applied to equipment, apparatus, materials and supplies purchased outside and shipped into the state to be used in operation, maintenance and repair of an interstate communication system. The use tax there was validated on the authority to the *Southern Pacific* case, *supra*. The Court decided that the taxpaying communications company exercised two rights or ownership in the taxing state—retention and installation of the equipment—after the termination of the interstate shipment and before the use or consumption in interstate commerce began. In the Court’s view, they could properly serve as taxable events. (See *Atchison* case, 294 P.2d 181, at p. 185, wherein it is further stated: “The *Gallagher* cases have been consistently followed,” citing *Curry v. United States*, 314 U.S. 14, 62 S.Ct. 48, 86 L.Ed. 9 (1941), (a case involving both governmental immunity and interstate commerce, with the incidence of the use tax on the United States itself.)

Turning, on the other hand, to the case of *Union Pacific R. Co. v. Utah State Tax Commission*, *supra*, the Court (in the Atchison case, 294 P.2d at p. 187) frankly concedes that in many respects the Union Pacific case was quite similar in its facts to those in the Atchison case. One important distinction noted by the Court in the Atchison case is that in the Utah case, apparently, the engines had first been used in Nebraska, “and, at some undefined date, ‘subsequently’ removed to Utah” while in the Atchison case “some undisclosed number of engines were intended for use in California but temporarily placed in emergency use in interstate commerce elsewhere before being shipped to California.” The Court, in the Atchison case, held such distinction to be important and sufficient for continued adherence to the rule of the Gallagher cases, *supra*.

We are informed that after advent of Bonanza’s aircraft and other rotatable equipment in the State of Nevada, and before their placement and use in service in interstate operations, Bonanza subjected such aircraft and installed rotatable equipment to “flight-tests,” which were given some newspaper publicity. If such aircraft and installed equipment came to rest in Nevada in such connection, then there was a taxable moment or event, justifying application of Nevada’s storage and use tax. In such case, no further inquiry is necessary as to other articles or equipment which are subjected to a retention, by comparison, farther removed from interstate commerce.

The following additional excerpt from the Atchison case, *supra*, (a quotation from the opinion below), would certainly appear to be pertinent at this point:

Would the rule of *Southern Pacific Co. v. Gallagher* be any different if there had been a formal period of prior interstate use outside the state? I think not. Over-simplifying the problem, one might imagine the railroad to be a small boy and an instrumentality of interstate commerce a hoop. Could the small boy then say, “If I roll my new hoop through Kansas and New Mexico I won’t have to pay a tax on it if I play with it in California, which is where I intend to use it personally.” Under the law as now interpreted, the little boy and the railroad would be wrong. * * *. (294 P.2d 189, 188-189.)

Also:

* * * A use tax may of course have a wider range of application than a sales tax (case). But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. We stated as much in the Berwind-White case where, in speaking of the sales tax, we said (309 U.S. at p. 49, 60 S.Ct. at p. 393): “It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that *immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title*, the merchandise has been transported in interstate commerce and brought to its journey’s end. Such a tax has no different effect upon interstate commerce than a tax on the ‘use’ of property which has just been moved in interstate commerce,” citing use tax cases including *Henneford v. Silas Mason Co.* and *Felt & Tarrant Co. v. Gallagher*.

The sales tax and the use tax are, to be sure, taxes on different phases of the interstate transaction. We may agree that the use tax is a tax “on the enjoyment of that which was purchased.” But realistically the sales tax is a tax on the receipt of that which was purchased. For as we said in the excerpt from the Berwind-White case quoted above, it is the “*transfer of possession to the purchaser within the state*” which is the “*taxable event regardless of the time and place of passing title.*” And *McGoldrick v. Felt & Tarrant Co.* makes plain that the transfer of possession need not be by the seller, for in that case, as in the present one, deliveries were made by common carriers which accepted the goods F.O.B. at

points outside the State. In terms of state power, receipt of goods within the State of the buyer is as adequate a basis for the exercise of the taxing power as use within the State. And there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same.

* * * I can see no warrant for an interpretation of the Commerce Clause which puts local industry at a competitive disadvantage with interstate business. If there is a taxable event within the State of the buyer, I would make the result under the Commerce Clause turn on practical considerations and business realities rather than on dialectics. * * *.” (Emphasis supplied; excerpt from dissenting opinion of Justice Douglas in *McLeod v. Dilworth Co.*, appearing at 322 U.S. pp. 334-335, which case involved the question of liability to the *sales* tax, rather than the use tax.)

At this point, it is to be noted that Bonanza is a Nevada corporation, with headquarters in Nevada; in other words, Nevada, both legally and in fact, is Bonanza’s domiciliary State for its operations, and headquarters of its aircraft, and supplementary or other rotatable equipment. Also, Bonanza’s interstate operations are carried on, *at least in part*, in Nevada, in addition to other states; consequently, Bonanza has some connection or “nexus” with Nevada, and has not been heard to deny that it is receiving some protection and benefits from its location in and conduct of multistate business from Nevada. (See [NRS 372.075](#) and [372.080](#) above.) And, finally, Bonanza certainly could have in its own interest and at its won pleasure, allocated use of the involved aircraft and other equipment *solely* within the confines of the State of Nevada.

Its is also important to note that Bonanza has admitted that it was neither subjected or required to pay either sales or storage and use tax in any other state. Nor, in fact could it be made liable for payment of either said taxes in any other state, since the company is incorporated and actually resident or located in Nevada, whence it conducts its interstate operations or commerce. Additionally, the storage and use tax levied upon Bonanza is the same as that levied on all Nevada residents or businesses, and at the same rate as the Nevada sales tax, so that there is no possible basis for any charge or discrimination or undue burden on Bonanza as a multistate operation, violative of either the “due process” or “commerce” clauses of the Federal Constitution.

It would, indeed, be ironical to sanction exemption of Bonanza from Nevada’s storage and use tax in the described circumstances, since, as indicated, to do so would mean that neither sales nor storage and use tax would apply, and Bonanza would go tax-free in connection with the transactions here involved. Obviously, this would be preferential treatment, discriminatory as against other Nevada residents or businesses, held subject to this State’s sales or storage and use taxes.

Moreover, from the standpoint of avoiding even the possibility of a cumulative tax burden, in the circumstances here under consideration, Nevada, as the state of market or use, rather than the state of origin or sale, is the logical state to impose the tax. (See Justice Rutledge’s opinion in *General Trading Co. v. State Tax Commission*, *supra*.)

As is evident from the Court’s opinion in the Atchison case, *supra*, it is somewhat difficult to determine the precise grounds upon which the Union Pacific case, *supra*, was decided. Admittedly, the facts in the Union Pacific case and the Atchison case were similar in many respects. In the Union Pacific case, the Court invalidated the use tax; in the Atchison case, the Court, adhering to the rulings of the United States Supreme Court in *Southern Pacific Co. v. Gallagher* and *Pacific Telephone & Telegraph Co. v. Gallagher*, *supra*, sustained the use tax.

The case of *Denver & Rio Grande Western R. Co. v. State Tax Comm’n*, 358 P.2d 352, 11 Utah 2d 301, decided in 1961, involved the validity of the Utah *sales* tax as applied to receipts for services in repairing, in Utah, owner railroads’ cars and locomotives used as exchange equipment in interstate commerce. It was therein contended that the sales tax was violative of the commerce clause. The Court held otherwise. Interesting, however, is the following excerpt from said case, 11 Utah 2d at p. 304:

Rio Grande voluntarily paid and concedes liability for a use tax on the material used in making these repairs * * *.

Since the Court in this 1961 case expressly affirmed its decision in the Union Pacific case, *supra*, and the foregoing was only a parenthetical observation, no claim is here made that the Utah Court has in any manner changed its view concerning the validity of that state's use tax when applied to instrumentalities of interstate commerce. It seems significant, however, that the taxpayer railroad there, in like manner to Bonanza here, through self-assessment and payment thereof, made acknowledgment of liability for the use tax.

Bonanza, through counsel at the hearing before the Nevada Tax Commission, indicated that it had no objection to payment of some use taxes to Nevada in the premises, on some basis of apportionment as determined by use of the tangible personal property in Nevada, having due regard to its use in the other states involved in Bonanza's multistate operations.

Unfortunately, we are not here concerned with an ad valorem personal property tax or a gross or net income tax, which are susceptible of apportionment on the basis of actual activities taking place, or revenue derived, within the taxing state. Involved here is a nondiscriminatory excise storage and use tax imposed on personal property within the State of Nevada. There is no need of, or legal justification for, severance or apportionment when there is no reference to receipts from extra-state enterprise. The object of "apportionment" is a hypothetical splitting of a multistate total into territorial segments. In the case of the storage or use tax, the total is totally derived from intrastate or intraterritorial activity, if any. (*See cases heretofore cited herein.*)

Incidentally, the judicial history of state privilege, license, occupation, personal property, gross receipts or gross income taxes, and even state net income taxes, applied to multistate businesses and operations would appear to rule out any "apportionment" as suggested by Bonanza herein. Our review of the literature on the subject and the principal cases leads us to the conclusion that such "apportionment," in the circumstances have involved, would not be valid. (*See, for example, 18 Ohio State Law Journal No. 1 (1957), containing a number of articles on the subject "State Taxation of Multistate Business," particularly, the one on the Transportation Industry, pp. 22-42; also 46 Virginia Law Review No. 6 (1960), "A Symposium On State Taxation Of Interstate Commerce," particularly, pp. 1091 et seq.; see also, Braniff Airways, Inc. v. Nebraska State Board of Equalization, 347 U.S. 590, 74 S.Ct. 757 (1954); Flying Tiger Line v. County of Los Angeles, 51 Cal.2d 314, 333 P.2d 323 (1959), cert. denied 359 U.S. 1031, 79 S.Ct. 1140 (1959); United Air Lines v. Joseph, 307 N.Y. 762, 121 N.E.2d 557 (1954); Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951).*)

On the other hand, the mere sale or storage and use in a state of tangible personal property for conduct of business operations constituting interstate commerce are, as we have seen, not immune from nondiscriminatory state excise taxes, simply because such personal property has been transported, or is utilized, in interstate commerce. (*See Henneford v. Silas Mason Co., supra; see cases cited therein at 300 U.S. pp. 582-583; Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U.S. 147, 52 S.Ct. 340 (1932); Edelman v. Boeing Air Transport, 289 U.S. 249, 53 S.Ct. 591 (1933); Douglas Aircraft Co. v. Johnson, supra; Southern Pacific Co. v. Gallagher, supra; Pacific Tel. & Tel. Co. v. Gallagher, supra; Atchison, Topeka & Santa Fe R. Co. v. State Board of Equalization, supra.*)

Finally, as regards the application of [NRS 372.075](#) and [372.080](#) to the facts herein, it must suffice to say that the provisions thereof are not to be construed as exempting or extending immunity from Nevada's storage and use excise tax to tangible personal property bought elsewhere, delivered elsewhere, but stored or used here, *prior to being placed regularly in interstate commerce*. The fact that such Nevada statutory provisions grant such exemption when subsequent use is "solely" outside this State provides additional ground why Bonanza, which admittedly does make some storage and use of the involved personal property in Nevada, is not entitled to the claimed tax immunity.

For the foregoing reasons, therefore, we conclude that Bonanza's claim for refund of storage and use taxes as herein paid by it, is without legal merit and should be denied.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Chief Deputy Attorney General

OPINION NO. 62-286 AGRICULTURE, STATE BOARD OF—The State Board of Agriculture has no authority to invest the livestock inspection fund, by aid of the State Board of Finance, or at all. Chapter 561, 564, 569, 571, 573 and 576 and NRS construed.

Carson City, May 24, 1962

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

STATEMENT OF FACTS

Dear Governor Sawyer:

The State Department of Agriculture carries in the state Treasury a nonrevertible fund entitled “livestock inspection fund.” The fund is derived from a special head tax on livestock, registration of brands, fees, and sale of brand books, and otherwise, pursuant to statutory authority. At the end of the fiscal year a nonbudgeted surplus will exist in this fund which the State Board of Agriculture desires to invest, by the aid of the State Board of Finance, in municipal and governmental bonds. In the past the Department has invested funds in this manner by aid of the State Treasurer.

QUESTION

In light of the provisions of Sections 244.635, 244.780, 355.140 and 355.150 of NRS is the State Board of Agriculture authorized to invest any of the funds of the Department heretofore and now carried in the State Treasury and credited to its livestock inspection fund?

CONCLUSION

We have concluded that the State Board of Agriculture has no authority to invest its funds with or without the aid of the State Board of Finance.

ANALYSIS

We do not express any opinion as to the legality of investments previously made because the present law is the result of a complete revision in 1961, contained in Chapter 304, statues of 1961.

Section 561.344 of NRS makes provision for the livestock inspection fund and provides the sources of sums to be deposited in the State Treasury, to constitute said fund. Subsection 3 thereof provides:

3. Expenditures from the livestock inspection fund shall be made only for the purpose of carrying out the provisions of chapters 564, 569, 571, 573 and 576 of NRS, and the provisions of this chapter.

Under the provisions of 561.105 of NRS the powers and duties of the State Board of Agriculture are enumerated and closely confined. Therein it is provided: "1. The board shall have only such powers and duties as are authorized by law." There follows an enumeration of powers and duties. The enumeration does not include authority to invest any of the funds of the Department. Nothing contained in Chapter 561 of NRS infers such authority.

Chapter 564 of NRS is entitled "Brands and Marks." This chapter makes provision for the manner of acquiring, using and transferring brands and marks. Chapter 569 is entitled "Estrays: Animals running at large." This chapter provides for the impounding of stray livestock, the manner of search for the owners, the sale, and in the event the true owners are not found, the deposit of proceeds of sale in the livestock inspection fund.

Chapter 571 is entitled "Diseased Animals," and makes provision inter alia for the destruction of diseased livestock. It also makes provision for a special annual tax (not ad valorem) to be levied upon the ownership of all Nevada livestock, and designates the maximum permissible amounts.

Chapter 573 is entitled "Public Livestock Sales." Provision is made for the manner of licensing of public livestock auction houses, and the bonding of such entities in the protection of vendors and vendees.

Chapter 576 is entitled "Livestock and Farm Products Dealers, Brokers and Commission Merchants." Similar to the content of Chapter 573, this chapter provides for licensing and bonding of such dealers.

Under 561.344 the livestock inspection fund is derived under the provisions of all of these chapters. However, nothing contained in Chapter 561, 564, 569, 571, 573 or 576 makes any provision for the investment of funds therefrom and under subsection 3 of [NRS 561.344](#), no funds can be drawn from the livestock inspection fund for investment purposes.

However, it is argued that certain statutes are to the contrary, viz:

By Sections 244.635 and 244.780 of NRS, it is provided that bonds are legal investments for the State and its political subdivisions and by reference provision is made to the types of bonds that qualify. Suffice it to say that if moneys could be legally withdrawn from the livestock inspection fund for investment purposes, these sections might be relevant in respect to qualification.

Under [NRS 355.140](#) there is an enumeration of the types of bonds in which the State and its various departments, institutions and agencies may make investment. Under [NRS 355.150](#) provision is made for the requisite care in determining that bonds issued under [NRS 355.140](#), do, in fact, qualify, prior to the making of an investment. However, when as here, the State Board of Agriculture is not authorized to invest from the livestock fund, and it is provided that the Board shall have only such powers and duties as are authorized by law, the quality of various securities cannot be considered.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 62-287 NATIONAL GUARD, NEVADA—If civilian employees of the Nevada National Guard desire to withdraw from the Federal Social Security enrollment, in order to be integrated in the State Public Employees Retirement System, two years' notice must be given to the Secretary of Health, Education and Welfare, unless period is shortened by the Secretary. [NRS 286.365](#), and Section 418 (g) (1) and (2) Title 42 U.S.C.A. construed.

Carson City, May 25, 1962

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, P.O. Box 637,
Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Buck:

There are presently approximately 250 civilian employees of the National Guard units of the State of Nevada. The civilian employees of the National Guard units have from the month of January 1956 been protected by and participating in the Old Age and Survivors Insurance program of Federal Social Security. (Chapter 7, Social Security, Title 42 U.S.C.A. sec. 301 et seq.)

The Legislature of 1960 (Ch. 161, p. 296, [NRS 286.365](#)) provided that the civilian employees of the Nevada National Guard might become members, with certain retroactive privileges, of the Public Employees Retirement System. It is provided, however, that there shall be no dual coverage of such employees, by this language:

3. No civilian employee of the Nevada National Guard shall be entitled to become or continue as a member of the system if he has or obtains retirement coverage for his position as such civilian employee under a retirement program administered by the United States Government, to the end that no dual coverage shall result.

The civilian employees of the Nevada National Guard have agreed and requested (presumably in the manner required by law) that they be integrated into the Public Employees Retirement System of the State of Nevada.

The federal law provides for the contribution by the government to the state system, for the employer contribution, in such cases.

A form of agreement has been provided by the Secretary of Defense proposed to be entered into by the said Secretary and the State of Nevada, by its Public Employees Retirement Board. The agreement would implement the integration into the state system and would provide for the contribution by the Secretary of the employer's contribution and the withholding for the employee contribution.

In view of a provision of the federal law providing for a two-year period of notice in respect to such integration, we have here the question presented of whether or not the Executive Secretary is authorized, at this time, to execute such an agreement.

QUESTIONS

1. Would it be proper for the Retirement Board to enter into an agreement substantially as shown by the enclosed form prior to official removal of the National Guard for OASI coverage?
2. If the answer to the foregoing is in the negative would it be proper to enter into a similar agreement provisionally conditioned upon removal of OASI coverage, with the agreement not to be valid or have any force and effect until such removal had been legally effected?

CONCLUSION

1. We have concluded that Question No. 1 must be answered in the negative.
2. Perhaps Question No. 2 may be answered in the affirmative, but it is very doubtful if such procedure would expedite the withdrawal from the national and entry into the state system, or that it would otherwise serve the purposes of the interested state employees.

ANALYSIS

To enable employees of a state or political subdivision to obtain OASI coverage, particularly desirable in those states in which there was no state system in existence, the Congress provided (Section 418(a)(1), Title 42 U.S.C.A.) for agreements to be entered into between the Secretary of Health, Education and Welfare and the state by which to define and limit the coverage group, provide for contributions and other important particulars. No doubt such an agreement was entered into in or about January 1956 in respect to this coverage group.

In subsection (g) thereof provision is made for the termination of such agreements, which in part provides:

(g)(1) Upon giving at least *two years' advance notice* in writing to the Secretary of Health, Education and Welfare, a State may terminate, effective at the end of a calendar quarter specified in the notice, its agreement with the Secretary of Health, Education and Welfare either

(A) in its entirety, *but only if the agreement has been in effect* from its effective date *for not less than five years* prior to the receipt of such notice; or

(B) with respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for more than five years prior to the receipt of such notice.

(2) If the Secretary of Health, Education and Welfare after reasonable notice and opportunity for hearing to a State with whom he has entered into an agreement pursuant to this section, finds that the State has failed or is no longer legally able to comply substantially with any provision of such agreement or of this section, he shall notify such State that the agreement will be terminated in its entirety, or with respect to any one or more coverage groups designated by him, at such time, *not later than two years from the date of such notice*, as he deems appropriate, unless prior to such time he finds that there no longer is any such failure or that the cause for such inability has been removed. (Emphasis supplied.)

The statute is clear that the State of Nevada may terminate the coverage under OASI insurance of the coverage group here involved by “giving at least two years’ advance notice in writing” to the Secretary. Dual coverage is prohibited under [NRS 286.365](#), subsection 3. It would therefore be improper and not legal to sign the contract providing for the Nevada coverage prior to the date of effectual release under OASI.

However, it is suggested that by the execution of the contract between the Secretary of Defense and the State of Nevada, acting by its Retirement Board, that after the execution the State of Nevada will be “no longer legally able to comply substantially,” and that as a consequence under the provisions of (g)(2), above, the Secretary of Health, Education and Welfare will be required to release the State from its obligation. There are two answers to this suggestion, viz: First, even if the Secretary did, under such circumstances, feel impelled to release the state from its obligations under the agreement, he may in his discretion make the effective date of release two years distant. Second, it is elementary law that one may not by his own voluntary act, designedly place himself in a position by which he becomes unable to discharge or comply with the burdens of his contract, and thus impair or destroy the obligations thereof.

For the reasons assigned it is clear that the proposed agreement in the present form or as suggested to be modified should not be executed at the present time. Neither would such present execution serve the purposes of the coverage group. Instead, the administration of the National Guard should strictly comply with Section 418 (g)(1) of Title 42 U.S.C.A., together with a plea to the Secretary of Health, Education and Welfare that the matter be expedited.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 62-288 SCHOOL PUPILS—Validity of regulation by school authorities of clothes and personal appearance of pupils while in school attendance. School authorities held presumed inherently to have all powers and authority “requisite to attain the ends for which the public schools are established and to promote the welfare and school children,” and [NRS 386.360](#) is merely declarative of such inherent powers, and expressly validates a reasonable regulation regarding the apparel of pupils while in attendance at schools. Authority and responsibility of School Boards of Trustees, in exacting compliance with a reasonable school regulation regarding apparel worn by pupils while in attendance at school, may not be surrendered or abdicated merely because of a parent’s disagreement therewith.

Carson City, May 25, 1962

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

STATEMENT OF FACTS

Dear Mr. Stetler:

The Board of Trustees of the Douglas County School District adopted and has had in effect regulations regarding the dress of students while in attendance at school. Said regulations are published in a policy manual which is read to students in order to be certain that they have been informed regarding the dress regulations under which the schools will operate.

The regulation pertaining to dress is contained in a statement under the heading “Dress of Students,” as follows: “Students shall dress according to accepted standards of the school.” There is also provision for exceptions, reading as follows: “Dress for special events to be determined by the school authorities and the student council.”

It further appears that a number of girls at one of the high schools attended school one day dressed in slacks. During extremely cold weather the girls had on other occasions been allowed to dress in slacks. However, on this particular day, since the weather was not extremely cold, the girls were sent home to change to more appropriate dress.

Apparently, all the girls complied, but the parents of one girl have taken exception to the authority of the Board of Trustees of the School District to establish regulations prescribing the dress of students in attendance at schools. The particular parents here involved are of the view, apparently, that if they wish to send their daughter to school in slacks, it is their sole prerogative to do so; in short, that their daughter may wear clothing which is contrary to school regulations.

QUESTIONS

1. Does [NRS 386.360](#) authorize the Board of Trustees of a School District to establish regulations pertaining to the dress of students while attending school?
2. Who shall be the determining authority, the Board of Trustees of a School District or the parent, in case of any conflict of opinion concerning the appropriateness or propriety of a student’s dress or appearance?

CONCLUSIONS

Question No. 1: [NRS 386.360](#) provides sufficient statutory authority for School Boards of Trustees to establish reasonable regulations, not in conflict with the constitution and the laws of the State of Nevada, “as may be requisite to attain the ends for which the public schools are established and to promote the welfare of school children”; such authority would include adoption of a reasonable dress regulation for students while in attendance at school

Question No. 2: Assuming the reasonableness of the dress regulation, the Board of Trustees of a School District must be deemed to have the necessary and requisite final authority to determine what student apparel or appearance is proper or appropriate while the student is in attendance at school in any given case.

ANALYSIS

[NRS 386.350](#) (“General powers of board of trustees”) provides as follows:

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

It is no longer open to question that the conduct of pupils directly relating to and affecting the management of a school and its efficiency is within the proper regulation of school authorities. “Such authorities are necessarily invested with a broad discretion in the government and discipline of pupils; the courts will not interfere with its exercise unless it has been illegally or unreasonably used.” (47 Am.Jur. Sec. 167, pp. 422-423.)

The following general observations concerning the “Rights of Parents and School Authorities” are pertinent to the question herein:

All persons assuming the position to pupils are subject to punishment for breaches of discipline, even though they may have reached the age of majority, or, in the case of a minor female student, have been emancipated by marriage.

It has been held that school directors and teachers have no concern with the individual conduct of pupils wholly outside the schoolroom and school grounds when they are presumed to be under the control of their parents. It has been said that when the schoolroom is entered by a pupil, the authority of the parent ceases and that of the teacher begins; when the pupil is sent to his home, the authority of the teacher ends, and that of the parent is resumed. On the other hand, the view seems well settled that the power of school authorities over pupils does not cease absolutely when they leave the school premises; conduct outside of school hours and school property may subject a pupil to school discipline if it directly affects the good order and welfare of the school. This authority has been declared to extend to punishment of acts committed at home and to the enforcement of reasonable rules and requirements while the pupils are at their homes, although ordinarily the power of school authorities to punish acts of misbehavior committed at home is limited to those having a direct and immediate tendency to injure the school and to bring the teacher’s authority into contempt. * * * (47 Am.Jur. Sec. 173, pp. 426-427.)

In our considered opinion, [NRS 386.350](#), quoted above, relating to the “reasonable and necessary powers” of Boards of Trustees of School Districts, merely confirms the authority and power which governing boards of schools inherently possess and traditionally exercise, even apart from express statute. Thus, regarding “Clothes or Personal Appearance of Pupils,” the following observations are very much in point:

In accord with the general principle that school authorities may make reasonable rules and regulations governing the conduct of pupils under their control, school authorities may prescribe the kind of dress to be worn by students or make reasonable regulations as to their personal appearance. Thus, so long as students are under the control of school authorities they may be required to wear a designated uniform or may be forbidden to use face powder or cosmetics or to wear transparent hosiery, low-necked dresses, or any style of clothing tending toward immodesty in dress. (*See* 47 Am.Jur. Sec. 171, p. 425, and cases therein cited in footnotes; also, Note, 18 A.L.R. 649.)

The “(V)alidity of regulation by school authorities as to clothes or personal appearance of pupils” was also annotated in 30 A.L.R. 1216 (as here pertinent), as follows:

In 24 R.C.L. Sect. 22 of the article on Schools states the power to make rules and regulations relating to pupils in the following language:

“In discharging the duties imposed on them by statute, school directors have the power to make rules and regulations pertaining to the schools and pupils. In some cases this power is expressly conferred by statute. These rules are administrative provisions, the right to enact which for the purposes of its existence is inherent in every corporation. They are analogous to by-laws and ordinances, and are tested by the same general principles.” And as to the power of the courts in regard to such regulations, the rule is given as follows in Sect. 24 of the same article: “The courts will not interfere with the exercise of discretion by school directors in matters confided by law to their judgment, unless there is a clear abuse of the discretion or a violation of law. So the courts are usually disinclined to interfere with regulations adopted by school boards, and they will not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the board. Acting reasonably within the powers conferred, it is the province of the board of education to determine what things are detrimental to the successful management, good order, and discipline of the schools, and the rules required to produce these conditions. The presumption is always in favor of the reasonableness and propriety of a regulation duly made.”

The latter rule is recognized in the reported case (*Pugsley v. Sellmeyer*, ante 1212), wherein it is held that a rule forbidding the wearing of transparent hosiery, low-necked dresses, or any style of clothing tending toward immodesty in dress, or the use of face powder or cosmetics, is a reasonable regulation, within the power of the board of school directors to make, and therefore one with the enforcement of which the court will not interfere. (The said annotation makes reference to the Note in 18 A.L.R. 649 previously mentioned, wherein regulations pertaining to clothes are discussed.)

However, it should be clear that fashions, taste, conventions, and practices will vary from place to place and from time to time. That which once may have been condemned or frowned upon by public or community opinion and judgment may presently be entirely approved or favored and accepted. In other words, the reasonableness of any regulation or rule is not to be determined abstractly and in vacuo, but in relation to existing mores and conventions, and the particular circumstances in, or the particular purpose for, which it will have and be given effect.

In making such statement, however, we certainly don't mean to imply or infer that a rule or regulation which may be at some variance with public or community opinion is, therefore, unreasonable or invalid. In the field of education, especially, it is not only desirable, but actually essential that leadership and direction be provided: not only must our schools provide learning, character-building, discipline and respect for constituted and proper authority, but we take it that such teaching and training includes the inculcation of some sense of good taste, proper manners,

deportment and conduct—yes, even a sense of the fit and proper regarding apparel and appearance, when other persons are present or involved.

In the instant case, the school authorities had duly adopted a regulation respecting student dress. The existence of the regulation and knowledge thereof had been conveyed to the students, and through them, presumptively to their parents. Assumption and exercise of regulatory power and control over student dress during school attendance was therefore a matter of established record and practice. While the specific mode of dress in any particular situation had not been spelled out, there exists in fact no legal requirement that such specific detail be provided. If not actually impossible, it certainly would be quite difficult to provide for every conceivable situation and variety of appeal which might be appropriate or proper in any given situation. Some matters have to be left to the discretion of those charged with the responsibility of administering the schools, and of regulating the conduct and appearance of students or pupils. It cannot be said that the type or kind of dress or apparel which a student wears while in attendance at school has no possible bearing upon the teaching process, the proper school environment, or student disciplinary problems.

The wearing of slacks by girls at school and in the classrooms was here evidently only permitted as an exception, when the weather was extremely cold or otherwise inclement; their use at other times was not considered the most appropriate, fit, or suitable. It cannot be said that, as a matter of law, such a restrictive regulation is entirely unreasonable, or unrelated to the primary purpose for which schools are established and maintained with public funds: a teacher or principal can properly and reasonably believe that the wearing of slacks by girls (except as justified for necessary protection from the effects of inclement weather) is not in the best of taste, nor proper or appropriate in the classroom or on the school grounds. Such view may reasonably be grounded in experience that such type of dress is conducive to needless distraction of other students from the learning process and generally promotive of disciplinary problems among the student body.

For the foregoing reasons, therefore, we are of the considered opinion, and accordingly conclude, that the dress regulation here in question and as here applied was not unreasonable in any respect whatsoever under applicable Nevada law.

Moreover, it is also our considered opinion that not the least of the responsibilities of our public school system is the inculcation of a proper respect for constituted authority and law in students or pupils. By objecting to such type of school regulations, and thus encouraging their children to do likewise, parents are undermining and preventing attainment of these very important objectives of education. Antisocial attitudes and general rebellion against and defiance of law and accepted social standards too often characterize the increasing number of juvenile delinquents. Is it too farfetched to infer that, to some extent at least, general disrespect for law and order has its roots in a lack of firm, proper and fair discipline of children in their early and formative years, both in the home and at school?

Where parents have some serious question concerning the reasonableness of a school regulation affecting their children, it certainly would be more suitable and proper, if at all possible, for them to discuss their views with school authorities directly and privately, without involving their children in the cross fire of divergent views or opinions. Such discussion should generally result in better mutual understanding of parents and school authorities, respecting the best interests and welfare of children in school attendance. Where, however, such discussion still leaves parents and school authorities in disagreement, school authorities are not free to, nor should they, abdicate their proper public functions, responsibilities and powers, simply because an isolated parent disapproves or disagrees.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter

Chief Deputy Attorney General

OPINION NO. 62-289 PERSONNEL, STATE DEPARTMENT OF—A full-time state employee of the executive branch of government is not precluded from accepting employment with a County School District, for services to be performed while he is on his paid annual leave from state service. [NRS 281.055](#) and [284.350](#) construed.

Carson City, June 1, 1962

Mr. Irvin Gartner, Personnel Director, State Department of Personnel, Carson City, Nevada.

Attention: Mr. James F. Wittenberg, Personnel examiner.

QUESTION

Dear Mr. Gartner:

May a full-time state employee of the executive branch accept and be compensated for employment from a County School District of Nevada while on paid annual leave for the state service?

CONCLUSION

We have concluded that he may.

ANALYSIS

In 1959 a full-time employee of the Department of Highways of the State of Nevada accepted a temporary position for hourly wages as janitor of the Virginia City public school. He worked at the janitor work at late hours after completing his regular work day at the Highway Department. This continued about one month until the regular janitor was sufficiently recovered from his illness to resume his janitor work. The state employee then submitted his bill for hourly work to the school district which was approved. The County Treasurer, however, declined to pass the statement until this Department could review the matter and assure that the sums so earned could be legally paid by the county. On December 24, 1959, this Department reviewed the pertinent law and assured the County Treasurer by letter opinion that the sum claimed could be legally paid.

The question presented at this time is substantially the same. The present case appears in some respects to be one that defines a more clear-cut right of the employee. In that case the work was done before the question was asked, whereas here it is proposed to be done if approved. In that case the work was done on days in which the state work was performed, thereby perhaps tending to impair the efficiency of the state work. Here the work is proposed to be performed at a time when the state employee will be free from duty to the State, being during the period of his paid annual leave.

We are concerned with the question of whether or not there is any statute subsequent to December 24, 1959, which would change the result and conclusion formerly reached. The Legislature of 1961 enacted Chapter 184, p. 299, now [NRS 281.055](#) which provides:

281.055 (Prohibition against filing for, holding more than one salaried elective office at same time; exceptions)

1. Except as otherwise provided in subsection 2, no person may:

(a) File nomination papers for more than one salaried elective office at any election.

(b) Hold more than one salaried elective office at the same time.

2. The provisions of subsection 1 shall not be construed to prevent any person from filing nomination papers for or holding an elective office of any special district (other than a school district), such as an irrigation district, a local or general improvement district, a soil conservation district or a fire prevention district, and at the same time filing nomination papers for or holding an elective office of the state, or any political subdivision or municipal corporation thereof.

The foregoing is an enumeration of restrictions against rights of office holding, i.e., against the liberties of citizenship, and must be strictly construed.

The prohibitions of [NRS 281.055](#) do not affect or bar this proposed employment, there is no constitutional impediment and we find no statute that the employment would offend. Nothing contained in [NRS 284.350](#) which sets forth the conditions and limitations of annual leave of employees in the classified and unclassified service of the State would preclude an affirmative answer to this question. We conclude that it would not be legally improper for the state employee to accept such employment for service to be performed while he enjoys his paid annual leave.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 62-290 PUBLIC EMPLOYEES RETIREMENT BOARD—Teacher executed and delivered the formal written contract for services to be rendered as teacher, within 18 months from the date of discharge from the Armed Forces of the United States, and other statutory conditions having been met, was entitled to the accreditation of his military time for retirement purposes, under [NRS 286.500](#) 1(c).

Carson City, June 1, 1962

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Post Office Box 637, Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Buck:

A public school teacher of the State of Nevada became actively engaged in his first position in the profession in September 1940, and continued in this position to May 1942. He enlisted in the United States Army on June 11, 1942, and was honorably discharged therefrom on November 8, 1945. There being no teacher vacancy in the school in which the teacher had served prior to enlistment in the Armed Forces (at midyear) and little likelihood of obtaining teacher employment elsewhere, the teacher enrolled in Stanford University in the spring quarter of 1946 and in August 1947 received a Master of Arts degree.

The teacher, having applied for employment with the Superintendent of the Reno schools, received a letter dated January 28, 1947, from the Superintendent of the Reno schools, confirming that there would be a position open for him beginning in September 1947, in the

Reno High School. Probably there was an acceptance of the offer by communication from the teacher to the Superintendent prior to a written contract, although this does not appear in the record, but is a reasonable assumption. In any event, a teacher contract of usual form dated May 5, 1947 was mailed on that date by the Superintendent to the teacher. It was received, signed and remailed by the teacher to the Superintendent on May 7, 1947. The teacher continued in enrollment and attendance in Stanford University to August 1947 and on August 28, 1947 commenced the performance actively of the teaching duties for which he had formally contracted on May 7, 1947. Since September 1947 the teacher has continued in active service in the teaching profession.

We are here pursuing the question of whether or not the time spent by this teacher in the Armed Forces (three years five months approximately) may, under the circumstances, be credited by the Public Employees Retirement Board toward retirement.

QUESTION

Will the signing of a teacher contract, providing for active services thereunder to commence on a date over three months thereafter constitute "reentry into covered service" within the meaning of [NRS 286.500](#) 1(c)?

CONCLUSION

We have concluded that the question is properly answered in the affirmative.

ANALYSIS

[NRS 286.500](#) provides the following:

286.500 (Absence on military service: Credits)

1. Any employee of an employer participating in the system who entered the Armed Forces of the United States after September 15, 1940, and prior to July 1, 1948, or who enters the Armed Forces thereafter and who, within 1 year after being honorably discharged therefrom or within 1 year after release from full-time active duty, returned to the services of participating public employer either prior to July 1, 1948, or thereafter, shall be entitled, subject to the limitations of this chapter and to the provisions hereinafter set forth, to credit for all his service to the participating public employer prior to July 1, 1948, and to credit for all his service in the Armed Forces after September 15, 1940, as if he had been an employee of a participating public employer throughout his service in the Armed Forces after that date; provided:

(a) That service in the Armed Forces, to be credited as service to the employer, and service for retirement must have been performed during the period of September 15, 1940, to December 31, 1946, inclusive, and on or after June 27, 1950, to January 31, 1955.

(b) That service in the Armed Forces in the above-mentioned periods of time shall be credited for retirement only upon the conclusion of 5 years of contributing membership service with a participating public employer or employers following return from the Armed Forces.

(c) That if the position held by the employee at the time of entry into the Armed Forces shall have been abolished between the time of entry into and the time of return from service in the Armed Forces or if the employee shall have applied for reinstatement and was refused such reinstatement then such individual may be granted a period of 18 months prior to reentry into covered service in lieu of 1 year as required in this subsection.

2. No period of service in the Armed Forces, at any time, shall be regarded as an absence from employment which shall operate to nullify or cancel prior service to participating public employers when the member shall have entered the Armed Forces from employment with a participating public employer and returned to employment with a participating public employer within 1 year after discharge or release from full-time active duty or within 18 months under the circumstances set forth in paragraph (c) of subsection 1.

We observe that all of the essential conditions of [NRS 286.500](#) are met by this teacher for the accreditation of his military service time, if the question propounded is answered in the affirmative. The signing of the contract occurred within 18 months of the date of discharge, namely, at the end of one year, 5 months, 27 days. Active employment was not within 18 months. Such active employment was 1 year, 9 months, 20 days from the date of discharge. The teacher was properly licensed. There is a record that the teacher has more than 5 years of contributing membership service following return from the Armed Forces, as required by [NRS 286.500](#) 1(b). There is no record that he applied to the school where he formerly served, in midterm for reemployment. Such would have been useless and a little foolish. The law requires no useless thing. Under the facts the teacher had 18 months ([NRS 286.500](#) 1(c)), within which to reenter covered service.

We presume first of all that the contract signed by the teacher on May 7, 1947 was of the usual content; that it provided for teacher service and for a definite salary. We presume that under its terms there was no release from the obligations thereof except by performance or mutual assent to release.

It follows that by the execution of the formal written contract, required by the provisions of [NRS 391.120](#), a mutual obligation was created, the teacher was obligated to serve as teacher at the time, with the duties and for the term designated. The school board was obligated to accept the service and to pay for it in the amount and in the manner contracted. There was a meeting of the minds upon a legal subject matter. A failure of either party to comply with the obligation thereunder would have been an actionable breach for which damages would lie.

Who can say but that the teacher “slanted” his study during the summer of 1947, to better qualify himself for the position he was under contract to fill.

Although we are not able to find any cases directly in point upon this proposition, we are clearly of the opinion that welfare statutes must be liberally construed to effectuate their purposes. Sutherland Statutory Construction, Volume 3, Old Age Pension and Social Security Legislation—Article 7210.

It follows that the signing and return of the contract in this case constituted “reentry into covered service,” and that the military time of this teacher should be credited by the Public Employees Retirement Board, pursuant to the provisions of [NRS 286.500](#) 1(c).

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 62-291 OPTOMETRY, STATE BOARD OF—Power of the Nevada State Board of Optometry to examine for licensing cannot be delegated, neither can it be exercised beyond the territorial limits of Nevada. Chapter 636 NRS construed.

Carson City, June 7, 1962

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

STATEMENT OF FACTS

Dear Dr. Myers:

An optometrist, now in the Armed Forces of the United States and stationed in the State of Texas, took the optometry examination in 1961, failed it, and now wishes to be examined in the subjects that he failed, pursuant to the provisions of Section 636.200 of NRS. He represents, however, that he is not able to obtain leave from service and not able to afford a trip to Nevada at this time and, therefore, asks that the Board authorize an examination in Houston, Texas, and appoint an agent in Texas with authority to give such examination. The board proposes (if legal) to authorize a Nevada licensed optometrist residing in that state, now employed as a professor of optometry at the University of Houston, to give the examination in Houston, State of Texas.

QUESTION

Is the State Board of Optometry legally authorized to delegate authority to an agent to give an optometry examination in the State of Texas?

CONCLUSION

The question is answered in the negative.

ANALYSIS

The power to give the optometric examination is delegated to the State Board of Optometry, and being a portion of the sovereign power of the State, in the absence of express authority to further delegate such powers, is not redelegable, and secondly, in any event, the sovereign power of the State is only coextensive with the territory of the State, and except where specifically provided otherwise cannot authorize officers to act beyond the geographic territory of the State.

Under [NRS 636.010](#) the practice of optometry is declared to be a learned profession, affecting public safety and welfare and charged with a public interest, and therefore subject to protection and regulation.

[NRS 636.030](#) creates the State Board of Optometry. [NRS 636.145](#) et seq. Under [NRS 636.200](#) it is provided that when one takes the optometry examination and fails it, he shall, upon reexamination, be examined only in the subject or subjects which he has failed.

No provision of the chapter provides that examinations shall be given only in the State of Nevada. Neither is there a provision of the chapter that precludes or forbids the delegation of the power to give the examination to one not a member of the Board. However, there is no doubt that members of the State Board of Optometry are State officers and that to them has been delegated a portion of the sovereign power of the State, and that such sovereign power as has been delegated to them is unassignable and nondelegable by them in the absence of clear-cut authority to so assign or delegate such power clearly expressed in the statute that confers it. *McCullogh v. Scott*, (N.C. 1921) 109 S.E. 789.

The power or duty of acting on applications and granting or issuing licenses usually is conferred by statute or ordinance on designated boards or officers, and the particular board or officer having the power or duty in a given case depends on the provisions of the act or ordinance by which the particular license is authorized or required. * * * and the powers and duties of such a board or officer, as far as they require the exercise of judgment and discretion, and are not mere ministerial acts,

cannot be delegated to agents. The board or officer must administer the licensing statute in accordance with its provisions. (Emphasis supplied.) 53 C.J.S. 629, Art. 37, "Licensing Boards and Officers."

In the McCulloch case, *supra*, it was proposed that the accountancy examination be given by the State of North Carolina, as a courtesy to the applicant, in the City of Washington, District of Columbia. To be authorized to give such an examination was held to be a delegation of a portion of the sovereign power, which could not be redelegated, such redelegation being unauthorized.

Despite the fact that the authorized examinations were not expressly limited to the geographic territory of the State, it was held that unless the act is specifically authorized to be done beyond the boundaries of the State, as, for example, the execution of conveyances or the taking of depositions, the authority is limited by the state boundaries. Held that the examination could not be given beyond the boundaries of the State of North Carolina. *McCulloch v. Scott, supra*.

The court said:

As a general rule, no law has any effect of its own force beyond the territorial limits of the sovereignty from which its authority is derived, every statute being *prima facie* confined in its operation to the persons, property, rights, or contracts which are within the territorial jurisdiction of the Legislature which enacted it. Though the Legislature may require certain official acts to be done beyond the state's limits, such as taking depositions of witnesses, acknowledgments of deeds, etc., such acts are done by its express permission and cannot be implied. *Idem*.

We regard the cited case as directly in point, well reasoned and determinative of this question. For the reasons given, we are of the opinion that the authority to give the optometry examination cannot be delegated and further that such examination must, when given, be given within the State of Nevada.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

292 Funeral Directors and Embalmers, State of Board of—A duly licensed funeral director of Nevada or California has no authority as such beyond the territorial limits of the state in which he is licensed. To conduct services or committal rites extraterritorially (courtesy) is a violation of law. Sections 642.590, 440.550 of NRS and 10479 Health and Safety (California) Codes construed.

CARSON CITY, July 10, 1962

MR. SILAS E. ROSS, *Secretary-Treasurer, Nevada State Board of Funeral Directors and Embalmers, P.O. Box 2407, Reno, Nevada*

STATEMENT OF FACTS

DEAR MR. ROSS: It has been the custom when death occurs in a state bordering on Nevada for licensed funeral directors in that state to bring the deceased person into Nevada for services and committal in Nevada cemeteries. It has been the practice for Nevada funeral directors to enjoy the same courtesy when the death occurs in Nevada and the services and

committal are held in one of the bordering states. We are not informed that a local burial permit is obtained in those cases in which death occurred in an adjoining state, nor are we informed that a local burial permit is obtained in those cases in which interment is in another state, the death having occurred in Nevada.

QUESTION

Is this procedure in violation of Nevada statutes?

CONCLUSION

Such custom or procedure, although as a practical matter has a great deal to recommend it, not only violates the statutes of Nevada, but also violates the laws of other states that participate in the manner outlined.

ANALYSIS

Under section 642.010 of NRS it is provided that a “funeral director or undertaker” is an entity or person “(c) directing or supervising or contracting to direct or supervise funerals.” Section 642.590 NRS, subsection 1 provides:

642.590 1. Any person, firm or corporation who engages directly or indirectly, in the business of funeral directing or undertaking or holds himself or itself out as a funeral director or undertaker or attempts to take care of the disposition of dead human bodies without having complied with the provisions of this chapter, and without being licensed so to do as herein provided, or who continues in the business of a funeral director or undertaker after his or its license has been revoked shall be guilty of misdemeanor, and upon conviction thereof shall be fined not less than \$50 or more than \$500. Each day that he or it is so engaged in such business shall be a separate offense.

It is therefore clear that for a California funeral director, duly licensed there, to convey the remains of a deceased person who died in that state to Nevada and to here supervise services and committal in a Nevada cemetery is to practice as a funeral director here and without a license, contrary to the provisions of Nevada law cited. The same would be true in respect to a licensee of any other state, whether bordering upon Nevada or distant therefrom. No distinction exists, between states, in this respect.

The same rule prevails when the converse situation is imagined in which a duly licensed Nevada funeral director would undertake to supervise services and committal in a cemetery of California. See Section 7055, West’s Annotated Code—Health and Safety (California). Such would constitute operating as a funeral director or undertaker without a license.

We have, of course, not digested the laws of all of the adjoining states, and such, as we shall show, would serve no useful purpose. To understand the manner in which the laws of Nevada and California have treated this matter and synchronized the law into a harmonious system (no doubt essentially followed by the other states) will make clear the duties and responsibilities of Nevada licensees in this respect.

The transportation of the remains of deceased persons into Nevada is contemplated and authorized only by common carrier. ([NRS 440.550](#)). This is easily understood in light of the fact that the present statute had its origin in Section 23 of Chapter 199, Statutes of 1911. This was prior to the substantial impact of the motor vehicle.

The laws of these two states are similar in that in each state in cases in which the remains of a deceased person are brought to the state for disposition, out-of-state removal permits must be examined and if found in order and in accordance with the law of the state where death occurred, the burial or other permit is then issued by the local registrar (California) or local health officer (Nevada) in the same manner as if the death had occurred locally. See Section 440.550 of NRS and Section 10479 West’s Annotated California Codes—Health and Safety.

[NRS 440.550](#) provides:

440.550 (Prerequisite to issuance of permit; bodies transported from another state.) No burial or removal permit shall be issued by any local health officer until a complete and satisfactory certificate of death has been filed with him, except that when a dead body is transported by a common carrier into a local health district in Nevada for burial, the transit and removal permit issued in accordance with the law and health regulations of the place where the death occurred, shall be accepted by the local health officer of the district into which the body has been transported for burial or other disposition, as a basis upon which he shall issue a local burial permit in the same way as if the death occurred in his district. He shall plainly enter upon the face of the burial permit the fact that it was a body shipped in for interment, and give the actual place of death.

Section 10479 (Health and Safety) of West's Annotated California Codes provides the following:

Sec. 10479 (Out of state removal permits; local burial permits.) When human remains are transported from outside the state into a registration district in California for interment, the transit or removal permit, issued in accordance with the law and health regulations of the place where the death occurred, shall be accepted by the local registrar of the district into which the human remains have been transported, as a basis upon which he shall issue a local burial permit, noting upon the face of the burial permit the fact that human remains were shipped in for interment and the place of death. The transit or removal permit issued in accordance with the law and health regulations of the place where the death occurred shall be filed with the copy of the permit issued by the local registrar.

From the content of the statutes quoted it will be observed that each state refrains from invading the powers of the other. Each state authorizes removal and supplies to the state of destination all pertinent data, and makes no further provision. Indeed, it has no authority to make further provisions. The state of destination then accepts the data supplied and exercises its local jurisdiction in the burial (or other disposition) permit.

Although in both states it is contemplated that the remains be brought from another state by common carrier, we have no hesitancy in approving the transportation by motor vehicle (hearse) controlled by the licensed funeral director of the state in which the death occurred, to a licensed funeral director of the state of destination. The transportation standing alone could not be regarded as a violation of local licensing laws. Such transportation would be far more efficient and expeditious than consignment by common carrier.

As we have shown by the statutes quoted, in such case, the local funeral director must then obtain the burial permit and disposition cannot be legally made without obtaining the local permit. This presents no problem for he is entirely familiar with the laws and procedures established locally.

Respectfully submitted,

ROGER D. FOLEY, *Attorney General*

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

S-1 State Personnel Department; Authority to Employ an Unclassified "Chief Assistant" in the Legislative Counsel Bureau; 40-Hour Workweek—Held: Neither the Legislative Counsel nor the Legislative Auditor is authorized to employ in the unclassified service a "chief assistant." Only unclassified position within Legislative Counsel

Bureau is that of deputy legislative auditor, whose salary is set by law. Legislative Counsel is not a head of an executive “department, agency or institution” so as to allow his appointment of unclassified deputy or chief assistant. Forty-hour workweek requirement not binding on all employees.

CARSON CITY, August 3, 1962

MR. HOWARD E. BARRETT, *State Budget Director, Carson City, Nevada*

DEAR MR. BARRETT: This opinion is given in response to three questions asked of this office by Howard E. Barrett, State Budget Director. All of the questions deal with the propriety of the appointment by the Legislative Counsel of one W. Elmo DeWhitt as a state employee in the unclassified service.

It is our opinion that Mr. DeWhitt’s employment was and continues to be unlawful.

FACTS

Mr. DeWhitt was appointed in July 1961, by J. E. Springmeyer, Legislative Counsel. His appointment and employment records indicate that he was appointed as “Chief Assistant” in the “Legislative Counsel Bureau, Audit Div.” By signature Mr. DeWhitt has designated himself in this manner:

“A. N. Jacobson, Legislative Auditor
W. Elmo DeWhitt, Chief Assistant”

Mr. DeWhitt is required to work, and actually works, only 32 hours per week, and this is specified in his appointment and other personnel records. His salary is stated to be “\$9.19 per hour.”

OPINION

With the facts of this patently irregular situation in mind, we are prepared to answer your specific questions:

QUESTION

Is it legally permissible for the chief assistant legislative auditor to be in the unclassified service when [NRS 218.700](#) would appear to indicate that all employees of the Legislative Counsel’s office should be under the personnel system?

The answer to this question is, “No.”

[NRS 218.700](#) does require that all employees in the Legislative Counsel Bureau be under the personnel system. The personnel system in turn requires that all such employees be in the classified service.

There is one exception to the requirement that employees of the Legislative Counsel Bureau be in the classified service and that is the exception specifically provided for by the Legislature in [NRS 218.765](#) which reads as follows:

Deputy legislative auditor. There may be employed in the office of the legislative auditor a deputy who shall be in the unclassified service of the state and who shall receive an annual salary of \$5,460.

Administrative Determination of Exact Nature of Employment.

The foregoing statute refers to a “deputy” and not to a “chief assistant.” Nevertheless a conclusion could be justified that Mr. DeWhitt was appointed to fill this statutory position. The deputy position authorized by [NRS 218.765](#) is the only possible position in the unclassified service within the Legislative Counsel Bureau. Mr. DeWhitt’s appointment in the unclassified

service is certainly some indication that either the Personnel Act was ignored or the deputy position was intended. The fact that the appointment is in the “Auditing Div.,” and that DeWhitt calls himself an assistant to the auditor is further indication.

It will be necessary to make an administrative decision on this point. In making such determination the Budget Director should examine all personnel records and communicate with the employee, the appointing officer and the Director of the State Personnel Department. If it should appear that Mr. DeWhitt is in fact the statutory deputy mentioned above, then arrangements should be made for him to be paid only the statutory salary of \$5,460, which is roughly one-third of what he is getting now. If he does not hold this position, then he holds no position at all; and, rather than just being overpaid, he has been unlawfully receiving state money. In either case, he and Mr. Springmeyer should be dealt with in the manner outlined in the conclusion of this opinion.

Other than appointment under [NRS 218.765](#) it is unlawful to appoint any employee in the classified service in this bureau.

[NRS 218.700](#), which you mention in this question, requires that appointments of staff by the Legislature Counsel “be made in accordance with the provisions of the state merit and personnel system.” A system for classifying state employees according to merit is set forth in Chapter 284 of Nevada Revised Statutes. One of the express purposes of this system (as stated in [NRS 284.010](#)) is to “establish uniform job and salary *classifications*.” (Italics supplied.) [NRS 284.150](#) reads as follows:

Classified service: Composition; appointments and discharge.

1. The classified service of the State of Nevada shall be comprised of 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 the public funds are funds received from the Government of the United States or any branch or agency thereof, or from private or any other sources.
2. Appointments in the classified service shall be made according to merit and fitness from eligible lists prepared upon the basis of examination, which shall be open and competitive, except as otherwise provided in this chapter. * * *

To be in other than the classified service, then, the position in question must be “not included in the unclassified service.”

[NRS 284.140](#) enumerates those positions which are included in the unclassified service. The only possible unclassified exception which could apply to “Chief Assistant” DeWhitt is that of paragraph 3, which provides that:

3. At the discretion of the elective officer or head of each department, agency or institution, one deputy and one *chief assistant* in such department, agency or institution. (Italics supplied.)

We hold that neither the Legislative Counsel nor the Legislative Auditor come within the category of an “elective officer” or head of a “department, agency or institution.” Neither can, accordingly, appoint a *chief assistant* or anyone else in the unclassified service (with the exception of the deputy auditor mentioned in [NRS 218.765](#)).

There are two reasons why neither the Legislative Counsel nor the Legislative Auditor can be held to be such a head of a department, agency or institution as to be permitted to appoint a chief assistant. The first is that a bureau, in general, and this bureau in particular, is of a lower level than a department, agency or institution and thus outside the scope of the authorization of appointment of such unclassified personnel. The second reason is that even if this were not the case, “department, agency or institution” means a department, agency or institution in the executive branch of government; and, accordingly, the staff of the Legislative Counsel Bureau,

all being in the legislative branch of government, are by definition ineligible to appoint unclassified deputies or chief assistants under [NRS 284.140\(3\)](#). We will explain each of these reasons.

First, let us examine the bureau. The Legislative Counsel Bureau is a bureau composed of an 8-member commission known as the Legislative Commission, the Legislative Counsel, the Legislative Auditor, and employees of the bureau provided for by statute. ([NRS 218.620](#).) It is a bureau composed of four entities, commission, counsel, auditor and employees. Although the Legislative Counsel is “executive head” of this bureau ([NRS 218.700](#)), he is also “responsible to the commission” (i.e., the Legislative Commission, [NRS 218.690\(1\)](#)) and subordinate to it. What the Legislative Counsel is, in fact, is a classified employee ([NRS 218.690](#)) employed by the Legislative Commission ([NRS 218.690](#)) and responsible to it. We think that the head of this bureau is the Legislative Commission and that the Legislative Counsel is really more of an executive assistant to the Commission. There is legal authority for calling such a commission or board the “head” of a governmental division, or subdivision, but it is unnecessary to discuss this for the reason that whoever is head of this bureau, such person or group of persons does not have the status of being head of a “department, agency or institution.”

A bureau is a division of a department. In re M’Laughlin, 210 N.Y.S. 68. In this case the question was raised as to whether or not a certain “Commissioner of Accounts” was head of a department or just of a bureau. As a department head he would have certain powers, such as compelling attendance of witnesses, which he would not have as a mere bureau head. The court found him to be the head of a major division of the executive branch of government and that he was a department head. Said the court: “He certainly was not the head of a mere (sic) bureau, because in the classification of the ministerial officers of the government, a ‘bureau’ is understood to be a division of a department. (Bouvier’s Law Dict.)”

If the Legislature had intended that the classified employee of a “mere bureau” should be able to appoint unclassified personnel, it would have specified the head of a “department, agency, institution or *bureau*.” It is a very elementary principle of statutory construction (“*Expressio unius est exclusio alterius*.”) that where a number of things are expressly designated, there is an inference that all omissions were intended by the Legislature.

A bureau is not a “department.” A bureau is subordinate to a department as we have seen. We are all familiar with the scores of federal bureaus, for example, which are subordinate to the various departments of government, for example, the *Bureau* of Investigation under the *Department* of Justice, and the *Bureau* of Mines under the *Department* of the Interior. The Legislature must be assumed to have been familiar with this common nomenclature as well as with the law relating to the difference between the two governmental units.

A bureau is not an “agency.” Agency is an extremely broad term, but it is narrowed and defined for us in the Personnel Act. [NRS 284.139](#) reads as follows:

284.139 “Agency” defined for purposes of [NRS 284.140](#). As used in [NRS 284.140](#), “agency” means every board and commission the members of which, or some of such members, are required by law to be appointed.

We do not find anything in this bureau, composed of a commission, counsel, auditor and employees, that remotely resembles either a board or commission. There is a commission within the bureau, but nothing approaches a board function. This statutory definition of agency clearly excludes such bureau for another reason. It does not seem that any “members” (if you can call either employees or the Legislative Commission a “member” of anything) are required by law to be appointed. The Legislative Commission appoints the Legislative Counsel and the Legislative Counsel appoints the Legislative Auditor; however, we feel that the meaning of “appointed” is different in the case of an appointment by the Governor of a board member from that of the appointment of a classified employee. We do not think that any employee of this bureau are appointed within the meaning of the word as it is used in [NRS 284.139](#) in the definition of “agency.”

A bureau is not an “institution.” Common understanding of the word “institution” tells us this. In *Prescott Courier v. Board of Superiors*, 67 P.2d 483, the definition of “institution” from Webster’s New International Dictionary is stated as follows:

An established society or corporation; and establishment, especially one of a public character; a foundation; as, a library or charitable institution; the Smithsonian Institution; also, a building or the buildings occupied or used by such organization.

It is quite clear that this bureau is not an institution. It is not an agency or a department.

“Department, Agency or Institution” refers only to the executive branch of government. “Department” is defined in *Black’s Law Dictionary*, Fourth Edition, as “one of the divisions of the *executive* branch of the government.” (Italics supplied.)

In the case of *Chase v. Falk*, 185 N.Y.S.2d 148, we find a situation similar to this. The matter before the court was a decision of the New York State Civil Service Commission that an officer called director of probation could be in the classified service. The lower court held that as a department head he had to be in the classified service. The appellate court in the above-cited decision held that “ ‘department’ means an administrative department,” i.e., an executive department, and that since the director of probation was in the judicial department he could still be in the classified service even though he were a department head. The point of this case is that when the Legislature talks about heads of departments as having certain privileges and immunities it is speaking of executive departments. Thus, only deputies and chief assistants to executive department heads may be in the unclassified service under authority of [NRS 284.140\(3\)](#). Persons not included in the unclassified service must be in the classified; and so must all the staff in the Legislative Counsel Bureau.

Before going to the next question, there are two other “makeweights” which further indicate to us that all employees in this bureau should be classified. [NRS 218.700](#) requires that such staff be appointed “in accordance with the provisions of the state merit and personnel system.” “State merit and personnel system” is not defined by present Nevada law. However, it has been defined in the past by our Legislature. “State Merit System” is defined in a now repealed act, Chapter 212, Statutes of Nevada, 1945.

Section 1(a) of this act reads:

Section 1. Definitions. As used in this act—(a) “State Merit System” means the state merit system of personnel administration, created for the purpose of insuring the impartial selection of personnel on the basis of merit, for the Nevada employment security department, the Nevada state department of health and the divisions of child welfare service and of old-age assistance within the Nevada state welfare department.

The act goes on to set up a system of merit examination. This indicates that when the Legislature directs appointment of staff to be under the merit system it means under a system of merit or competitive examination, which is to say the classified service.

It is also interesting to note that the Legislative Counsel Bureau is not indexed in the official index of Nevada Revised Statutes under “Department,” “Agency,” “State Agencies and Departments,” “Institutions” or “Public Institutions.”

These latter arguments are merely further indications which support our general conclusion that the Legislature did not contemplate permitting a classified employee in the legislative branch of government to appoint unclassified assistants.

Is there legal authority for the Legislative Counsel to set the workweek for the chief assistant at 32 hours rather than the usual 40 hours per week?

The answer to this question is “Yes.”

[NRS 281](#) provides:

281.110. State offices to maintain 40-hour week; office hours.

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 [p.] m. and from 1 p.m. until 5 p.m. every day of the year, with the exception of Saturdays, Sundays and public holidays.

Section 8101 of the State Administrative Manual provides:

Unclassified Personnel, General Statement. In general, the same rules concerning working conditions shall apply to unclassified employees as apply to classified employees.

The question here is whether or not the requirement that offices maintain a 40-hour workweek is also a requirement that all state employees work 40 hours each week. We are constrained to hold that since the Legislature did not specifically require all employees to work 40 hours per week, that a department head has legal power to permit employees to work less than 40 hours. In the absence of information relating to some abuse in the budgeting procedure, we will have to advise that under our law it is possible for preferred treatment to be given in this manner. It is also possible to give what would be equal to increases in salary by reducing the number of hours required to be worked by state employees. We think that perhaps a bad precedent has been set here, but since the action was legal, this matter will have to be passed upon by the Director of the State Department of Personnel and the Legislature.

QUESTION

Is there legal authority to pay the chief assistant \$15,000 per year, which is in excess of the \$10,956 paid to the Legislative Auditor, and which is in excess of the \$5,460 which is set by statute to be paid to a deputy legislative auditor if such a position were filled?

The answer to this question is “No” because if the “chief assistant” is a deputy auditor, he is being paid too much, and if he is anything else, he shouldn’t be paid at all.

CONCLUSION

[NRS 353.260](#)(2) reads as follows:

It is unlawful for any state officer, commissioner, head of any department or employee of this state to bind, or attempt to bind, the State of Nevada or any fund or department thereof in any amount in excess of the specific amount provided by law, or in any other manner than that provided by law, for any purpose whatever.

Whatever you may determine Mr. DeWhitt’s position to be, it is our opinion that the Legislative Counsel and the Legislative Commission have bound, or attempted to bind, the State of Nevada “in an amount in excess of the specific amount provided by law” and in a manner not provided by law. In so doing the office of the Budget Director, the office of the Director of the State Personnel Department and Mr. DeWhitt himself have been placed in a very difficult position.

There is adequate provision in the law ([NRS 284.173](#)) for employment of professional personnel such as Mr. DeWhitt by independent contract, in which cases all of the provisions necessarily applicable to state employees are not involved. If Mr. DeWhitt was to be employed as a state employee, it should have been done in a legal manner. Since it has not been done in this way, action must be taken to correct the situation. When it has been determined by your office just what position is purported to be held by Mr. DeWhitt, this office should be advised so that necessary steps can be taken for recovery of any illegally paid state funds.

Respectfully submitted,

S-2 Savings and Loan Association—Federally chartered associations having a principal office in Nevada, and these only, would be qualified to convert from a federal to a Nevada state charter. In effecting such a conversion all state laws respecting the creation of a state association, except the State’s capitalization requirements, would apply. [NRS 673.080](#), [673.650](#), [673.690](#), Section 1464 of Title 12 USCA construed.

CARSON CITY, August 8, 1962

MR. JOHN H. BELL, *Commissioner of Savings Associations, Carson City, Nevada*

DEAR MR. BELL: Your recent letter requesting an opinion of this department presents exclusively a question of law, viz:

QUESTION

Does the Commissioner of Savings Associations have the discretionary power to deny to a federally chartered savings and loan association the privilege to convert to a state charter?

CONCLUSION

Federally chartered associations having the principal office in this State, and these only, would be qualified to convert from a federal to a state charter.

In effecting such a conversion the federally chartered association would be required to comply with all Nevada laws applicable to the creation of a state association, except the requirements in respect to capitalization, including the requirement of surmounting protests (if any) made by other established associations under subsection 8 of [NRS 673.080](#).

Within these limitations, the commissioner could not deny the conversion privilege.

ANALYSIS

Under the provisions of [NRS 673.070](#), building (savings) and loan associations may be incorporated under the provisions of Chapter 673, and the provisions of Chapter 78 of NRS (the general corporation law) are adopted except as modified by the provisions of Chapter 673.

Under [NRS 673.080](#), subsection 1, the Secretary of State may not issue a certificate to any such association until its articles of incorporation are approved by the commissioner. Under subsection 2, its amendments to articles must be so approved. Under subsection 3, such an association may not sell its permanent stock until it has been licensed by the commissioner to do so. Under subsections 4 and 5, the information that shall be given to the commissioner in application for such a license is provided. Under subsection 6, the commissioner may issue a license for the sale of the stock if he finds that the proposed issue “will not mislead the public as to the nature of the investment or will not work a fraud upon the purchaser thereof.” Under subsection 7, no association may sell its stock until it is licensed by the commissioner and until it has applied for and secured insurance under the regulations of the Federal Savings and Loan Insurance Corporation. Under subsection 8, before the commissioner is authorized to grant a new or branch office license notice shall be given to certain other licensees and an opportunity to protest shall be accorded.

None of these sections of [NRS 673.080](#) were enacted prior to 1931. It would, therefore, appear that subsection 1 through 7 or [NRS 673.080](#) would apply only partially to a foreign building and loan association that had qualified to do business in Nevada prior to 1931, and has remained in good standing continuously thereafter.

As to foreign savings and loan associations operating under a state charter now applying for admission to Nevada, all of the provisions of [NRS 673.080](#) would apply. Also, domestic

associations now to be created under state charter would be required to comply with the provisions of [NRS 673.080](#). These conclusions, however, although relevant, do not reach the question of conversion of an association possessing a federal charter to an association of state charter, or the converse.

Under the provisions of [NRS 673.600](#) to [673.640](#), provision is made for the conversion of a savings and loan association from state charter to federal charter. Under the provisions of [NRS 673.650](#), provision is made for the conversion of a savings and loan association from federal charter to state charter.

A federal savings and loan association is created pursuant to Section 1464 of the Home Owners' Loan Act of 1933, as amended. See Title 12 U.S.C.A., Section 1464. Under subsection (i) thereof, provision is made for conversion from or to a state association, when the state statutes authorize such conversion, and to be made in strict compliance with the provisions of state law.

It has been held that a state association may not be converted to a federally chartered association, despite the consent of a majority or all of the stockholders for such conversion, without the State's consent, by reason of the fact that it deprives the sovereign state of that which it has created and desires to continue in existence for its benefits. Such a conversion is violative of the Tenth Amendment to the Constitution of the United States. *Hopkins Federal Savings and Loan Association v. Cleary*, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403. The opinion points out that such a conversion would not only change the rights of the state of the forum but also the rights of creditors. It would appear that the same rule would apply if the proposed conversion was from federal to state charter.

In any event, the Nevada statutes do authorize conversion both from and to state charters, as aforesaid. Under authority of the Hopkins case (*supra*), however, there must be strict compliance with the state statutory provisions.

It appears that a federal savings and loan association having its principal office in another state would not be permitted to convert to a state charter of this State. See Section 1464(i), Title 12 U.S.C.A., which in part provides:

Any Federal savings and loan association may convert itself into a savings and loan type of institution organized pursuant to the laws of the State, District, or Territory (hereinafter referred to in this section as the State) in which the principal office of such Federal association is located * * *.

[NRS 673.650](#) provides:

673.650 (Permission for conversion of federal association to state association; votes necessary.) Any federal savings and loan association may convert itself into a building and loan association, company or corporation under the laws of this state upon a vote of 51 percent or more of the votes of members of such federal savings and loan association cast at any regular or special meeting called to consider such action.

[NRS 673.650](#) is, therefore, limited by the provisions of the federal statute above quoted, and must be construed in such a manner as to permit conversion of an association of federal charter having its principal office within Nevada, and not elsewhere.

[NRS 673.690](#) in part provides:

673.690 (When permissible for federal association to follow procedure for becoming domestic association; proceedings by directors; requirements as to minimum amounts of capital.)

1. After the meeting, the federal association shall take or cause to be taken such action in the manner prescribed and authorized by the laws of this state as shall make it a building and loan association, company or corporation of this state, and the directors elected at such meeting shall file such documents and take such proceedings as are

required by the laws of this state in the case of the original incorporation of a building and loan association, company or corporation.

Subsection 2 thereof provides that such converting company shall not be required to comply with the provisions of the law in respect to minimum capital requirements. This, of course, for the reason that it has complied with federal exacting requirements in this respect.

Such a converting corporation from federal to state charter would, therefore, be required to comply with all laws applicable to a beginning state corporation, except the requirements respecting capitalization. It would be required to meet the test of protesting existing associations in respect to the location of a branch office.

Under the laws of the United States (Title 12 U.S.C.A., Section 1464(e)) a concern is shown, as under [NRS 673.080](#), subsection 8, that the public welfare will be served by the granting of the charter. It is not given to all applicants at all locations. This subsection (e) provides:

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-3 Bond Commission; 1962 State General Obligation—Chapter 357, Statutes 1961, providing for the issuance of \$1,410,000 of state general obligation negotiable coupon bonds, the proceeds therefrom to be used in the constructing, equipping and furnishing of a minimum security prison, interest thereon and principal to be repayable from the Consolidated Bond Interest and Redemption Fund ([NRS 349.080](#) to [349.140](#), inclusive) is constitutional.

CARSON CITY, August 24, 1962

EDWARD L. BURTON & COMPANY, *174 South Main Street, Salt Lake City 1, Utah*

Attention: Mr. Nicholas G. Smith, Vice President

STATEMENT OF FACTS

DEAR SIRs: The Legislature of 1939 enacted Chapter 197 creating the Consolidated Bond Interest and Redemption Fund which, as amended by Chapter 162, Statutes of 1957, was designed to receive appropriations biennially from the General Fund of the State for the purpose of and sufficient to meet the obligations of the State during the biennium in respect to the interest upon and redemption of matured state bonds. [NRS 349.080](#) to [349.140](#), inclusive.

The Legislature of 1961 enacted Chapter 357, p. 720, which is an act providing for the issuance of general obligation negotiable coupon bonds of the State of Nevada in an amount not to exceed \$1,410,000, proceeds to be used in the constructing, equipping and furnishing of a minimum security prison. The sufficiency of content of Chapter 357, Statutes 1961, upon constitutional grounds has been questioned and it, therefore, becomes necessary to refer specifically to the content of this act.

Sections 1 and 2 create the 1962 State General Obligation Bond Commission, composed of the Governor, Secretary of State and Attorney General.

Section 3 authorizes the commission to issue and sell general obligation negotiable coupon bonds, for the purpose aforesaid, in the aggregate maximum principal amount aforesaid.

Section 4 makes provision for the manner of issuance, serial maturity dates, maximum rate of interest, detachable interest coupons, and other particulars.

Section 5 makes provision for the manner of public sale, notice, minimum price that is authorized to be accepted, etc.

Section 6 makes provision for the manner and content of notice to bidders of sealed bids for said bonds, and Section 7 makes provisions for the content of the sealed bids and deposit thereon.

Section 8 provides for the acceptance of the best responsible bid or bids, and Section 9 provides for the return of deposits of unsuccessful bidders and notification to the successful bidder, and Section 10 provides for the procedure by the commission if all bids are rejected.

Section 11 provides for the registration of the bonds by the State Treasurer, delivery to purchaser and payment therefor.

Sections 12, 13 and 14 provide the following:

Sec. 12. Payment of the principal and the interest on the bonds shall be made from the consolidated bond interest and redemption fund of the State of Nevada, under the provisions of [NRS 349.080](#) to [349.140](#), inclusive.

Sec. 13. The faith of the State of Nevada is hereby pledged that this act shall not be repealed until all the bonds issued under and by virtue hereof, and the interest thereon, shall have been paid in full as provided in this act.

Sec. 14. The resolution providing for the issuance of the bonds may state that the bonds may contain a recital that they are issued pursuant to this act, which recital shall be conclusive evidence of their validity and the regularity of their issuance.

Section 15 provides for the 1962 State General Obligation Bond Commission Fund, appropriates \$5,000 to said fund, and authorizes the commission to retain legal, fiscal and other expert services, and to expend not to exceed the amount appropriate in the payment of said experts and the printing and sale of said bonds.

Section 16 provides that the proceeds from the sale of the bonds is to be credited to the account of the State Planning Board. If not needed immediately, the State Board of Finance is authorized to make short term investments, the interest thereon to be credited to the State General Fund.

Section 17 provides the following:

Sec. 17. This act, without reference to other statutes of the state, shall constitute full authority for the authorization and issuance of bonds hereunder, *except as herein otherwise specifically provided*. No other act or law with regard to the authorization or issuance of bonds that in any way impedes or restricts the carrying out of the acts herein authorized to be done shall be construed as applying to any proceedings taken hereunder or acts done pursuant thereto. The powers conferred by this act shall be in addition and supplemental to, and not in substitution for, and the limitations imposed by this act shall not affect the powers conferred by, any other law. No part of this act shall repeal or affect any other law or part thereof. (Italics supplied.)

Section 18 provides that the proceeds of such bonds (interest) shall never be taxed by the State of Nevada or a political subdivision thereof.

Section 19 provides that the State of Nevada or any political subdivision thereof may legally invest its investment funds in said bonds.

Section 20 provides that the act being a welfare measure shall be liberally construed to effectuate its purposes.

Section 21 contains the severability clause, to the effect that if any section or portion of the act is held to be invalid, the validity of the remainder shall be unaffected and shall remain valid, and Section 22 provides that the act shall become effective on January 1, 1962.

Pursuant to Section 15 of Chapter 357, Statutes 1961, the commissioners have let a contract to Edward L. Burton & Company and this company has consulted with and sought the approving opinion of Dawson, Nagel, Sherman & Howard, Esqs., specialists in bonding matters, 1900 First National Bank Building, Denver 2, Colorado. The bond attorneys have raised certain legal questions, summarized as follows:

QUESTIONS

1. Considering the fact that Chapter 357, Statutes 1961, which authorizes a state bond issue of not to exceed \$1,410,000, and provides (Section 12) that the payment of principal and interest shall be from the Consolidated Bond Interest and Redemption Fund of the State of Nevada, pursuant to the provisions of [NRS 349.080](#) to [349.140](#), inclusive, does the fact that there is no provision in the act (Chapter 357) which purports to levy a tax for the payment of interest and principal of such bonds, render the bonds not authorized, and not legal, if issued?

Two questions are inherent in arriving at the proper answer to the above question, viz:

A. Are the provisions of Section 3, Article IX of the Constitution complied with by the content of Chapter 357 in respect to the levying of an annual tax sufficient to pay the interest upon the proposed bonds and the principal in full within 20 years from the date of the passage and approval of the act?

B. Is an act authorizing the issuance of state bonds defective by reason of the fact that it makes no provision for the levy of an annual tax for payment of interest and principal of said bonds, although it makes reference to another act, by adopting same, which makes provision for biennial appropriations to cover the obligations contained in said bonds?

2. Does Chapter 357, Statutes 1961, specifically appropriate the proceeds of taxes for the payment of principal and interest on the proposed bonds within the meaning of Section 3 of Article IX of the Constitution?

Two questions are inherent in arriving at the proper answer to the above question, viz:

A. Does the constitutional provision designated prevent or preclude the commingling of funds in a consolidated bond interest and redemption fund which has been appropriated to pay the interest and principal on several outstanding bond issues of the state government?

B. Do the requirements of [NRS 349.120](#) that "each biennium, moneys shall be provided by direct legislative appropriation from the general fund sufficient in amount to meet the bond interest and redemption requirements of the State of Nevada, as designated by the various issues of bonds" meet the constitutional test of an effective appropriation within the meaning of Section 3 of Article IX of the Nevada Constitution?

CONCLUSIONS

Reference is made to Question No. 1B. One Legislature cannot bind a succeeding Legislature as to the terms and provisions of its appropriations of money. However, the Constitution (Section 3, Article IX) has bound all Legislatures in forbidding a Legislature to repeal such a statute or postpone or diminish the tax requisite to pay the interest upon and redeem state bonds. The act makes a clear reference to the Consolidated Bond Interest and Redemption Fund which makes provision (mandatory under Section 3 of Article IX of the Constitution) for an appropriation biennially to this fund sufficient to meet all state bond contractual requirements. The act (Chapter 357) is not defective in this particular.

Reference is made to Question No. 1A. The constitutional requirement of Section 3, Article IX, purportedly requiring the annual levying of an ad valorem tax upon all Nevada property not exempt from taxation, and appropriating the proceeds to the payment of a state bond issue, must be construed in a manner to be relaxed in light of changed conditions and circumstances, for otherwise all other tax moneys or revenues to the State are not available for this purpose. Bonds (both principal and interest) issued by the State would be serviced only from ad valorem tax revenues. The act (Chapter 357) is not defective in this particular.

Reference is made to Question No. 1. The fact that there is no provision in the act (Chapter 357) which purports to levy a tax for the payment of interest and principal of said bonds, constitutional requisites of guaranties and good faith, with adequate appropriations being met in another act, does not render the chapter unconstitutional, nor does it render bonds to be issued thereunder unauthorized and illegal.

Reference is made to Question No. 2B. The requirement of a direct legislative appropriation by the Legislature biennially to service the bonds is, under constitutional provisions (Section 3, Article IX), mandatory. Chapter 357 is, therefore, not defective (or unconstitutional) for want of an appropriation therein, for Chapter 357 is clearly tied to the Consolidated Bond Interest and Redemption Fund statutes, which statutes, in legal contemplation, become a part thereof.

Reference is made to Question No. 2A. The concept of commingling of funds within a consolidated bond interest and redemption fund, rather than to compartmentalize the funds requisite to service individual bond issues, is no disadvantage to the bond holders, neither does it reduce their security or impair their contracts in any respect, for all of such funds must, in the final analysis, come from one reservoir (the General Fund) which is fed and replenished by innumerable streams which at different seasons and in vastly different amounts flow thereto.

Reference is made to Question No. 2. The specific appropriation constitutionally required by Section 3 of Article IX of the Constitution is provided by [NRS 349.120](#), subsection 2, being a part of the Consolidated Bond Interest and Redemption Fund Act, which has been adopted by the express provisions of Chapter 357.

ANALYSIS

Section 3 of Article IX of the Constitution, insofar as here pertinent, 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 specifically appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished until the principal and interest of said debts shall have been wholly paid. Every contract of indebtedness entered into or assumed by or on behalf of the state, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repeal invasion, suppress insurrection, defend the state in time of war, or, if hostilities be threatened, provide for public defense.

Section 3 of Article IX of the Constitution when adopted was in slightly different content and provided, in part, the following:

Sec. 3. For the purpose of enabling the State to transact its business upon a cash basis, from its organization, the State may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of three hundred thousand dollars, except for the purpose of defraying extraordinary expenses, as hereinafter mentioned. * * *. (See Marsh, *Constitution Debates and Proceedings*)

In order to show the contrast of the condition of the State in October 1864, to that presently existing, tax-wise, and in order that we may properly construe the constitutional limitation above quoted, it appears necessary to reflect upon conditions then existing, which we shall now briefly outline.

There was, of course, no state fund accumulated. Accordingly, the Legislature enacted Chapter III, effective January 4, 1865, which authorized the State to issue bonds in a sum not to exceed \$150,000, to run not longer than one year and to bear interest at a rate not to exceed 2 percent per month. This Legislature also enacted Chapter LXXXV, effective March 9, 1865, which provided an ad valorem state tax upon all property within the State not exempt from taxation of 95 cents upon each \$100 of assessed value, the proceeds from this tax, among other things, to pay the principal and interest on the said bonds aforesaid; and provided an additional ad valorem tax of 25 cents and appropriated it to the payment of the indebtedness of the Territory of Nevada, as assumed by the State; and provided an additional tax of 5 cents for the support and maintenance of the University and the common schools. This statute was in accordance with Section 24 of Article XVII of the Constitution, which limited the state levy for the first three years to \$1.25 per \$100 of assessed valuation. (Marsh, *Constitutional Debates and Proceedings*, q.v.)

At that time there was no constitutional limitation of the combined ad valorem tax of not to exceed \$5 per \$100 of assessed valuation, as presently existing. (Section 2 of Article X, Constitution.)

The within problem does not in any respect involve the application or construction of Section 2 of Article X of the Constitution.

At that time (1864-1865) the framers of the Constitution and the Legislature, fully realizing that they had one method only of raising public revenue and such was by an ad valorem levy upon a very limited tax base, and being very concerned with the retention of state credit and state solvency, proposed constitutional, and enacted statutory, provisions that would protect against these dangers and evils. They protected the people against an excessive debt and against a burdensome tax, at the same time provided for a prompt discharge of all contractual obligations and the modest accumulation of a state fund.

Mark the contrast. Although the State still takes a small bite from the ad valorem levy (28 cents by the provisions of Chapter 318, Statutes 1961), and has priority over the counties and other political subdivisions in taking its part of the \$5 maximum levy, it has many other sources of income, e.g., the sales and use tax, the gaming tax, the tax on insurance premiums, on petroleum products, the fees of the Secretary of State as corporation commissioner, and many others. Different subdivisions of the state government have funds to invest and the State has been able to accumulate a healthy general fund balance.

With the possible exception of a legislative appropriation to discharge the obligations of the state arising in its bonded indebtedness, a Legislature has no power to effectively appropriate money to be assessed, taxed and paid at a time subsequent to its term of office. With this possible exception, one Legislature cannot effectually bind another. "One legislature cannot control the action of its successor, nor tie its successors hands by making future levies and appropriating the revenues to be derived therefrom." *Billeter v. State Highway Commission* (Ky. 1924), 261 S.W. 855. It may be that under Section 3 of Article IX of the Constitution an appropriation to pay interest upon and to retire bonds, many years in the future, is valid and binding upon subsequent Legislatures. It appears to me more likely, however, that a subsequent Legislature could amend an appropriation act of this type, inherited from a former Legislature, in any manner which would not impair the obligations of the contract. Be this as it may, under the plan adopted by the Legislature by the provisions of Chapter 357, Statutes 1961, and [NRS 349.080](#) to [349.140](#), no appropriation is made by a Legislature calculated to be effective beyond its term of office. Appropriations are made biennially in amounts sufficient to cover the interest and redemption of principal upon its bonded indebtedness.

No question is presented as to constitutional maximum debt of the State under the limitations of Section 3, Article IX of the Constitution.

Before dealing squarely with the principal question of whether or not Chapter 357, Statutes 1961, effectually provides for levying an annual tax, and effectually appropriates the proceeds of such tax to the payment of interest and principal of such proposed bonded indebtedness within the meaning of Section 3 of Article IX of the Constitution, it will be necessary to fully comprehend the content of [NRS 349.080](#) to [349.140](#), inclusive.

Under the provisions of [NRS 349.090](#) the Consolidated Bond Interest and Redemption Fund is created in the State Treasury, and under [NRS 349.100](#) all funds in the State Treasury on March 28, 1939, the effective date of the original act, for the payment of interest on and the redemption of state bonds was transferred to the said fund. Under [NRS 349.100](#) it is provided that from and after March 28, 1939, all payment of interest and redemption of principal of state bonds should be from said fund.

[NRS 349.120](#) provides:

349.120 (Legislative appropriations from general fund for consolidated bond interest and redemption fund.)

1. For each biennium, moneys shall be provided by direct legislative appropriation from the general fund sufficient in amount to meet the bond interest and redemption requirements of the State of Nevada, as designated by the various issues of bonds for which the faith of the State of Nevada has been or may hereafter be pledged. The amount shall be determined by the legislature from time to time so as to effectuate the purposes of [NRS 349.080](#) to [349.140](#), inclusive.

2. All moneys so appropriated shall be placed in the consolidated bond interest and redemption fund. All moneys so appropriated and placed are hereby expressly set apart and appropriated for the purpose of discharging the obligations of the State of Nevada for bond interest and redemption of bonds issued prior to and after March 28, 1939.

[NRS 349.130](#), out of an abundance of caution and solicitude, provides that if at any time there are not sufficient moneys in the Consolidated Bond Interest and Redemption Fund to pay due interest upon bonds or redemption of bonds when mature, the same shall be paid from the General Fund of the State.

[NRS 349.140](#) provides:

349.140 (Effect of [NRS 349.080](#) to [349.140](#)). The provisions of [NRS 349.080](#) to [349.140](#), inclusive, are not intended to repeal, modify or otherwise affect the obligations of the State of Nevada or the faith thereof, nor the payment of interest and the redemption of bonds which have been issued prior to March 28, 1939, or which may be issued after March 28, 1939, pursuant to any act of the legislature.

It is urged that we give specific attention to the provisions of Section 2 of Article X of the Constitution in resolving the within questions. This section provides:

Sec. 2. 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.

On the merits, does Chapter 357 make a sufficient and constitutional appropriation of funds for the payment of interest on and the principal of the proposed bonds? We are clearly of the opinion that it does. In section 12 thereof it adopts the Consolidated Bond Interest and Redemption Fund, which was then fully effectual and in operation, and with reference to which act such an appropriation is made biennially and the faith of the State of Nevada is pledged that it will be made biennially. In Section 13 the faith of the State of Nevada is clearly pledged as to the payment of interest upon and the principal of said bonds.

The fact that the appropriation is in another act is of no constitutional significance. Neither is the fact that when appropriated from general funds it does not arise fully from an ad valorem levy of any significance. Article XVI, Section 1 of the California Constitution contains a similar provision in regard to a statute to provide ways and means for the repayment of the loan.

The veterans' Welfare Bond Act of 1921, Stats. 1921, p. 959, providing for a bond issue, was not unconstitutional as against contention that it does not provide ways and means for the repayment of the loan, as required by this section in view of section 5 of said act, providing that the bonds shall be paid from a fund to be raised in part by taxation in the same manner as moneys raised for general purposes of the state. *Veterans' Welfare Board v. Jordan* (1922), 208 P. 284, 189 C. 124, 22 A.L.R. 1515. See West's Annotated California Codes—Constitution, Art. XVI, Sec. 1, p. 327.

Section 3, Article IX of the Constitution, requires that the act authorizing bonds "shall provide for levying an annual tax sufficient to pay the principal within twenty years from the passage of such law, and shall specifically appropriate the proceeds of said taxes to the payment of said principal and interest * * *."

The requirement of levying an annual tax under the authority of the veterans' welfare case, *supra*, is satisfied by reference to another act, and in the Nevada case the requisite appropriation is clearly contained in [NRS 349.120](#), subsection 2.

This holding is in keeping with changed and modern conditions. It would be most unrealistic for this office to hold that in view of the constitutional provisions the bonds (in order to be legal) must be paid solely from the proceeds of an ad valorem levy and that other sources of General Fund moneys are not available for this purpose.

All of the laws of taxation for the obtaining of state revenue in force and effect at the time the bonds are issued will become a part of the obligation of such bond contract, protecting the holder of the bonds under constitutional provisions. *State v. Milam* (Florida 1933), 153 So. 100.

In arriving at the conclusions heretofore set out, we have in mind that a state constitution is not a grant of power, but is a limitation of power. "The legislature has all power unless restricted by the constitution." *Rhea v. Newman* (Ky. 1913), 156 S.W. 154; *People v. Nelson* (Ill. 1931), 176 N.E. 59; *King v. Board of Regents* (Nev. 1948), [65 Nev. 533](#), 200 P.2d 221.

"The constitution is a living thing, and is to be interpreted in the light of new and changing conditions." *King v. Board of Regents*, *supra*. Certainly, from the fact that General Fund moneys are now available from many sources other than by reason of an ad valorem levy, and the fact that a strict construction of Section 3 of Article IX of the Constitution would require the repayment solely from the proceeds of an ad valorem levy, such a construction becomes unreasonable in the extreme, and cannot be approved.

Finally, every presumption is in favor of the constitutionality of Chapter 357, Statutes 1961.

Courts should uphold statute as valid, unless clearly unconstitutional; every intendment and presumption being in favor of constitutionality. *Koy v. Schneider* (Texas 1920), 221 S.W. 880.

A statute "should be not held invalid unless its unconstitutionality be made to *appear beyond any reasonable doubt*" (Original case was in italics). (Citing authorities.) *Koy v. Schneider*, *supra*.

Since the legislature can pass any act not expressly prohibited by the state or national constitution, an act is presumed to be constitutional until declared otherwise by a court of competent jurisdiction. *Riter v. Douglas* (1910), [32 Nev. 400](#), 109 P. 444; *State v. Commissioners of Humboldt County*, [21 Nev. 235](#); *T. & G.R.R. Co. v. Nev. Cal. T. Co.*, [58 Nev. 234](#), 75 P.2d 727.

Every presumption is in favor of constitutionality of statute and every doubt must be resolved in its favor. *King v. Board of Regents*, *supra*.

There is nothing vague or ambiguous about the statute. Its intent is crystal clear. We are, therefore, solely concerned with the question of whether the provisions of Section 3 of Article IX of the Constitution bar the procedure in respect to the levy of a tax, and the appropriation of the

proceeds thereof, which has been pursued by the Legislature in Chapter 357, Statutes of 1961, and we are convinced that the constitutional provisions do not render the said statute unconstitutional.

We are in agreement with the bonding attorneys that the bonds should be issued in such form, respecting maturity, as to be paid and fully redeemed within 20 years of the passage of the enabling act, namely April 6, 1961.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-4 Bonded Indebtedness of County School Districts—Bonded indebtedness is incurred within the limitation contained in [NRS 387.400](#) only when bonds of a school district are voted, approved, issued and delivered. The total bonded indebtedness of a school district must, therefore, be computed at time of actual issuance of bonds and not at time of election. While no school bonds may be issued after expiration of 3 years from date of election, the principal amount of any bond issue authorized by a bond election may be divided into two or more series, with different issuance dates for each series, and with maturities for each series to comply with the provisions of [NRS 387.335](#) to [387.525](#). (Note: This opinion supersedes A.G.O. S-4, dated September 13, 1962.)

CARSON CITY, October 12, 1962

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

STATEMENT OF FACTS

DEAR MR. STETLER: Because of the tremendous growth problems being experienced in said county, the Clark County School District anticipates that it will be necessary for it to have at least two bond elections in 1963, and still others each year thereafter, so long as the county's present rate of growth continues. It is suggested that considerable savings in cost of the indicated bond elections can be effected for the taxpayers, and more efficient planning in the district's building program attained, by seeking the approval of the voters to a bond plan which reduces the number of bond elections and would authorize the district to contract indebtedness by issuance of bonds from time to time as required and legally permitted, the total or aggregate in outstanding bonds at no time to exceed the 10 percent limitation in respect of the last valuation of taxable property within the school district, as provided in [NRS 387.400](#).

In requesting our opinion and advice as to the legality of such proposed bond plan, it is indicated that while there may have been little necessity for it for solution of the "school problem" in Nevada in the past, it is now, and will hereafter increasingly be regarded as the most practical and economical manner of financing required school facilities, particularly in the more populous counties of the State.

QUESTION

May a county school district seek authorization of the electors to issue bonds in an amount exceeding 10 percent of the total of the last assessed valuation of taxable property within the district, providing that at no time will there be issued and outstanding bonds in a total or aggregate amount exceeding such limitation?

CONCLUSION

Upon review of applicable law, our answer is that a county school district may seek authorization and approval of such proposed bond plan.

ANALYSIS

The statutory provisions which are pertinent to the question herein are as follows:

[NRS 387.400](#) (Limitation of total amount of bonds), as pertinent herein, in part provides as follows:

1. The total bonded *indebtedness* of a county school district shall at no time exceed an amount equal to 10 percent of the total of the last assessed valuation of taxable property situated within the county school district less an amount equal to any total outstanding bonded indebtedness of the school districts and educational districts abolished by [NRS 386.020](#) whose areas are now within the county school district. (Italics supplied.)

[NRS 387.337](#) (Notice of intention to issue bonds to be given county commissioners; waiver of notice) provides as follows:

1. On or before January 1 preceding any fiscal year in which the board of trustees of a county school district intends to issue bonds, the clerk of such board of trustees shall notify, in writing, the board of county commissioners of the county whose boundaries are coterminous with the boundaries of such county school district of such intent. If the *issue* of such bonds was authorized by a prior bond election, the notice shall indicate the amount of such bonds to be *issued* in such year. If the issue of such bonds is contingent upon the outcome of a bond election to be held in such year, the notice shall indicate the amount of the bonds to be *issued* in such year if the *issue* thereof is *authorized*. (Italics supplied.)

2. The notice required by subsection 1 may be waived by appropriate resolution of the board of county commissioners after the receipt of a written request therefor from the board of trustees of the county school district.

[NRS 387.470](#) (Division of bonds into series of different dates permissible) provides as follows:

1. Subject to the provisions of subsection 2, the board of trustees of a county school district may divide the principal amount of any issue *authorized* at any election into two or more series and fix different *dates of issue* for the bonds of each series. The bonds of any one series may be made payable at different times from those of any other series. If the bonds of any authorized issue are divided into series, the maturity of each respective series shall comply with the provisions of [NRS 387.335](#) to [387.525](#), inclusive. For the purpose of computing the maturity of each series the term "date of issue" shall be deemed to be the date of the bonds of each series respectively.

2. No county school district bonds shall be *issued or sold* by the board of trustees after the expiration of 3 years from the date of the election authorizing such issue. (Italics supplied.)

[NRS 387.480](#) (Levy of tax for interest), as pertinent hereto, provides as follows:

1. Whenever any county school district shall *issue* bonds under the provisions of [NRS 387.335](#) to [387.525](#), inclusive, or shall have any bonds outstanding, the board of county commissioners of the county whose boundaries are coterminous with the boundaries of the county school district shall levy and assess a special tax on all the taxable property in the county school district, including the net proceeds of mines, in an

amount sufficient to pay the interest accruing thereon promptly when and as the same become due according to the tenor and effect of the bonds. (*Italics supplied.*)

[NRS 387.485](#) (Levy of tax for payment of bonds; sinking fund), as pertinent hereto, provides as follows:

1. Following the *issuance* of bonds by a county school district and within sufficient time so that the receipts of the special tax shall be sufficient to pay the principal as it accrues, and annually thereafter until the bonds have been paid in full, the board of county commissioners of the county whose boundaries are coterminous with the boundaries of the county school district shall levy and assess a special tax, and shall continue to levy and assess such special tax, and shall cause it to be collected, on all the taxable property in the county school district, including the net proceeds of mines, in an amount sufficient to pay the principal accruing promptly when and as the same becomes due *according to the tenor and effect of the bonds*, which amount shall be levied, assessed and collected by the county treasurer of that county in the same manner as the tax for the payment of the interest coupons. (*Italics supplied.*)

While we have been unable to find any Nevada Supreme Court ruling which is determinative of the question, the apparent weight of legal authority preponderantly supports a construction or interpretation of legislative intent, as expressed in [NRS 387.400](#), in terms of actual, rather than potential, indebtedness.

Boards of county commissioners and school district trustees have only limited powers, as expressly conferred by statute, or reasonably necessary or implied to carry out express powers. (67 C.J.S. 378-379.) In trying to ascertain legislative intent, it is necessary to review the entire context of a statute. Also, the language or words employed by a legislature in any given statute are generally given their usual and ordinary meaning. With these considerations in mind, we address ourselves to a determination of legislative intent as contained in [NRS 387.400](#).

The purpose of statutes limiting debts which may be *incurred* by governmental units is to protect taxpayers from confiscatory taxation, and such statutes must be construed with reference to [the] evil which [the] legislature sought to remedy in enacting them. (*Italics supplied.*)

* * * * *

Modern and better rule of statutory construction is to construe enactments in accordance with ordinary meaning of language used, assuming that [the] legislature knew what it was saying and meant what it said by [the] words used rather than reading something into statutes which was not expressed specifically therein. (Pacific Gas & Electric Co. v. Shasta Dam Area Public Utility District, 135 Cal.App.2d 463, 287 P.2d 841 (1955).)

Manifestly, the words “bonded indebtedness” should, therefore, be given their ordinary meaning within the context of [NRS 387.400](#). Since there can be no “indebtedness” if there is no debt, and a bond creates no debt unless issued and delivered, the words “bonded indebtedness” can only relate to *issued* bonds, i.e., those authorized by a valid bond election, and actually sold and delivered. Unexercised authority and power to make issuance of bonds in fact and in legal effect creates no debt or bonded indebtedness, unless and until such bonds are actually issued or sold and delivered.

It is the well-established general rule that in the absence of clear statutory or constitutional provision a governmental unit incurs no debt until the issuance of any form of security, and that any existing constitutional or statutory debt limitation must be measured at the time of bond issuance rather than at the time of an authorizing election.

See 15 McQuillin, Municipal Corporations, 3d Ed. Sec. 41.37, at p. 391; 1 Dillon, Municipal Corporations, 5th Ed., Sec. 207; Clark v. Los Angeles, 116 Pac. 722, 160 Cal. 30 (1911); Connelly v. San Francisco, 127 Pac. 834, 164 Cal. 101 (1912); Mistler v. Eye, 231 Pac. 1045, 107 Okl. 289 (1925); Faught v. City of Sapulpa, 292 Pac. 15, 145 Okl. 164 (1929); People v. Baxter, 159 N.E. 203, 204, 328 Ill. 23 (1927); Board of Education of City of Pittsburg v. Davis, 245 Pac. 112, 120 Kan. 768 (1926); Rowan County board of Education v. Citizen's Bank, 130 S.W.2d 832, 279 Ky. 413 (1939); Shadow v. Rapides Parish School Board, 56 So.2d 555, 220 La. 32 (1951); Hill v. Board of Education of School District No. 2, 132 N.E.2d 315, 309 N.Y. 945 (1955); Gray v. Joint Rural High School District No. 9, etc., 286 P.2d 147, 178 Kan. 387 (1955); Hebel v. School District R-1, County of Jefferson, 279 P.2d 673, 131 Colo. 105 (1955).

The rationale of all of the foregoing cases seems to be well stated in the case of Frost v. Central City, 120 S.W. 367, 134 Ky. 434 (1903). At page 369 of the Southwest Reporter, the court in said case stated as follows:

. . . The question, then, is whether or not the indebtedness is created at the time of the election or at the time of the issuance and sale of the bonds. Clearly the election is only one of the steps necessary to be taken in order to legally create the indebtedness, and the indebtedness itself is not created until the bonds are sold. No good would result in holding the at the election is void because at the time it was held the city could not under the Constitution have issued the bonds which the voters authorized. Every substantial good intended to be effectuated by the Constitution will be subserved by holding that the right to issue the bonds is to be determined by the condition of the indebtedness of the municipality at the time the bonds are sold. The intention of the Constitution was to limit the aggregate amount of the bonded indebtedness of municipalities; and when this is effectuated and the indebtedness kept within the prescribed limits, the whole intent of the framers on that instrument is subserved. In 28 Cyc. p. 1584, the rule on the subject in hand is thus stated: "The time of the actual issue of municipal bonds is the time for determining whether the debt limit is exceeded." (Citing cases.)

Examination of the provisions of [NRS 387.400](#) clearly indicates that the Nevada Legislature limited the amount of bonded *indebtedness* and did not intend to prescribe computation of existing or outstanding bonded indebtedness as a condition precedent to the holding of a bond election seeking the voter's approval relative to subsequent or future issuance of bonds as required, and as legally authorized and permitted. [NRS 387.400](#) expressly and unequivocally provides that ". . . total bonded *indebtedness* of a county school district shall *at no time* exceed an amount equal to 10 percent of the total of the last assessed valuation of taxable property situated within the county school district . . ." less the debt of abolished districts. (Italics supplied.)

As already indicated, there is no new or additional obligation at the time of any bond election. The school district has received no loan or funds which must legally be repaid. If the voters have given their approval at the bond election, they have in legal effect merely endorsed the school district's building construction program and conferred upon the school district trustees and the board of county commissioners the legal power to make subsequent issuance of bonds as required and as legally authorized and permitted.

The foregoing conclusion finds confirmation and support in the above-quoted provisions of [NRS 387.470](#) which expressly authorizes the issuance of bonds in series within 3 years after a bond election. Evidently, the Nevada Legislature did intend to constitute the authorization given at any bond election as permitting two or more series of bond issuance, each having a different date of issue, and each series to have varying maturities in compliance with the provisions of [NRS 387.335](#) to [387.525](#). There appears to be no basis either in the Constitution or the statutory law of Nevada which in any way suggests that such legislative grant of power is violative of due process or other valid limitation or prohibition. In this connection, moreover, it would appear that the notice respecting issuance of bonds and approval of any bond issue by resolution of the board

of county commissioners, required under [NRS 387.337](#), provides adequate safeguards against incurrence of bonded indebtedness in excess of the limitation contained in [NRS 387.400](#).

In a relatively recent California case, *Sasmalia School District v. Board of Supervisors*, 4 Cal.Rptr. 656, 180 Cal.App.2d 332 (1960), the court affirmed the judgment below which had held “inter alia, that [a] school district was not entitled to a writ of mandate directing [the] county board of supervisors to sell a specific bond issue of the school district where, at the time such relief was sought, due to reduction in size of [the] district requesting such relief, there did not remain sufficient valuation to sustain [the] requested bond issue.” Moreover, it would appear that if any property should be detached from a school district after authorization had (by bond election) but prior to any actual issue of bonds (sale and delivery), such property would not be subject to the tax levied and assessed to fund such bond issue, either as to interest or principal thereof. ([NRS 387.480](#), [387.485](#); *People v. Baxter*, supra.)

In view of our foregoing analysis, therefore, we are of the considered opinion that the Clark County School District Board of Trustees may seek the authorization of the voters to issue bonds in an amount exceeding 10 percent of the total of the last assessed valuation of taxable property within the district, providing that at no time will there be issued and outstanding bonds in a total or aggregate amount exceeding such limitation, and if any bond issues made are in full compliance with [NRS 387.335](#) to [387.525](#).

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-5 Savings Associations, Department of—If savings associations in the making of a construction loan, perform construction control of voucher control services for themselves, a reasonable charge therefor, by way of deduction from the loan may be made which charge is not to be included in the initial loan fee. [NRS 673.330](#) construed.

CARSON CITY, September 18, 1962

MR. JOHN H. BELL, *Commissioner of Savings Associations, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. BELL: [NRS 673.330](#), in part provides for allowable loan fees to be charged by savings associations. This provision, in the public interest, and theoretically to prevent the public from suffering imposition, ties the allowable loan fees and charges to the amount of the loan and to allowable interest rates, by way of percentage computations. This section also, in part, enumerates certain service items, consisting for the most part in out-of-pocket expenses, which are not to be considered or included in the computation of allowable loan fees. At least one of these enumerated service items (construction control or voucher control fees) could ordinarily be performed by the lending association equally as well as if the function were delegated to another entity. If this service is performed by the lending institution and a charge therefor is made to the borrower, equal to the charge ordinarily made by an independent entity (1 1/2 percent of the total amount of the loan), a profit is likely to result therefrom. If this service is performed by the lender and for the lender, we are concerned with whether or not if such charge is made, it may be excluded from the items enumerated as legal charges.

A construction or voucher control service, as we understand it, is designed primarily to permit funds to be advanced during the course of construction. The functions are dual and utilize the talents of persons of diverse training and experience. First, is utilized the knowledge and

talents of a construction man in seeing to it that the construction follows specifications in both materials and workmanship. Secondly, the knowledge and talents of an accountant are utilized in the securing and assembling of the proper paper records prior to the approval to the release of moneys periodically during construction. Such knowledge and diverse talents, we believe, are seldom found in one individual.

QUESTION

If a savings and loan association performs a construction control or voucher control service for a borrower in connection with a loan by the association, may it charge a fee not in excess of the fee normally charged for such services and treat the fee so charged as an out-of-pocket expense not included in the amount of the initial loan fee, permitted to be charged under [NRS 673.330](#)?

CONCLUSION

The question is answered in the affirmative.

ANALYSIS

[NRS 673.330](#) (Prepayment amounts, initial loan fees limited.) Associations shall not charge for the privilege of prepayment in part or in full of any real property loan an amount greater than 180 days' interest on the amount prepaid. Initial loan fees shall not be in excess of that amount which, together with the first year's interest, will exceed the rate of 12 percent. Initial loan fees shall not include recording fees, attorneys' fees, fire insurance, life insurance and title insurance premiums, escrow fees, taxes and assessments, the cost of federal documentary stamps, appraisal fees, *construction control or voucher control fees*, tax service, inspection fees, membership fees, the cost of credit reports, and reconveyance fees, either by deduction from the proceeds of such loan or otherwise, *and paid out* by the association. Discounts on loans purchased shall not be considered as initial loan fees. (Italics supplied.)

The purpose of [NRS 673.330](#) is to protect the borrowing public from the exaction of inordinate or excessive charges, on the one hand, but not exclusively this. It is also to protect the associations and the members thereof, as lenders. For if reasonable precautions are promulgated respecting management, the lending public as members of such associations are protected.

If a statutory construction be adopted which minimizes the significance of the words "paid out" in respect to construction control or voucher control fees and thereby permits lending institutions to perform this service for themselves, or to contract the responsibility to another entity, the charge being no more than would be charged by such entity, the borrowing public will not have been injured. If this construction were adopted the lending associations would clearly be accorded the right of choice. They could perform the work required or let the responsibility to another entity. This discretion would theoretically strengthen the lending association, thereby better protecting the lending public. If the statute be construed otherwise, it would virtually compel lending associations to engage others to perform this vital service for them. No matter how limited the talent of those willing to perform the service, no matter how much overworked or understaffed to perform the service expeditiously, no matter how much they might lack in the way of competition to assure a reasonable charge for the work, the lending association would have little choice but to engage others to do the work. This would be a strained construction that appear unwarranted.

It is highly significant also that of all the services enumerated in this section which are not to be included in the initial loan fees, practically all from their nature can be had by the lending association only by paying out sums therefor. For the statute to have employed the language "paid out" is, therefore, not unnatural, although not intended to constitute a limiting or compelling factor to determine charges that may be excluded. We, therefore, are of the opinion that the Legislature intended construction control or voucher control fees not to be included in the initial loan fees, if paid out or if not paid out by the lending association. Neither do profits

from such an operation change the conclusion, provided always that the charges are not to exceed charges that might have been made by others qualified and available to serve.

When an association elects to follow such procedure, however, it should carefully compile and preserve a supporting record designed to establish that the charges made for construction control or voucher control services were in fact competitive with the charges that would have been made if the responsibility had been let by contract to an outside qualified entity.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-6 Cities—Cities incorporated under general law (Ch. 266 NRS) are not precluded from enacting ordinances to provide for periodic pay increases during the terms of elected or appointed officers, provided such ordinances are enacted prior to the election or appointment of such officers. [NRS 266.450](#) construed.

CARSON CITY, September 25, 1962

MR. JOHN MANZONIE, *City Attorney, City of Henderson, City Hall, Henderson, Nevada*

STATEMENT OF FACTS

DEAR MR. MANZONIE: The city of Henderson is chartered under general law. See Chapter 266 NRS. [NRS 266.450](#) provides the following:

266.450 (Compensation of officers, restrictions on increases, decreases.) All officers of any city shall receive such compensation as may be fixed by ordinance, but the compensation of any such *officers shall not be increased or diminished to take effect during the time for which the office was elected or appointed.* (Italics supplied.)

The employees of the city have a progressive scale of annual salary increases and by reason of this fact since officers are bound by the provisions of [NRS 266.450](#), the salary of an employee during a 4-year term can and frequently does overtake and exceed the salary of his supervising and employing officer. This appears inequitable.

QUESTION

May the Henderson City Council enact an ordinance, applicable as to both elective and appointive officers, by which periodic pay raises may be made available during the terms for which they may, after the effective date of the ordinance, be elected or appointed?

CONCLUSION

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

ANALYSIS

A provision similar to the above-quoted statute is contained in the State Constitution having application only to certain of the state officers. Section 9, Article XV, of the Constitution of Nevada.

This is mentioned to show the theory of these provisions. Such provisions are predicated partially upon the theory of contract, to the effect that if one becomes a candidate for an office, or accepts an appointment for a term of years to an office, for which a definite salary is provided by law, he is under the theory of contract (in the absence of resignation) entitled to receive the

contract sum, which is not to be increased or diminished for the term for which he has been elected or appointed.

Such provisions are based also in part upon the theory that it is conducive to obtaining the best public service available for the amount fixed as the obtainable salary. For who can say that after an election the candidate who was elected would have been elected if a higher salary had been contained in the statute respecting such office. Perhaps different or superior candidates would have been available than those who applied, had the salary offered been more attractive. The same rule applies to persons available as officers for appointment for a term of years.

Such also is deemed a protection to the public interest in that it tends to prevent using the influence of the office to obtain the favor of salary increases.

We are here concerned with elections held or appointment made after the passage of an ordinance which would provide for periodic pay increases for both elected and appointed officials.

Clearly if the pay increase ordinance is passed and approved after the election or appointment of the person involved, it offends not only the language of the statute, but also the theories heretofore enunciated. Such statutes would clearly offend [NRS 266.450](#).

We have found no cases in which by statute or ordinance the salary per year, during the term, is to increase. However, an ordinance so providing could be prepared, which would be just as definite and precise as if it provided for a constant annual salary during the term, and if so drafted it would not offend the language of the statute nor would it offend the theories upon which such statute is predicated.

It will be observed that the language used is "was elected or appointed." The meaning is clear that the forbidden ordinance is one that would be *passed* at a date subsequent to the election or appointment. An ordinance providing for increases in pay, during the term of an elective or appointive officer, passed prior to election or appointment, would not offend the statute, even though it provides for annual pay increases therein.

* * * laws providing that the change of salary shall not take effect during the term for which the officer was elected or appointed are often construed to prohibit any change of salary after election or appointment to take effect during the term for which the officer was elected or appointed. (Citing authorities) McQuillin—Municipal Corporations, Third Ed., Vol. 5, Sec. 12, 198. See also *In re Report of Auditors, etc.* (Pa. 1944), 37 A.2d 21, 166 A.L.R. 842.

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

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-7 State Forester Firewarden; Personnel, State Department of—State Department of Personnel not authorized to fix the rate of pay or certify the payroll of emergency fire fighters, employed pursuant to Chapter 472 of NRS. Sections of 472.045 and 284.185 of NRS, construed.

CARSON CITY, October 10, 1962

MR. IRVIN GARTNER, *Director, State Department of Personnel, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. GARTNER: The Legislature of 1953 enacted Chapter 351, now with amendments contained in Chapter 284 of NRS, constituting the State Personnel Act.

Under the provisions of [NRS 284.185](#) (hereinafter quoted), the state fiscal officers are forbidden to pay any salary or compensation to classified or unclassified state employees unless the payroll or account for such salary or compensation, containing the names of all persons to be paid, shall have been certified by the director, stating that such persons have been employed pursuant to the provisions of Chapter 284 of NRS, and that the salary or wage certified has been fixed pursuant to law.

The 1957 Legislature enacted Chapter 198, with provisions now contained in [NRS 472.045](#), and created a revolving fund for the payment of temporary labor and particularly fire-fighting operations, obviously for the purpose of making compensation for such labor quickly available.

Pursuant to Section 7, Chapter 149, Statutes of 1945 (now [NRS 472.070](#)), the State Forester Firewarden has entered into agreements with the U.S. Forest Service and the U.S. Bureau of Land Management, under the provisions of which rates (changeable from year to year) are fixed for occasional labor in the fighting of forest and range fires. Such rate fixing of course antedated the enactment of the Personnel Act.

QUESTION

Is it legally necessary or authorized for the Personnel Advisory Commission to establish rates of pay for emergency fire fighters who work under the supervision of the State Forester Firewarden, and for the Department of Personnel to certify as to the accuracy of payrolls of temporary labor employed in the suppression of forest or range fires?

CONCLUSION

We are of the opinion that the law does not authorize such or any participation on the part of the State Department of Personnel.

ANALYSIS

[NRS 284.185](#) provides:

284.185 (Payroll certifications by director.) The state controller or any other state fiscal officer shall not draw, sign, issue or authorize the drawing, signing or issuing of any warrant on the state treasurer or other state disbursing officer, and the state treasurer or other state disbursing officer shall not pay any salary or compensation to any person in the classified or unclassified service of the state unless the payroll or account for such salary or compensation containing the name of every person to be paid shall bear the certificate of the director or his authorized representative stating:

1. That the persons named in the payroll or account have been appointed, employed, reinstated or promoted as required by law and the rules and regulations established under this chapter; and
2. That the salary or compensation is within the salary or wage schedule fixed pursuant to law.

Under the provisions of [NRS 472.040](#), subsection 2(d), the State Forester Firewarden is authorized to employ emergency fire fighters.

Under the provisions of [NRS 472.070](#) the State Forester Firewarden is authorized to enter into agreements with the U.S. Forest Service, the U.S. Bureau of Land Management, and other fire protection agencies, and we understand that prior to the enactment of the State Personnel Act, such agreements have been entered into which provide among other things for the fixing of the wage schedule to be employed in the payment of such emergency fire fighters. From year to year, depending upon going wages of labor in the community this wage is in this manner cooperatively fixed and agreed upon.

[NRS 472.045](#) provides:

472.045 (State forester firewarden revolving fund.)

1. Upon written request from the state forester firewarden, the state controller is authorized and directed to draw his warrant in favor of the state forester firewarden in the sum of \$2,500, and upon presentation of the same to the state treasurer, the state treasurer is authorized and directed to pay the same from the general fund in the state treasury.
2. The sum of \$2,500 shall be known as the state forester firewarden revolving fund and may be used by the state forester firewarden for the purpose of paying temporary labor hired for fire-fighting purposes and other obligations requiring prompt payment in connection with fire-fighting operations, but for no other purposes.
3. All claims or demands paid by the state forester firewarden shall, after payment thereof, be passed upon by the state board of examiners in the same manner as other claims against the state. When approved by the state board of examiners, the state controller shall draw his warrant for the amount of such claim or claims in favor of the state forester firewarden revolving fund to be paid to the order of the state forester firewarden, and the state treasurer shall pay the same.
4. The state forester firewarden is directed to deposit the state forester firewarden revolving fund in one or more banks of reputable standing, and to secure the deposit by a depository bond satisfactory to the state board of examiners.
5. The state forester firewarden shall execute a bond, with good and sufficient sureties, in the amount of at least \$2,500, for the faithful performance of his duties under this section.

We understand that the manner of operation of the State Forester Firewarden in the premises is as follows:

The hourly rate of compensation of emergency fire fighters is fixed annually by the state and federal officers designated, pursuant to the provisions of contract which has been entered into pursuant to the authority of [NRS 472.070](#), and that when a forest or range fire breaks out requiring the immediate service of emergency fire fighters, such occasional labor is picked up wherever available, by emergency messages and about the streets wherever such labor may be found. When employed, such laborers are assured of compensation at a definite hourly rate, with money available immediately at the time of termination of employment. When the emergency is over the employees are paid by the State Forester Firewarden from the fund which has been established pursuant to [NRS 472.045](#), without delay. Thereafter the said state officer presents his claim to the State Board of Examiners pursuant to the provisions of [NRS 472.045](#), subsection 3, for the amount expended in the emergency, and the sum paid out is approved by the State Board of Examiners, and authority is granted for the payment of said sum to the Revolving Fund of the State Forester Firewarden thus restoring the fund to the former balance of \$2,500.

We are of the opinion that the Legislature has intended that the State Personnel Advisory Commission and the Director of the State Department of Personnel have no jurisdiction over this operation. Nothing contained in Chapter 472 (State Forester Firewarden) or Chapter 284 (State Department of Personnel) of NRS would indicate any legislative intent to make the provisions of [NRS 284.185](#) applicable to the operation of the State Forester Firewarden in the extinguishment of forest or range fires, or in the manner of paying the costs incidental thereto.

We have in mind that the present manner of operation presents a system of checks and balances or scrutiny of the functions of the State Forester Firewarden, and that this method realistically fixes the rate of compensation of such labor, and facilitates the prompt payment upon termination of employment. We also have in mind that [NRS 472.045](#) contains a specific provision in the manner of operation, enacted in 1957, whereas the provisions of [NRS 284.185](#) are general in nature and enacted in 1953. A cardinal rule of statutory construction in such instances requires that the specific statute will control, especially when enacted at a later date.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-8 District Attorney, Clark County; Validity of Assessing Personal Property in Clark County After Lawful Assessment in Nye County—1. Personal property may not be assessed during the same tax year in Clark County after being lawfully assessed in Nye County. 2. A motor vehicle may not lawfully be registered in a county in which the owner does not reside.

CARSON CITY, October 22, 1962

HON. JOHN F. MENDOZA, *District Attorney, Clark County, Las Vegas, Nevada*

STATEMENT OF FACTS

DEAR MR. MENDOZA: A number of Clark County residents work in Nye County. The registration of motor vehicles owned by these Clark County residents has on occasion occurred in Nye County. You request our opinion as to whether personal property which has been lawfully assessed in Nye County may be assessed again in Clark County if found therein within the same tax year.

QUESTIONS

1. May an automobile owned by a Clark County resident be lawfully registered in Nye County?
2. May personal property which has been lawfully assessed in Nye County be again assessed if found within Clark County during the same tax year?
3. May Clark County require registration of a motor vehicle which has been unlawfully registered in Nye County?

CONCLUSIONS

1. Registration in Nye County of a motor vehicle owned by a Clark County resident is unlawful.
2. Personal property lawfully assessed in Nye County, may not be assessed in Clark County during the same tax year.
3. Clark County may disregard the unlawful registration in Nye County and require the Clark County owner resident to lawfully register his motor vehicle. Such action does not constitute an unlawful second assessment within the meaning of this opinion.

ANALYSIS

Motor vehicle registration, pursuant to [NRS 482.215](#), subsection 2, may only be lawfully accomplished in the county wherein the owner resides. The requirement of the statute is mandatory. See AGO 130 dated November 29, 1955. The Nye County registration is unlawful and any motor vehicle so registered is not lawfully registered and the owner is liable to all penalties arising out of the operation of an unlicensed vehicle.

For the reason that personal property taxes are assessed as part of the registration process, the second question that arises is whether the fact that Clark County may require licensing of an unlawfully licensed vehicle constitutes double taxation. Where the assessment of personal property is lawful, such personal property may not lawfully be assessed again during the same tax year. However, where the first assessment is unlawful it may be disregarded.

The Tax Commission has not promulgated a regulation governing the subject nor has any statute been passed which resolves the issue. However, there are several early Nevada cases

which clearly indicate that personal property has a factually determinable tax situs, such determination being a prerequisite of assessment by a particular county assessor.

The first of these is *State v. Earl*, [1 Nev. 334](#) (1865), in which the court made the following statements:

. . . all money in the State on the first Monday of May in each year is subject to taxation, and if taxed a lien relates back to that day in favor of the State according to the letter of the statute upon each piece of gold or silver coin within its limits. A lien also accrues, or may accrue, if the Tax Collector finds it, on each piece of coin that may come into the State between the first Monday of May and November of each year; but the same coin which was taxed in the hands of A on the first Monday of May, could not again be taxed in the hands of B a week afterwards.

The true theory of the statute is that each piece of tangible real or personal property within the State between the first Monday of May and the first Monday of November, each inclusive, should be taxed *once* at its true value, and *only once*.

Although this was dicta in the case, it indicates that the legislative intent as found by the court was that no property should be taxed twice in the same year. The theory of the case is that situs is a fact which must be determined prior to assessment.

The next case which states that assessment may lawfully occur only once in a tax year is *State v. Carson and Colorado Railroad Company*, [29 Nev. 487](#), 500 (1907), wherein the court restated the doctrines of *State v. Earl*, supra, in the following terms:

It is the theory of the law of taxation and revenue in this state that all tangible real and personal property shall be assessed each year once at its full cash value. We have found no authority in this state in conflict with the doctrine laid down in the case of *State of Nevada v. Earl, et al.*, [1 Nev. 397](#), wherein this court in referring to this theory said: "The true theory of the statute is that each piece of tangible real or personal property within the state between the first Monday of May and the first Monday of November, each inclusive, should be taxed once at its true value, and only once."

In a series of cases dealing with cattle, beginning with *Barnes v. Woodbury*, [17 Nev. 383](#) (1883), the court adopted a theory that despite its ambulatory character personal property has a determinable situs for purposes of ad valorem taxation and made further statements to the effect that a single assessment in a given year is what is contemplated by the revenue laws.

A man may reside in Storey County and own real estate within White Pine County, and have cattle kept grazing and cared for thereon, and both the real estate and personal property would be properly assessable in White Pine County. Personal property of this character, unlike "money," etc. "is to be considered, like real estate, as having a situs of its own, independent of the domicile of its owner." (*People v. Niles*, 35 Cal. 286.)

"The truth is, that personal, as well as real estate, has a locality, although not so permanent, nor always ascertained with so much certainty." (*State v. Falkinburge*, 15 N.J.L. 323.)

But, by assigning to this class of personal property a situs for the purpose of taxation, independent of the mere residence of the owner, it does not necessarily follow that the property can be legally assessed in whatever county it may first be found during the period of assessment.

The revenue laws are framed with the idea that there should be a harmonious system to govern and control cases of this character. * * *.

In declaring that the county assessor should assess all personal property within his county, it was not intended by the legislature to authorize him in assessing all the personal property that he could find within his official limits at any time while making his assessments. It was only intended to tax such personal property as is actually located or

used within his county “with something like permanency, and not having its actual location or home somewhere else.” (State v. Haight, 30 N.J.L. 429.) * * *.

The property was, in the eye of the law, within Eureka County for the purpose of taxation, because it belonged there, and it was so situated “as to make it a part of the wealth of that county.” (Conley v. Chedic, [7 Nev. 341.](#))

These views accord with the general principles announced in many of the decided cases, and are within the meaning, spirit and intent of the revenue laws of this state.

By adhering to this rule the system of taxation of property of this kind is, upon just and equitable principles, made harmonious and certain.

If the rule contended for by appellant is to prevail, the locality where the property would be assessed would depend entirely upon the will of the owner of the property, the vigilance of the assessor or collusion, of both. It would lead to endless confusion and uncertainty, if not to the commission of frauds upon the revenue law.

The principles stated above were applied in Whitmore v. McGregor, [20 Nev. 451](#) (1890). In this case a team and wagon were based in Nye County and used in teaming and freighting in Eureka County. The personal property was assessed in Nye County. The complaint that the property could be assessed again in Eureka County was held to be an invalid reason for nonpayment in Nye County on the theory that Eureka County did not have the authority to assess the same property again in the same tax year. In State v. Shaw, [21 Nev. 222](#) (1892), the facts were essentially the same as Barnes v. Woodbury, supra, and the case was determined on the theory that a single situs exists for livestock in a given tax year.

It is clear that where an item of personalty has a single situs despite the fact of moving between counties that these principles apply and dual assessment may not legally occur. The difficult question arises where a readily determinable tax situs changes during the assessment period. However, the dicta contained in State v. Earl, supra, and the holding in Attorney General’s Opinion 912, April 27, 1950, are sufficient authority for the statement that once a lawful assessment has occurred no other assessment during that tax year is lawful. This conclusion is borne out by general statements made at 84 C.J.S. 137, to the effect that where double taxation is sought to be imposed all doubts as to its validity should be resolved in favor of the taxpayer. The imposition of double taxation is neither presumed nor inferred and is permitted only when clearly imposed.

These general principles are applicable to all personal property. When, however, the Legislature by statute designated the residence of the owner of a motor vehicle as the tax situs of this particular class of personal property, it eliminated the factual determination of situs and a county assessor should, in the case of motor vehicles, make a factual determination only as to the residence of the owner. This precludes any other lawful assessment in any county other than such residence county.

Clark County may therefore require lawful registration of motor vehicles operated by Clark County residents.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

S-9 Real Estate Commission, Nevada—The removal within Nevada of a duly appointed member of the Nevada Real Estate Commission to a county other than that from which he was appointed would not create a vacancy in office, and he would be authorized to continue to serve for the remainder of the term for which he had been appointed. [NRS 645.100](#) and [283.040](#) construed.

CARSON CITY, November 5, 1962

MR. GERALD J. MCBRIDE, *Executive Secretary, Nevada Real Estate Commission, Drawer C, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. MCBRIDE: [NRS 645.050](#) provides for the creation of the Nevada Real Estate Commission consisting of five appointive members. Certain subsequent sections make provisions for the term of commissioners appointments, the oath of office, the filling of vacancies and the qualifications of members.

[NRS 645.100](#) provides:

645.100 (Residence qualifications of commission members; state divided into districts.)

1. At least two members of the commission shall be residents of the eastern district of Nevada, and at least two members of the commission shall be residents of the western district of Nevada.
2. Not more than one member shall be appointed from any one county.
3. The eastern district shall consist of all that portion of the State of Nevada lying within the boundaries of the counties of Clark, Elko, Eureka, Lander, Lincoln, Nye and White Pine.
4. The western district shall consist of all that portion of the State of Nevada lying within the boundaries of the counties of Churchill, Douglas, Esmeralda, Humboldt, Lyon, Mineral, Ormsby, Pershing, Storey and Washoe.

At present the commission is composed of two representatives residing in the eastern district, being residents of Clark and Elko Counties, and three representatives residing in the western district, being residents of Churchill, Ormsby and Washoe Counties.

The member of the commission who resides in Churchill county contemplates moving to Clark County, near the end of the year 1962. It is not revealed whether or not this member will change his domicile to Clark County or merely his temporary residence. We shall consider the situation from both aspects.

QUESTION

After the removal of the member of the commission to Clark County, who has been appointed from and as a resident of Churchill County, will this member be authorized to continue as a member of the commission?

CONCLUSION

We are of the opinion that regardless of the intention of the member, upon his removal to Clark County, either to make that county his permanent domicile or merely temporary residence, he will be authorized to continue as a member of the commission for the remainder of the term for which he has been appointed.

ANALYSIS

[NRS 283.040](#) in part provides:

283.040 (Events causing vacancy in office.)

1. Every office shall become vacant upon the occurring of either of the following events before the expiration of the term:

* * * * *

(f) The ceasing of the incumbent to be a resident of the state, district, county, city or precinct in which the duties of his office are to be exercised, or for which he shall have been elected or appointed.

[NRS 10.020](#) provides:

10.020 (Legal residence.) The legal residence of a person with reference to his right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence, 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 his residence.

In 1955 a question was presented in which a State Senator had moved during his term of office from the county in which he was elected to another Nevada county. It was not clear that he had intended to abandon his domicile. In A.G.O. No. 93 of August 11, 1955, this office ruled that his removal did not create a vacancy in office.

In 1959 a question was presented in which an Assemblyman moved, during the term of his office, from the county in which he was elected to another Nevada county. It was not clear that he intended to abandon his domicile. In A.G.O. No. 70, July 16, 1959, this office ruled that his removal did not create a vacancy in office.

In the latter case it was pointed out that under the provisions of [NRS 10.020](#) a domicile had not been shown to have been abandoned, and that under the authority of *State v. Van Patten*, [26 Nev. 273](#), a domicile once established continues until there is an intent to abandon it.

If the member of the commission from Churchill County removes to Clark County without intent to abandon his Churchill County domicile or to establish a domicile in Clark County, the authority above cited would control, and there would be no vacancy in his office, even if [NRS 283.040, 1\(f\)](#), were pertinent or applicable to this set of circumstances. However, [NRS 283.040, 1\(f\)](#), heretofore quoted, has no application to the within projected facts, for reasons hereinafter set out.

The provisions of [NRS 645.100](#) are clearly intended to require the composition of the Nevada Real Estate Commission to be truly representative of the principal areas of real estate activity. This is borne out by the provisions of [NRS 645.150](#) requiring meetings of the commission to be conducted alternately in the eastern and western districts. To make the commission truly representative only one member was authorized to be appointed from any one county.

The legislative intent of [NRS 283.040, 1\(f\)](#), is to perpetuate working conditions of or conducive to efficiency in office. It also forbids nonresident and indifferent representation. This subsection (f) therefore contemplates the scope of the duties of an office, i.e., whether the duties of the office are statewide or of smaller limited area. With this object this section provides that if the duties of an office are statewide, the incumbent may not remove his residence to another state. Similarly, if the duties of his office are within a district, he may not remove his residence from such district, and as to a county, city or precinct the same rule applies and for the same reason.

It is true that one member of this commission was appointed from Churchill County, pursuant to the provisions of [NRS 645.100](#), but he is not appointed for services to merely benefit Churchill County. He is appointed to represent the State and is therefore under the statute precluded from establishing a residence in another state.

However, since the duties of the office are statewide and the statute requires meetings in both areas of the State, subsection 1(f) of [NRS 283.040](#), has no application to bring about a forfeiture of a commissioner's office, merely from moving his residence and domicile within the State. After the removal of residence and domicile there would still be two commissioners residing in one district and three in the other, as provided in [NRS 645.100](#), subsection 1.

We, therefore, conclude that when the commissioner moves to Clark County, with intent to reside temporarily therein or with intent to become domiciled therein, he may in either case

continue to serve as a member of the commission for the remainder of the term for which he has been appointed. In the event that this commissioner applies for reappointment at the expiration of his present term, it will be necessary to consider subsection 2 of [NRS 645.100](#), and the composition of the board then existing, to determine whether or not he is eligible for reappointment.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-10 Architecture, State Board of—Satisfactory passing of equivalent examination in another state by an applicant who has previously failed Nevada State Board of Architecture examination a number of times held not entitled to credit in Nevada as a matter of right, and not warranting Nevada grant of registration or license for practice of said profession in this State on a reciprocal basis. Examining and licensing power may not be delegated to, nor can it properly be exercised by, a corresponding authority in another state, if evidence reasonably shows that protection of the public health, safety, and welfare of the people of Nevada may not be sufficiently assured and secured thereby. Applicable provisions of Chapter 623 of NRS construed as relevant to specific questions herein considered.

CARSON CITY, November 13, 1962

MR. RAYMOND HELLMANN, *Secretary-Treasurer, State Board of Architecture, 137 Vassar Street, Reno, Nevada*

STATEMENT OF FACTS AND QUESTIONS

DEAR MR. HELLMANN: The following problem situations respecting the examination of applicants for registration and licensing by the State Board of Architecture of Nevada have been submitted for opinion and advice:

Case No. 1: An applicant fails one portion of the Nevada State Board of Architecture examination, after two previous failures, thus rendering himself ineligible to retake the written examination until a period of 2 years shall elapse. ([NRS 623.320](#), par. 2.)

QUESTIONS

A. Assuming equivalency of another state's examination with that given in Nevada, may the applicant retake that portion of the examination which he failed in Nevada in such other state and, upon satisfactorily passing the same, apply to the Nevada State Board of Architecture for credit therefor, and Nevada registration or licensing on a reciprocal basis? ([NRS 623.210](#), par. 1(b).)

B. May the Nevada State Board of Architecture license such an applicant, under the circumstances stated in "A" above, before the elapse of a period of 2 years, as prescribed in [NRS 623.320](#), par. 2, when he would again be eligible to retake the Nevada examination?

Case No. 2: An applicant fails to pass the written examination within the prescribed time limitation, waits 2 years, and again applies for licensing. ([NRS 623.200](#), [623.320](#).)

QUESTION

May the Nevada State Board of Architecture require the applicant to retake only the written portions he previously failed, and give him an oral examination on the written portions he had previously passed? ([NRS 623.210](#), [623.320](#), 623.190, 623.200.)

Case No. 3: An applicant fails to pass the written examination within the prescribed time limitation, and not wishing to wait 2 years when he would be eligible to reapply and to retake the examination in Nevada, he goes to another state which gives an examination considered equivalent to the one given in Nevada, takes and passes such examination in such other state, and is registered or licensed therein.

QUESTION

May the Nevada State Board of Architecture license such applicant on a reciprocal basis? ([NRS 623.210](#), par. 1(b).)

CONCLUSIONS

All questions are answered in the negative, as herein specifically indicated.

ANALYSIS

Statutory provisions applicable to the foregoing problems are: [NRS 623.140](#) (Election of officers; rulemaking powers of board), as relevant herein, provides as follows:

Within 30 days from and after the date of their appointment, the board shall:

* * * * *

2. Formulate and adopt a code of rules and regulations for its government in the examination of applicants for certificates to practice architecture in this state.
3. Formulate and adopt such other rules and regulations as may be necessary and proper, *not inconsistent with this chapter*. (Italics supplied.)

[NRS 623.180](#) (Issuance of certificates; registered architects), as relevant herein, provides as follows:

* * * * *

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. * * *.

[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 623.200](#) (Annual examinations) provides as follows:

Upon complying with the requirements set forth in [NRS 623.190](#) and before receiving a certificate or being registered, the applicant shall satisfactorily pass an examination in such technical and professional courses as may be established by the board, *unless the applicant be entitled to such certificate and registration without examination as provided in this chapter*. The board shall give examinations at least once each year, unless no applicants for examinations are pending with the board. (Italics supplied.)

[NRS 623.210](#) (Acceptable qualifications in lieu of examinations) provides as follows:

1. The board *may*, in lieu of all examinations, accept satisfactory evidence of any one of the qualifications set forth under the following paragraphs:

(a) A diploma of graduation from an architectural school or college showing that the applicant has completed a technical and professional course of not less than 4 years duration, which course is approved by the board, and, in addition thereto, has had at least 3 years of satisfactory experience, 2 years of which shall have been in the office or offices of a reputable architect or architects meeting all of the qualifications for practice under the provisions of this chapter. The board *may* require applicants under this paragraph to furnish satisfactory evidence of knowledge of professional practice and supervision of construction.

(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. (Italics supplied.)

[NRS 623.320](#) (Reexaminations) provides as follows:

1. If the applicant fails to pass a written examination, as provided in [NRS 623.200](#), or any part thereof, he may retake the examination or the part or parts failed in a subsequent examination upon the payment of the fees as provided in [NRS 623.310](#).

2. An applicant shall be permitted to retake the examination, or the part or parts in which he has failed, two additional times, and upon failure to pass the examination or the part or parts in which he has failed, two additional times, and upon failure to pass the examination or the part or parts previously failed, he shall be required to retake all parts of the examination after a period of 2 years and pay the \$35 fee required for an examination for a certificate.

3. All persons who have previously failed the written examination prior to March 30, 1959, shall be entitled to take the written examination, or part or parts failed, two additional times within 2 years from March 30, 1959.

[NRS 623.330](#) (Exemptions), in our view, does not contain any provision deemed pertinent to the problems and questions herein.

Because architectural and structural engineering directly affect and are related to public safety, it is well settled that states, in the exercise of their police powers, may regulate such professions and may demand that all persons so engaged, or wishing to practice such professions, "shall have a prescribed degree of skill and learning as determined by an examining board before granting the license to practice." Such licensing statutes are, therefore, enacted for the protection of the public. (3 Am.Jur. 998, Sec. 3; 33 Am.Jur. pp. 336-339, Secs. 17 and 18, and p. 373. Sec. 53.)

The primary function of an administrative agency, such as the State Board of Architecture of Nevada, "is to carry into effect the will of the state as expressed by its legislation." (42 Am.Jur. 315, Sec. 25.) The powers of administrative boards, commissions, and officers "are limited by the statutes creating them to those conferred expressly or by necessary or fair implication. * * * In determining whether a board or commission has a certain power, the authority given should be liberally construed in light of the purposes for which it was created, and that which is incidentally necessary to a full exposition of the legislative intent should be upheld as being germane to the law. In the construction of a grant of powers, it is a general principle of law that where the end is required the appropriate means are given. Implication of necessary powers may be especially appropriate in the field of internal administration. However, powers should not be extended by implication beyond what may be necessary for their just and

reasonable execution. Official powers cannot be merely assumed by administrative officers, nor can they be created by the courts in the proper exercise of their judicial functions.” (42 Am.Jur. pp. 316-318.)

“The fact that some degree of discretion is necessary in order properly to examine the qualifications of * * * applicants [for professional licenses], and to discharge the duties of examiners, cannot be esteemed a delegation of legislative power.” (33 Am.Jur. 373.) Also, “[I]t is a general principal of law, expressed in the maxim ‘delegatus non potest delegare,’ that a delegated power may not be further delegated power may not be further delegated by the person to whom such power is delegated.” (42 Am.Jur. 387.) Especially is such the case where exercise of judgment and some degree of discretion is involved in the originally conferred power.

The general principles of law outlined above are helpful in our analysis of the particular problems and questions hereinbefore stated.

It has been noted that the Nevada State Board of Architecture does have the power of formulating and adopting a code of rules and regulations to govern the examination and registration or licensing of applicants who wish to engage in the practice of architecture in Nevada, *provided such rules and regulations are not inconsistent with other provisions in the statute governing the functions, powers and duties of said board*. In view if the submission of the particular questions presently under consideration, it must be assumed that no applicable rules or regulations have previously been adopted, or are now in effect.

The foregoing statutory excerpts, we believe, reasonably support the conclusion that principal emphasis is essentially placed upon the qualifications of applicants ([NRS 623.190](#)), and on the satisfactory passing of the annual examinations given by the board ([NRS 623.200](#)), for Nevada licensing as architects. This conclusion is clearly justified by the significant fact that [NRS 623.210](#), which provides for acceptable qualifications in lieu of the indicated annual examinations, is permissive only, rather than mandatory. The board “may,” but is not required to, grant an applicant registration or a license to practice architecture in Nevada, on the basis of the enumerated alternative qualifications or reciprocity.

It must be presumed that the Legislature meant what it enacted into law with the provisions of [NRS 623.320](#), and that desired protection of the public safety and interests of the people of Nevada was important and should not be jeopardized or endangered by any circumvention of applicable laws designed to bring about the licensing of only those persons who had clearly established their qualifications and competency to engage in the architectural profession. The principal and primary responsibility for making the involved determination, and of exercising the judgment and discretion requisite thereto, was expressly imposed upon the said State Board of Architecture of Nevada by the Nevada Legislature, rather than the examining board of any other state. (Chapter 623 of NRS.) The maxim “delegatus non potest delegare” clearly applies, except as expressly otherwise authorized by the Legislature which created the board and conferred upon it said examining and licensing power.

It is our considered opinion that when the board has been alerted to an apparent, or possible lack of professional qualifications for the practice of architecture in Nevada by three previous failures of an applicant in passing the Nevada examination, it is legislative intent that there be mandatory and strict adherence to the requirements contained in [NRS 623.320](#).

Applying the foregoing principle to the specific problems and questions submitted, we therefore conclude as follows:

Case No. 1: Having failed the whole or a portion of the Nevada State Board of Architecture examination a third time, after two previous unsuccessful efforts, an applicant may retake *all* parts of a *Nevada* examination after the elapse of two years. Such applicant, even though he took and satisfactorily passed an equivalent examination in another state is not entitled to claim credit for such other state examination results of the Nevada State Board of Architecture *as a matter of right*, nor should the Nevada State Board of Architecture grant any such applicant registration or license for practice of the architectural profession in Nevada on a reciprocal basis. (“Delegatus non potest delegare.”)

In view of the foregoing, it also follows that Question B must be answered in the negative.

Case No. 2: [NRS 623.320](#) makes it mandatory that an applicant who has failed the whole or any part or parts of the Nevada State Board of Architecture examination three times shall be required to await the expiration of two years from the date of the last examination taken by him, and further shall be required to retake *all* parts of the Nevada examination, in accordance with procedures and requirements applicable to the taking of said examination for the first time. In specific answer to your question, legislative intent, as expressed in [NRS 623.320](#), prohibits an *oral* examination on any written part previously passed.

Case No. 3: Consistent with the view and our opinion and advice relative to Case No. 1 above, your question in connection with this factual situation must also be answered in the negative, i.e., the Nevada State Board may not register or license such an applicant to practice the architectural profession in Nevada on a reciprocal basis. (“Delegatus non potest delegare.”)

Our foregoing opinion and advice is in accord with the views and conclusions contained in A.G.O. 291, dated June 7, 1962, which is concerned with a related question submitted by the Nevada State Board of Optometry. The syllabus of that opinion, in part, holds:

Power of the Nevada State Board of Optometry to examine for licensing cannot be delegated, neither can it be exercised beyond the territorial limits of Nevada.

The following excerpt from said opinion is equally applicable herein:

No provision of the chapter provides that examinations shall be given only in the State of Nevada. Neither is there a provision of the chapter that precludes or forbids the delegation of the power to give the examination to one not a member of the Board. However, there is no doubt that members of the State Board of Optometry are State officers and that to them has been delegated a portion of the sovereign power of the State, and that such sovereign power as has been delegated to them is unassignable and nondelegable by them in the absence of clear-cut authority to so assign or delegate such power clearly expressed in the statute that confers it. * * *

(NOTE: The Nevada State Board of Architecture has similar status, jurisdiction, and powers.)

The power or duty of acting on applications and granting or issuing licenses usually is conferred by statute or ordinance on designated boards or officers, and the particular board or officer having the power or duty in a given case depends on the provisions of the act or ordinance by which the particular license is authorized or required. * * * and the powers and duties of such a board or officer, as far as they require the exercise of judgment and discretion, and are not mere ministerial acts, *cannot be delegated to agents*. The board or officer must administer the licensing statute in accordance with its provisions. (Italics supplied.) 53 C.J.S. 629, Art. 37, “Licensing Boards and Officers.”

* * * * *

As a general rule, no law has any effect of its own force beyond the territorial limits of the sovereignty from which its authority is derived, every statute being *prima facie* confined in its operation to the persons, property, rights, or contracts which are within the territorial jurisdiction of the Legislature which enacted it.

* * * * *

In an action to enjoin the State Board of Accountancy of North Carolina from examining applicants for certificates in Washington, D.C., on the ground it exceeded its jurisdiction * * * the Supreme Court may judge * * * whether examination outside the state is for public interest or personal interest of applicants. See *McCulloch v. Scott*, 109 S.E. 789 (N.C., 1921)

Indubitably, in the problem situations herein considered, the public interest takes precedence over any personal interests or convenience of applicants desirous of qualifying for and establishing their eligibility for grant of registration or license to engage, in Nevada, in the practice of the architectural profession, which patently directly involves the public health, safety, and welfare.

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

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-11 Public Employees Retirement Board—Enrollees with the Washoe Medical Center, principally for student training in certain technology, even though paid a nominal sum are not eligible to become members of the Public Employees Retirement System. [NRS 286.330](#) construed.

CARSON CITY, November 26, 1962

MR. KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, P. O. Box 637, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. BUCK: The Washoe Medical Center, a county hospital operated by the County of Washoe, has enrolled as trainees in its laboratory and X-ray departments certain persons who receive on-the-job instruction in order that they may receive national accreditation as technicians. Presumably they work a normal week of 40 hours. They are paid a small cash income—on the average, about \$100 per month. In the words of the administration of the hospital the relationship of the hospital to the students is as follows: “We have full-time students in our Laboratory and X-Ray Departments who receive on the job instruction. Our Laboratory students are employed for one year and X-Ray for two years which is necessary to meet the requirements for national accreditation. Their reimbursement is minimal * * *.”

QUESTION

Are such trainees, so enrolled and so employed with the Washoe Medical Center, eligible to become members of the Public Employees Retirement System?

CONCLUSIONS

Such trainees are to eligible or legally qualified by reason of such service to become members of the Public Employees Retirement System.

ANALYSIS

The conditions of membership in the system are provided by the provisions of [NRS 286.290](#) et seq. [NRS 286.330](#) negatives membership in the system to certain persons with this language:

286.330 (Inmates, trainees of state institutions excluded from membership in system.) No inmate of a state institution and no person enrolled full time in a state

institution principally for purposes of training, even though he receives compensation for services performed for the institution, may become a member of the system.

The nominal amount of the compensation for full-time service supports the tentative belief that the enrollment, in the cases under investigation, is “principally for the purposes of training.” This conclusion is supported also by the description made by the hospital administrator that “their reimbursement is minimal.”

If the Washoe Medical Center were a state institution, the statute quoted and facts stated would clearly show that the enrollees are not qualified for membership in the system. If these students were connected with the Nevada State Hospital, under the same contract, to perform the same service and receive the same training, they would clearly not be eligible for membership.

A county is a political subdivision of the state created to aid in the administration of government. (20 C.J.S. 753.) The distinction between state government and county government in this respect is, therefore, more apparent than real.

“A county is but an agency or arm of the state government, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state, and as a matter of public convenience in the administration of the government.” (20 C.J.S. 754.) Many authorities are cited and the meaning of the Nevada statute is thus made clear. The words “state institution” as used in [NRS 286.330](#) are, therefore, construed to include a hospital established and operated solely by the county.

A.G.O. 280 of March 26, 1962, passing upon the same statutory provision, is compatible with the conclusion herein reached.

We, therefore, conclude that such students so employed are not eligible for and may not by reason of such employment become members of the Public Employees Retirement System.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-12 Superintendent of Banks; Nevada Tax Commission—In determining ratios for the apportionment of motor vehicle fuel taxes, as required by [NRS 365.360](#), net proceeds of mines valuations are includable as property.

Carson City, December 4, 1962

Superintendent of Banks, *Nevada Tax Commission, Carson City, Nevada*

STATEMENT OF FACTS

Gentlemen: [NRS 365.560](#) (2) states the manner in which motor vehicle fuel tax receipts allocated to a given county shall be apportioned among said county and any incorporated cities within the county. The ratio computation is based on the assessed valuation of property within the county and within a given incorporated city. The question has arisen as to whether the valuation placed upon net proceeds of mines is to be included in the computation.

QUESTION

Are net proceeds of mines valuations includable in the computation of total assessed valuation for purposes of [NRS 365.560](#)?

CONCLUSION

Yes.

ANALYSIS

The basic question is whether net proceeds of mines are property as contemplated by [NRS 365.560](#).

This question has not been the subject of a prior opinion of this office. However, the question has been answered as to a matter involving the immunity from taxation of property of the United States by the State of Nevada. In A.G.O. No. 9 (February 16, 1943), it was held that net proceeds of mines are personal property. A reading of the relevant portions of Marsh, *Nevada Constitutional Debates and Proceedings*, leads to the conclusion that the net proceeds of mines tax was intended to exempt mines from ad valorem taxation and not to alter the status of the proceeds to something other than personal property.

The United States Supreme Court had occasion to consider this problem in *Forbes v. Gracey*, 94 U.S. 762 (1876), and it was held that upon severance ores become personal property. The Nevada Supreme Court in *City of Virginia V. Chollar Potosi G. & S. Co.*, [2 Nev. 86](#) (1866), came to the same conclusion:

* * * We think the products of mines are personal property, subject to taxation for State and county purposes and also to municipal taxation, under the law conferring the taxing power on the corporate authorities of Virginia. *Id.* At 91.

The foregoing leads to the conclusion that net proceeds of mines are property within the meaning of [NRS 365.560](#) and are includable in the computations necessary to determine the apportionment ratios as required by said statute.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

By FRANCIS P. FINNEGAN, *Deputy Attorney General*

S-13 Budget, Director of—If the Civil Defense Advisory Council failed to convene during a fiscal period, there would nevertheless be a legal obligation of the Civil Defense Agency to pay the Nevada Industrial Commission the premium incurred upon its insurance for such fiscal period. The result would be the same as to those members of the council who hold full-time positions with political entities which fully insure them with the commission as to such full-time positions. [NRS 414.050](#) and [616.079](#) construed.

CARSON CITY, December 14, 1962

MR. HOWARD E. BARRETT, *Director of the Budget, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. BARRETT: Under the provisions of [NRS 414.050](#), the members of the Civil Defense Advisory Council are appointed by the Governor. This section also provides: “* * * the members shall serve without compensation, but may be reimbursed for their reasonable and necessary expenses incurred in the performance of their duties.”

Under the provisions of [NRS 616.079](#), the members of such boards, commissions and agencies are protected by industrial insurance for injuries that may be received in the performance of such duties, and for purposes of computations of benefits are regarded as having received \$250 per month for such services. Also each department is required to budget for the premiums to be charged for such insurance.

It appears that this council now has 16 members and that the council did not convene during the fiscal year beginning July 1, 1961, and ending June 30, 1962. It also appears that certain of the members of the council are regularly employed by political subdivisions, upon full-time positions, and that such political entities do contribute the premium to the Nevada Industrial Commission for insurance on such employees covering full-time compensable employment.

QUESTIONS

1. Would a claim by the Civil Defense Agency for the payment of covering insurance of the Civil Defense Advisory Council, a premium to the Nevada Industrial Commission for a fiscal year in which the council did not convene, be properly allowed by the budget office?

2. If the answer to the foregoing question is in the affirmative, would a claim for a member who is regularly employed full time by a political subdivision, which pays an insurance premium upon such employee covering such employment, be properly paid as a member of the Civil Defense Advisory Council?

CONCLUSION

We are of the opinion that both questions must be answered in the affirmative.

ANALYSIS

[NRS 616.079](#) provides the following:

616.079 (“Employees” and “workman”: Members of state departments, boards, commissions, agencies or bureaus who serve without compensation; state board of education; regents of University of Nevada.)

1. Members of state departments, boards, commissions, agencies, or bureaus appointed by the governor, the legislature or other statutory authority who serve without compensation, and the members of the state board of education and the members of the board of regents of the University of Nevada, while engaged in their designated duties as such members, shall be deemed, for the purpose of this chapter, employees receiving a wage of \$250 per month, and, in the event of injury while performing their designated duty, shall be entitled to the benefits of this chapter.

2. For the fiscal year commencing July 1, 1961, and for each fiscal year thereafter, each such state department, board, commission, agency or bureau and the state department of education and the board of regents of the University of Nevada shall budget for such premiums in the same manner as other expenditures are budgeted for, and shall pay such premiums out of moneys appropriated therefor in the manner provided in [NRS 616.405](#) to the extent that such provisions are applicable.

[NRS 616.405](#) provides for record-keeping and the supplying of information in respect to the employment to the commission, in order that risks may be computed and rates fixed by the commission. Nothing contained in this section appears to have any bearing upon the questions presented.

By the provisions of [NRS 616.079](#), we observe that members of all agencies of the state government who serve without compensation and who are appointed by the Governor are to be protected by the insurance afforded by the commission. The members of the Civil Defense Advisory Council meet these requirements. There is no discretion or choice accorded as to whether or not they shall be protected by the insurance afforded by the commission. They were protected during the fiscal year. There was no exposure but this was no concern of the commission. It appears that they were protected “while engaged in their designated duties as members,” and irrespective of the number of times that they might have convened in the performance of their designated duties. Such is the nature of the insurance that the premium accrues for all of these agencies that qualify whether the exposure is great or small, frequent or infrequent. If the accrual of the premium is to depend upon other elements, it will be necessary for the statute to so provide, which at present it does not.

No complication in the solution arises by reason of the fact that certain of the members of the Civil Defense Advisory Council are full-time employees of other political entities and as such are insured by the commission for injuries that might be received by such employees "arising out of and in the course of such employment." The exposure in the two employments is entirely separate and does not overlap. The one is the protection afforded to the individual against injuries that might be incurred "arising out of and in the course of such employment," when the individual is serving in his full-time political position, and the other is protection to the same individual in the same manner when he is serving as a member of the Civil Defense Advisory Council.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-14 Personnel Act: Allowance of Preference for Residence—Where residence has properly been expressly "waived" as a condition or restriction to take an examination for a position in the State's classified service, and the qualifications of applicants (as determined by the examination ratings) are presumptively not otherwise equal for the particular employment, it would be improper and, legally, highly questionable to grant any preference in state employment to any successful applicant merely because of Nevada residence.

CARSON CITY, December 17, 1962

MR. IRVIN GARTNER, *Director, Nevada State Personnel Department, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. GARTNER: It is indicated that current procedure for open competitive examination (when not restricted to residents) results in eligible lists of successful candidates in numerical order of highest to lowest ranking in total examination scores, including 5 and 10 (disabled) point veteran preference, and as further modified by placing all resident eligibles above all nonresident eligibles. Twelve (12) months' residence in Nevada is required for preference credit as a resident according to the 1954 Rules for State Personnel Administration.

It is further indicated that a current examination is being held for a personnel Officer for the University of Nevada, and that, because initial recruitment efforts restricted to Nevada residents had failed to develop an adequate field of competition, said current examination is being held nationwide, at the request of the University of Nevada. Accordingly, the Personnel Advisory Commission "waived" the Nevada residence requirement and further approved an upward salary adjustment for the involved position. Additional Nevada residents have applied during the current recruitment effort, and there appears to be a definite possibility that several Nevada residents may pass the current examination. If current procedure is followed, the names of such Nevada residents would be placed at the top of the eligible list, regardless of the comparative scores of the nonresidents, and the appointing authority would then have the top three eligibles certified for appointment of one.

Because those passing the written examination will be invited to Reno to compete in the oral examination, it is desired that our opinion and advice on the legal and related ethical, financial, and basic merit system questions be made available at the earliest date possible.

QUESTION

What is legally proper and required concerning preference of Nevada residents on eligible lists for classified employment, as promulgated by the State Personnel Department under the circumstances hereinabove outlined?

CONCLUSION

Where, as in the circumstances outlined, Nevada residence has been expressly waived for authorized and justifiable reasons (as provided in Section 5.10, Rules for State Personnel Administration) and qualifications of applicants, as determined by examination ratings, are not otherwise equal relative to the involved position, it would be highly improper and questionable, both ethically and legally, to grant preference to, and employment in, the State's classified service merely because of Nevada residence.

ANALYSIS

[NRS 281.060](#) (Preferential employment by state and political subdivisions; employment of aliens), as here relevant, provides as follows:

1. Only citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States shall be employed by any officer of the State of Nevada, any political subdivision of the state, or by any person acting under or for such officer in any office or department of the State of Nevada, or political subdivision of the state.
2. In all cases where persons are so employed, preference shall be given, *the qualifications of the applicants being equal*:
 - (a) First: To honorably discharged soldiers, sailors and marines of the United States who are citizens of the State of Nevada.
 - (b) Second: To other citizens of the State of Nevada. (Italics supplied.)

[NRS 284.150](#) (Classified service: Composition; appointments and discharge) provides as follows:

1. The classified service of the State of Nevada shall be comprised of 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 the public funds received from the Government of the United States or any branch or agency thereof, or from private or any other sources.
2. *Appointments in the classified service shall be made according to merit and fitness from eligible lists prepared upon the basis of examination, which shall be open and competitive, except as otherwise provided in this chapter.*
3. No person shall be *appointed*, transferred, promoted, demoted or discharged as an officer, clerk, employee or laborer in the classified service in any manner or by any means other than those prescribed in this chapter *and the rules and regulations adopted in accordance therewith*. (Italics supplied.)
4. No person shall be discriminated against on account of his religious opinions or affiliations or race.

[NRS 284.155](#) (Regulations for classified service: Force and effect; amendments) provides as follows:

1. The director shall prescribe a code of rules and regulations for the classified service, which, upon approval of the commission after public notice and opportunity for public hearing, shall have the force and effect of law.

2. Rules concerning certifications, appointments, layoffs, and reemployment shall be prescribed for positions involving unskilled or semiskilled labor. These rules may be different from the rules concerning certifications, appointments, layoffs and reemployment for other positions in the classified service.

3. Upon recommendation of the director, amendments to rules and regulations may be made in the same manner required for the adoption of rules and regulations.

[NRS 284.205](#) (Director to prescribe regulations for competitive examinations) provides as follows:

The director shall prescribe rules and regulations for open competitive examinations to test the relative fitness of applicants for the respective positions.

[NRS 284.210](#) (Character of competitive examinations.) All competitive examinations for positions in the classified service shall:

1. Relate to those matters which will fairly test the capacity and fitness of the persons examined to discharge efficiently the duties of the class in which employment is sought.

2. Be open to all applicants who meet the reasonable standards or requirements fixed by the director with regard to experience, character, age, education, physical condition and such other factors as may be held to relate to the ability of the applicants to perform the duties of the position with reasonable efficiency.

[NRS 284.250](#) (Establishment of eligible lists) provides as follows:

1. The director shall prescribe rules and regulations for the establishment of eligible lists for appointment and promotion which shall contain the names of successful applicants *in the order of their relative excellence in the respective examinations.* (Italics supplied.)

2. The term of eligibility of applications on such lists shall be 1 year, but such term may be extended by the director to a maximum of 3 years.

[NRS 284.255](#) makes provision for “Appointments from appropriate eligible lists;” [NRS 284.260](#) authorizes grant of additional credits on examinations and preferential appointment of honorably discharged veterans; and [NRS 284.265](#) provides for “Notice of new positions, vacancies: Certification of names by director,” and, in such connection, states: “Within a reasonable time after the receipt of such notice, the director shall certify from the list of eligible persons, appropriate for the grade and class in which the position is classified, the three names at the head thereof.”

Turning to the “Rules for State Personnel Administration,” as adopted in 1954 and ratified and confirmed in 1959, the following excerpts therefrom are relevant and material to the question under consideration:

Section 5.10—Eligibility to Compete in Examination. The competitive examination shall, after public notice, be open to all applicants who are citizens of the United States, who have been residents of the State of Nevada for a period of one year on the date of the examination, and who meet the reasonable standards or requirements fixed by the director with regard to experience, age, education, physical condition, and such other factors as may be held to relate to the ability of the candidates to perform with reasonable efficiency the duties of the position.

For positions requiring professional, technical, or unusual qualifications, and in other cases which may arise from time to time, the director may waive the residence

requirements. All such actions must be reported to the commission at the next regular meeting. * * *

Section 5.25—Order of Names of Eligibles on Lists. On such eligible list for original appointment or promotion, the eligibles shall be ranked in order of ratings earned in the examination, including veteran's preference points as herein provided.

In case of ties in the ratings, such ties shall be broken on the basis of ratings earned on the part of the examination given the greatest weight and any remaining ties shall be broken on the basis of parts of examination given progressively lesser weights.

Section 5.26—Order of Use of Eligible Lists. Upon receipt of each requisition for employment from an appointing authority, the director shall make certification from the list of the appropriate class of positions in the following order: (1) reemployment lists; (a) divisional, (b) departmental, (c) service wide; (2) promotional lists, (a) divisional, (b) departmental, (c) service wide; (3) original entrance lists, (a) legal residents of Nevada, (b) non-residents of Nevada.

Appointments shall be made from the appropriate eligible list, but if no such list exists, then the director may certify from such other list as he deems most appropriate. A new and separate list shall be created for a stated position only when there is no satisfactory list.

Announcement No. 695 W, amended, for the position of University Personnel Officer, on its face, expressly declares: "Residence: Waived." In "Information About State of Nevada Employment," contained on the back of said Announcement No. 695 W, amended, we find the following:

2. Residence: Unless otherwise stated on the face of the bulletin, all applicants must have been residents of the State of Nevada for at least one year prior to the date of the examination for which they are applying.

Such employment information also makes reference to preference for veterans, but in no manner (other than as already indicated), conditions eligibility for certification for, and appointment to, the involved position from among the three or more persons whose names have been submitted to an appointing authority, on any preference for Nevada residence. An examination of the Application for Examination (NPD-1), while requiring information as to the residence of the applicant, does not provide any notice that Nevada residents are entitled to, or will receive, preference in employment.

Preliminarily, therefore, the legal question which must first be determined is: What effect, if any, did the waiver of Nevada residence, as approved by the Advisory Personnel Commission, have upon the preference to employment, provided for in statute and regulation, as above set forth?

We note that statutes and regulations restricting appointments or employments in the public service to residents of the state or local jurisdiction, or favoring those who have resided in the jurisdiction for a stated period of time, are generally valid in the absence of statute precluding such requirement. (See H. Elliott Kaplan, "The Law of Civil Service," p. 49, and footnote cases; McQuillin, Municipal Corporations, 3rd Edition, Vol. 3, Sec. 12.59, p. 240 et seq., and footnote cases.)

It is also well established that certain types of eligible lists may validly be given precedence over others, often referred to as "preferred," or "reemployment," or "reinstatement" lists. They may embrace various classes, such as veterans, and others, as set forth in Section 5.26, "Rules for State Personnel Administration" above.

* * * The extent to which any preferred list must be used ahead of another and ahead of original entrance or promotion lists depends on statutory provision or authorized rule of the personnel agency. If the statute does not specifically provide the manner in which such special classes of eligibles shall be placed on an eligible list the personnel

agency may provide by rule for any reasonable or rational method of placement. * * *
(See Kaplan, id., p. 165.)

However:

Candidates seeking admission to the public service must be informed with reasonable definitiveness and clarity the requirements necessary for admission to the examination. * * * So long as any such requirements are reasonable and are applied objectively to all candidates, there are few limitations on the discretion which may be exercised by the personnel agency in fixing the basis or conditions for taking the examination. * * * (See Kaplan, id., p. 127.)

In our considered opinion, the foregoing principle of required notice “with reasonable definitiveness and clarity” as to “the requirements necessary for admission to the examination” is equally applicable to notice of any preference authorized and accorded any particular class of applicants on the basis of residence. Where, as here, residence has been expressly and properly waived in connection with an examination, it must also be deemed to be waived with respect to the results of the examination, including the relative order of eligibility for and certification to the public employment; unless, of course, reasonable notice of allowance of credit or preference for residence has previously been made and given to all would-be applicants. Residence, properly waived as a condition or requirement for admission to an examination, may not thereafter be considered or used for grant of any preference, unless reasonably announced and expressly reserved.

On the basis of the facts before us, it does not appear that there was any notice given of any credit or preference to residents, as against non residents, as to the order of standing and eligibility to certification to the involved position. Nonresident applicants, therefore, could reasonably assume that Nevada residence having been expressly waived in the announcement of the examination (Announcement No. 695 W, amended), ratings, eligibility and certification for employment or appointment would be uniform as to all successful applicants, without preference of any kind to Nevada residents.

This result follows from the fact that all the necessary elements of an “implied contract” exist in the legal relationship established between the State Personnel Department and all persons filing applications for the particular examination involved. The “contract,” implied by law, is that the rules and conditions of the examination, once established, shall not be changed “in midstream” by grant of any previously undeclared and undisclosed preference reserved for, and to be accorded to, residents only. The legal consideration for the contract implied by law is the detriment or inconvenience already sustained by nonresident applicants in connection with the taking of the examination, without any prior notice of announcement of reservation of preferential treatment for residents only. Additionally, where, as here, it appears that nonresidents will also be required to spend time and money to come to Nevada for the oral part of such examination, it most certainly would be unfair, improper, unethical, and legally highly questionable to permit them to do so without previous disclosure of the credit and preference to be accorded to residents only in the final determination of relative standing and eligibility to certification for appointment or employment. In our considered opinion, such residence preference in the particular circumstances here involved would probably be illegal and subject to judicial reversal.

Finally, attention is invited to the specific provisions of [NRS 281.060](#), paragraph 2(b). It will be noted that the preference to Nevada residents is not absolute: only when “the qualifications of the applicants [are] equal,” is there any basis for any such preference. Obviously, if the rating on an examination as attained by a nonresident applicant is in any degree at all higher than the rating attained by a resident on the same examination (apart from allowance of credit or preference of any kind), then the nonresident is presumptively better qualified, and any allowance of preference because of residence is not only no longer mandatory, but would, in fact, be improper.

Nonetheless, as current practice has been outlined to us, the priority of the *list* of resident eligibles over the list of nonresident eligibles *is* absolute, wholly ignoring the relative and comparative qualifications, fitness, and examination ratings of grades of each particular person named in each of the two lists.

Such being the case, we must, therefore, conclude that such result, of so according residence preference to public employment in the indicated circumstances, is violative of, and contrary to, Nevada legislative declaration of policy and intent in connection with the enactment of the Personnel Act. In our considered opinion, it is also manifestly contrary to fundamental principles, criteria, and accepted requirements of any proper merit system for employment in the public service, and in the circumstances described, would probably be subject to serious legal question.

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

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-15 Nevada State Hospital—The respective duties of the Superintendent of the Nevada State Hospital, the county commissioners, county welfare board, the estate of a committed person and of financially responsible relatives, owing a duty of support to such person, at the time of his discharge, are under the provisions of [NRS 433.550](#).

CARSON CITY, December 27, 1962

LOWELL R. HUGHES, M.D., *Superintendent, Nevada State Hospital, P.O. Box 2460, Reno, Nevada*

Attention: Mr. Edward E. Mueller, ACSW Director, Psychiatric Social Work.

STATEMENT OF FACTS

DEAR MR. MUELLER: The several counties of the State of Nevada that have supplied patents to the Nevada State Hospital, upon being notified by the superintendent of intention to discharge a patient, pursuant to the provisions of [NRS 433.550](#), have taken various attitudes and viewpoints in respect to legal duties in assuming any of the costs or other obligations concerning such patients. Some have apparently disclaimed any further obligation to the said patient upon delivery to an agent of the hospital at the county seat of the county from which committed. It has therefore become necessary, in order that uniformity may be established, that the many situations that may arise be dealt with individually, by which the duty and timing may be clearly stated as to each such situation.

QUESTIONS

1. If a committed patient has no funds or property, but has relatives who owe him a duty of support within the provisions of [NRS 433.370](#), who have in fact supported him during the period of commitment at the Nevada State Hospital, is he an “indigent patient” within the meaning of [NRS 433.550](#)?
2. When a committed patient who is not an indigent is about to be discharged, is it incumbent upon the superintendent that he notify the county clerk of the county from which he was committed of the plan to discharge?

3. When a committed indigent patient, not laboring under a residual medical or surgical disability is about to be discharged, is it incumbent upon the superintendent to notify the county clerk in respect to such intended discharge?

4. In such case is it incumbent upon the county commissioners to make provision for the transportation of such person from the hospital to the county from which he was committed?

5. When an indigent person who is laboring under a residential medical or surgical disability is about to be discharged, is it incumbent upon the superintendent to give notice of such intended discharge to the board of county commissioners of the county from which the patient was committed?

6. If the answer to Question No. 5 is in the affirmative, state whether after the giving of such notice a duty devolves upon the board of county commissioners, What duty?

7. If a patient not an indigent is laboring under a residual medical or surgical disability, is about to be discharged from the hospital, is it incumbent upon the superintendent to give notice of such intended discharge to the county clerk or the county commissioners of the county from which he as committed?

8. If a dotard, who is not an indigent, is about to be discharged from the hospital, is it incumbent upon the superintendent to give notice of such intended discharge to the financially responsible relatives or guardian?

9. If a dotard, who is an indigent, is about to be discharged from the hospital, is it incumbent upon the superintendent to give notice to the county commissioners of the county from which he was committed of such intended discharge?

10. If the answer to the last preceding question is in the affirmative, does a duty then devolve upon the commissioners to supply the discharged dotard with transportation from the hospital to the county from which he was committed?

CONCLUSIONS

1. Such a person is not an indigent patient within the meaning of [NRS 433.370](#). Hereinafter committed patients should be considered as indigent only if they or their estates cannot pay, or if a relative owing a duty of support cannot pay in their behalf.

2. There is no legal duty to notify anyone; however, a moral duty or courtesy would require notification to those persons who have contributed funds or otherwise shown an interest in such patient.

3. Ten days' written notice of such intended discharge shall be given to the county clerk of the county from which said patient was committed, pursuant to the provisions of subsection 2 of [NRS 433.550](#).

4. No legal duty devolves upon the county commissioners in this case to provide transportation to such person from the hospital to the county from which he was committed. However, the fact that notice to the county clerk is required suggests that the county commissioners, after considering all of the facts of a case, may desire to provide transportation. The superintendent should, therefore, clearly determine the wishes of the county commissioners before discharging one with little or no funds from the hospital, in a community in which he is only slightly acquainted.

5. In this case the superintendent must give notice to the board of county commissioners of such intended discharge, of not less than 10 days, pursuant to the provisions of subsection 3 of [NRS 433.550](#).

6. In this case a duty devolves upon the board of county commissioners or county welfare department to designate the individual or agency which is authorized to take delivery of the discharged person.

7. In this case the superintendent is not legally required to give notice of such intended discharge to either the county clerk or county commissioners of the county from which commitment was made. Common courtesy requires, however, since his guardian or relative with duty of support has paid for his necessary subsistence costs, that such person be properly notified and that the release be made according to a prearranged plan.

8. In this case notice must be given to the financially responsible relative or guardian, namely the one who has discharged his financial obligation to the hospital.

9. In this case it is required that notice be given as is required for one discharged with full mentality but suffering under a residual medical or surgical disability, for in neither case is the person able to properly protect himself or guard against misfortune.

10. A duty does devolve upon the county commissioners to provide the transpiration and supervisory care to return the dotard to the county from which he was committed and there protect him in a humane manner, according to the circumstances.

ANALYSIS

The statutes with which we are here concerned are welfare statutes and, being remedial, must be liberally construed to effectuate their purposes.

Under the provisions of [NRS 433.360](#) and subsequent sections, it is clearly shown to be legislative intent that the necessary costs of caring for the patients at the Nevada State Hospital as well as transportation to and from the hospital, in all cases in which it may reasonably be effected, shall be paid from the estate of the patient or by those persons owing a legal duty of support.

Since these several statutes have for their purpose the protection of the interests of the Nevada State Hospital in the collection of sums required to defray the costs of maintenance of the committed patients at the hospital, we are inclined to the view that “indigent person” should include only those patients for whose care no moneys are collected either from the estate of the patient or from financially responsible relatives having a duty of support. We are of the opinion that if the superintendent is able to collect for such support in either manner, such patient is not an “indigent person” for the purposes of construing [NRS 433.550](#).

[NRS 433.550](#) provides:

433.550 (Discharge of patients.)

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.

2. No committed indigent patient shall be discharged except upon 10 days’ written notice being first given to the county clerk of the county from which such patient was committed.

3. An indigent person discharged as having recovered from his mental illness, but having a residual medical or surgical disability which prevents him from obtaining or holding remunerative employment, shall be returned to the county from which he was committed. The superintendent shall first give notice in writing, not less than 10 days prior to discharge, to the board of county commissioners of the county. Delivery of the discharged person shall be made to an individual or agency designated by the board of county commissioners or county welfare department.

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.

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.

It is clearly not within the province of the boards of county commissioners to disclaim any interest in indigent persons about to be discharged from the hospital who have a “residual medical or surgical disability.” Under the provisions of subsection 3 of [NRS 433.550](#), it is clearly

provided that the board of county welfare department shall make arrangements for delivery of such patients to a designated individual or agency for return to the county from which committed.

We are of the opinion, that because of disability (mental), it was the intention of the Legislature to protect dotards as if specifically designated in subsection 3 of [NRS 433.550](#), for they also are not able to care for themselves and the same humane principle applying to those with “residual medical or surgical disability” would be required to be applied in the protection of such mentally deficient persons.

A county may not lawfully disclaim such duty by assigning the reason that it is not properly equipped to care for such persons. It is its duty under the present law to care for such persons and to make reasonable provisions to do so.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-16 Budget, Director of: “Religious Counseling, Advisory, and Instructional Services” in State Institutions; Expenditure of Public Funds for—The expenditure of public funds for religious counseling, advisory, and instructional services in state institutions under the particular facts here involved held to be unauthorized and invalid because violative of federal and state constitutional prohibitions.

CARSON CITY, December 31, 1962

MR. HOWARD E. BARRETT, *Budget Director, State of Nevada, State Capitol Building, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MR. BARRETT: It appears that for a number of years ministers and priests have been paid at the Nevada Youth Training Center, the Nevada State Hospital, and the Nevada State Prison, on a part-time salary basis. In the case of the Girls School at Caliente, this office recently felt constrained to disapprove a proposed contract between the School and a minister because the provisions thereof were considered violative of Article 11, Section 10, Nevada Constitution, namely: “No public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes.”

Some of the express provisions set forth in said proposed contract between the Girls School at Caliente and the ordained minister therein named were:

The First Party employs Second Party to serve as Religious Advisor on a non-sectarian basis for and to administer religious counselling and advice to such girls, being resident at Nevada Girls Training Center, as may require such counselling from time to time. It is specifically understood and agreed that Second Party will not at any time advocate religion on a sectarian basis to any of the girls resident at Nevada Girls Training Center.

* * * * *

That Second Party will interview girls from time to time and when needed and will offer religious advice on a non-sectarian basis in an effort to better rehabilitate such girls. He will direct the religious training of girls, being resident at Nevada Girls Training Center, and create helpful attitudes of mind for said girls. He will not be obliged to conduct religious services at Nevada Girls Training Center.

It shall be the duty of the Second Party to determine and (sic) analyze the religious background of each girl resident at said Nevada Girls Training Center and to make a factual report regarding his findings to the superintendent. The report shall be in such detail and shall include such factual information as shall be required by the superintendent. The report shall be such as will apprise the superintendent and other officials at said girls' school regarding the religious background and attitudes towards religion of each girl to the end that such information may be used in the determination of a therapeutic program for the girls resident at Nevada Girls Training Center.

In the case of the Nevada Youth Training Center at Elko (boys), a letter from the Center's superintendent contains the following excerpt:

* * * Although our part-time Chaplain is an ordained minister * * *, none of his activities include indoctrination in any denomination or sect in the areas of religion. In his general duties, he interviews every boy that enters the school and reports in writing to the Superintendent and the Classification Committee his findings about the boy and his family as to their religious interests, training, and background and other information concerning the family constellation; which information is most valuable to us in planning a proper program for the boy and in better understanding his social and cultural experiences. This Chaplain does not hold formal church services as such, but does carry on religious instruction covering faith and religion without referral to sect, creed, or denomination and this activity has the approval of the Elko County Ministerial Association.

We have no information as to the particular nature of the services being rendered by minister or priest at the Nevada State Hospital or the Nevada State Prison.

QUESTION

Is the expenditure of public funds for the described "religious counselling, advisory, and instructional services" being rendered, or contemplated, at the Nevada Youth Training Centers at Elko and Caliente authorized under applicable law?

CONCLUSION

Strictly confined to the particular facts here involved, the expenditure of public funds for said "religious counselling, advisory, and instructional services" at said state institutions is not authorized under present applicable law.

ANALYSIS

As here relevant, Amendment I of the Constitution of the United States provides:

Congress shall make no law respecting an establishment of religion * * *

As here relevant, Amendment XIV of the Constitution of the United States provides:

* * * nor shall any State deprive any person of * * * liberty * * * without due process of law * * *

The Supreme Court of the United States in *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213 (1940), and other United States cases, has held that the prohibition of the First Amendment was by the Fourteenth Amendment made applicable to the States. (Also see "The New York Prayer Case," *Engel, et al. v. Vitale, et al.*, U.S., 8 L.Ed.2d 601, 82 S.Ct. (1962).)

Article I, Section 4, of the Nevada Constitution, provides as follows:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Article XI, Section 9, of the Nevada Constitution, provides as follows:

No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this Constitution.

Article XI, Section 10, of the Nevada Constitution, provides as follows:

No public funds of any kind or character whatever, State, County, or municipal, shall be used for sectarian purposes.

According to the Nevada Supreme Court, the words “sectarian purposes” are therein used in the popular sense; and every body of persons, united in religious tenets differing from those of other groups, is sectarian within the meaning of that word as employed in the Constitution. (*State v. Hallock*, [16 Nev. 373](#), 377, 379, 385.) The cited case is also authority for the proposition that it is the duty of the State Controller to refuse to draw his warrant for any money that is to be used for unconstitutional purposes.

Nevada law does not prescribe any religious belief as a qualification for any teacher in a public school, and school authorities may properly select a teacher who belongs to any church, or no church, as they may think best. The same principle is considered valid as to the Nevada Youth Training Centers at Elko and Caliente, respectively, viewed as public “schools” for boys and girls there resident.

The legal objection is not essentially against the person (teacher, minister, etc.) as a member of a sect but the sectarian views or instruction proscribed by law; it is what is done, not who does it, or the name of the place where it is done, that is significant.

Even when only Bible reading has been involved, the conflicting views, judicial and otherwise, respecting the constitutional separation of church and state are largely explainable as due to (1) difference in the particular facts involved, (2) the different constitutional provisions invoked and applied, and (3) the different concepts of the courts as to the definitions of the terms “sect” and “sectarianism.” (*Engel v. Vitale*, *supra*; Note, 5 A.L.R. 866.) Thus, giving the term “sect” a broad significance and regarding the activities of the followers of one faith to be sectarian as related to the activities of the adherents of another faith, have resulted in some courts banning Bible reading, even when unaccompanied by any comment, on the grounds that (1) any version of the Bible adopted as authoritative by any denomination is a sectarian work, (2) holding religious exercises on school premises infringes constitutional prohibitions against appropriation of money for religious purposes, and (3) excuse from attendance (when permitted) serves only to accentuate religious differences and to impose pressure upon the individual pupil to conform to the practice of the majority (particularly applicable for protection of the rights of Jews and non-believers).

There is respectable judicial authority supporting the validity of Bible reading, without comment, when the excerpts read are relatively free of sectarian doctrine and the chief purpose is the inculcation of morality (ethical, educational, or cultural) rather than sectarian instruction (the inculcation of religious tenets). It would serve no useful purpose to review in detail such cases, and others involving many and varied aspects of the problem. It must suffice to indicate that even when the matter involved merely Bible reading, without comment of any kind, some courts have held the same to be violative of constitutional prohibitions, both federal and state. For some references concerning various aspects of the problem, see: 5 A.L.R. 866, Note: Sectarianism in schools; 20 A.L.R. 1351, Note: Sectarianism in schools; 31 A.L.R. 1125, Note: Sectarianism in

schools; 57 A.L.R. 195, Note, Sectarianism in schools; 141 A.L.R. 1144, Note: Sectarianism in schools; 70 A.L.R. 1313, Note: Power and duty of school authorities to maintain kindergartens or specialized departments; 86 A.L.R. 1195, Note: Use of school property for other than school or religious purposes; 2 A.L.R.2d 1401, Note: Right of school authorities to release pupils during school hours for purpose of attending religious education classes; A.G.O. No. 320, dated March 3, 1954: Released Time From School Attendance for Purpose of Religious Instruction No Authorized by the Laws of Nevada; 60 A.L.R.2d 285, Note: Wearing of religious garb by public school teachers; 79 A.L.R.2d 1148, Note: Use of public school premises for religious purposes during nonschool time; (1955, Duke Un.), 20 Law and Contemporary Problems 138, Article by Harold H. Punke: Religious Issues in American Public Education; 45 A.L.R.2d 742, Note: Bible distribution or reading in public schools.

It is quite apparent from the facts provided by the superintendents of both Nevada Youth Training Centers at Elko and Caliente that the actions and functions of ministers or priests here involved go far beyond mere Bible reading, without comment of any kind; in both instances “religious counselling and advice” and “religious instruction covering faith and religion without referral to sect, creed, or denomination” is actually expected, provided, or is contemplated. How such “religious counselling and advice” and “religious instruction,” when given by ordained ministers or priests of a particular faith or sect, can be free of sectarian indoctrination of some kind and to some degree, is not shown. It would, however, be reasonable to infer that the particular religious discipline and vows of minister or priest would perforce influence the nature of the religious counseling, advice, and instruction given by them in some discernible manner and measure, within the indicated prohibition of Federal and State Constitutions.

It should also be noted that in all of the institutions indicated, namely, the Nevada Youth Training Centers, the Nevada State Hospital, and the Nevada State Prison, we are, in a very real sense, dealing with actual “captive” audiences. There is not indication of any exemption or freedom from the indicated religious counseling, advice, or instruction for dissident resident inmates. The fundamental fact is that no matter how brief the prayers, instruction, counseling, or advice, a person (minister or priest) invested with official status, who is on the public payroll, is performing a religious exercise, activity, or function in a governmental institution under circumstances in which the element of coercion is indubitably present.

The following excerpts from the concurring opinion of Mr. Justice Douglas in the case of *Engel v. Vitale*, 8 L.Ed.2d 601, at p. 614 et seq., seem most appropriate at this point:

“We are a religious people whose institutions presupposes a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L.Ed. 954, 962, 72 S.Ct. 679. Under our Bill of Rights free play is given for making religion an active force in our lives. But “if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups not by the Government.” *McGowan v. Maryland*, 366 U.S. 420, 563, 6 L.Ed.2d 393, 525, 81 S.Ct. 1101 (dissenting opinion). By reason of the First Amendment Government is commanded “to have no interest in theology or ritual” (*id.* 366 U.S. at 564), for on those matters “government must be neutral.” *Ibid.* The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.

Justice Douglas also quotes from the dissenting opinion of Mr. Justice Rutledge in the case of *Everson v. Board of Education*, 330 U.S. 1, 17, as follows:

The reasons underlying the Amendment’s policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or

its agencies in the state's domain or dependency on its largesse * * *. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation, it vanishes with the resting * * *. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups * * *. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened form * * *. The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions * * *.

A careful review of the cases leaves no reasonable doubt that any conduct, activity, or function which exceeds mere Bible reading without comment of any kind will fall within the constitutional prohibition by the Supreme Court of the United States, especially if there is any suggestion of the existence or presence of coercion or a captive audience. On the other hand, it would seem that the Supreme Court of the United States has not explicitly outlawed the mere reading of relatively nonsectarian excerpts from the Bible without comment of any kind.

A.G.O. No. B-81, dated February 18, 1942, while holding that the law authorizing religious services at the Nevada State Prison ([NRS 209.050](#)) was applicable to a Reader of the Christian Science Church, did not consider the constitutional question involved. In the present state of the law, we are constrained to express serious doubt as to the constitutionality of [NRS 209.050](#), since it goes beyond the mere reading of nonsectarian excerpts from the Bible without comment of any kind.

Finally, in our considered opinion, all of the indicated state institutions, i.e., both Nevada Youth Training Centers, the Nevada State Hospital, and the Nevada State Prison, should adhere to the restricted nonsectarian practices and activities which existing law, both federal and state, permit.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-17 Insurance, Department of—The premium tax under Nevada statute is limited to “premium income” of the issuing corporation. [NRS 686.010](#) construed.

CARSON CITY, January 2, 1963

HON. PAUL A. HAMMEL, *Insurance Commissioner, State of Nevada, Carson City, Nevada*

DEAR MR. HAMMEL: Your letter of December 12, 1962 poses the following question:

QUESTION

If a life insurance company issues in behalf of its employees or agents, as the insured, insurance contracts, either life or accident and health, either without premium or at reduced premium, as a fringe benefit to such persons, is a premium tax due and collectible from such company, upon a premium which would normally be collected for such exposure, but which was in this case never collected?

CONCLUSION

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

ANALYSIS

[NRS 686.010](#) insofar as here pertinent provides as follows:

686.010 (Insurance, annuity companies to pay state tax.)

1. Every insurance or annuity company or association of whatever description, * * * doing an insurance or annuity business in this state, shall annually pay to the commissioner a tax of 2 percent *upon the total premium income*, * * * from all classes of business covering property or risks located in this state during the next preceding calendar year, * * *. (Italics supplied.)

Under the above provision it clearly appears to have been the intention of the Legislature to exact the tax of 2 percent only upon “total premium income,” and not to include a tax liability upon the premium which would normally have been charged for policies upon which there was no premium income.

The statute must be strictly construed against the State and in favor of the taxpayer, in conformity with the usual rules of statutory construction.

While the power to tax, and the exercise of that power is indispensable to the effective operation of government, the rule has become firmly established that tax laws are to be strictly construed against the state and in favor of the taxpayer. (Sutherland Statutory Construction, Third Edition, Art. 6701.)

The Attorney General of New York, upon a similar question but somewhat more inclusive statute reached a different conclusion in official opinion of February 17, 1960. There the statute in part provided:

* * * pay a tax of one and three-fourths per cent on all gross direct premiums, less return premiums thereon, received in cash *or otherwise* on risks resident in this state, * * *. (Italics supplied.)

Under that statute the value to the issuing corporation was presumably received otherwise than by receipt of premium. We deem the distinction of the language of the statute significant.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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

S-18 Library, Nevada State—The State Librarian is authorized to change the hours in which the library shall be open to the use of the public, being limited only by the provisions of [NRS 378.070](#). [NRS 281.110](#) distinguished.

CARSON CITY, January 3, 1963

MRS. MILDRED J. HEYER, *State Librarian, Nevada State Library, Carson City, Nevada*

STATEMENT OF FACTS

DEAR MRS. HEYER: In your recent inquiry you have informed us that you propose to change library hours insofar as the general public is concerned at the same time continuing to make the library facilities available to the state officers and offices as at present.

You propose after giving notice of a change to have the staff of the library on duty from 8 a.m. through 7 p.m. daily, Monday through Friday. The employees would work 8-hour shifts as before. However, by staggered shifts the 11-hour period would be fully covered. The library would be open to the general public from 11 a.m. to 7 p.m., Monday through Friday, and would be open from 8 a.m. of governmental agencies, state and local officers. It is believed that this system if authorized by law would afford a more adequate service to students, who are the general patrons of the library and would afford more adequate supervisions of the state property during the rush hours of the evening.

QUESTION

Is the State Librarian authorized by law to institute such a schedule of hours for the Nevada State Library?

CONCLUSION

We are of the opinion that the State Librarian has been accorded authority to institute such library schedule. However, in order that the proposed schedule of library hours may be well known and the transition to the new schedule may cause the minimum amount of inconvenience we urge that public notice be given a number of days before the change.

ANALYSIS

Chapter 294, Statutes of 1949, now [NRS 281.110](#), makes provision for office hours of state offices, departments, boards, commissions and agencies. This statute is general agencies. This statute is general in its application and were it not for a later statute, it would, we feel, be controlling in respect to the hours for the Nevada State Library.

[NRS 281.110](#) provides the following:

281.110 (State offices to maintain 40-hour workweek; office hours.)

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 [p.] m. and from 1 p.m. until 5 p.m. every day of the year, with the exception of Saturdays, Sundays and public holidays.

2. Where conditions and the size of the staff permit, the offices of all state officers, departments, boards, commissions and agencies shall remain open during the noon hour of each regular working day.

However, the Legislature, by the provisions of Chapter 431, Statutes of 1955, now [NRS 378.070](#), made a specific provision by which authority was granted to the State Librarian to designate the hours in which the State Library should be open to the general public, provided however that such designation should require the library to be open at least 8 hours per day for at least 5 days per week, with the exception of legal holidays. The schedule that is proposed would satisfy the requirements of this statute.

[NRS 378.070](#) provides:

378.070 (Hours of state library.) The state librarian shall have the power to designate the hours that the state library shall be open for the use of the public, but the state library shall be open for at least 5 days in each week and for at least 8 hours in each day with the exception of legal holidays.

We do not have any hesitation in arriving at the conclusion that the latter statute ([NRS 378.070](#)) provides an exception to the requirements of the earlier statute ([NRS 281.110](#)) and permits the adoption of the schedule of library hours that are suggested.

It is a cardinal principle of statutory construction that when either of two conflicting statutes would control a situation, if the statute stood alone, one of the statutes being general in its application and the other being specific, the specific will control, especially (as in this case) when the specific statute is of later enactment.

Respectfully submitted,

CHARLES E. SPRINGER, *Attorney General*

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