

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1970

The following opinions have been furnished by this office in response to inquiries submitted by the various state officers and departments, district attorneys and city attorneys.

OPINION NO. 1970-632 Waters—Carson River is a navigable stream; low water mark is boundary.
OPINION NO. 1970-632 Waters—Carson River is a navigable stream; low water mark is boundary.

Carson City, January 6, 1970

Mr. Frank W. Groves, Director, Department of Fish and Game, P.O. Box 10678, Reno, Nevada 89510

Dear Mr. Groves:

In your letter of December 30, 1969, you asked for an opinion as to whether or not the Carson River is a navigable stream, and if it is, what is the extent of its boundaries.

ANALYSIS

Chapter XXXV of the First Session of the Territorial Legislature for the Territory of Nevada was enacted on November 28, 1861. It provided for the improvement of the Carson River, but stated the act was not to be construed so as to make the river a navigable stream.

The Second Session of the Territorial Legislature, however, enacted two chapters which strongly indicate a legislative intent to declare the Carson River a navigable stream. Chapter VI of that session, enacted on December 10, 1862, was a statutory grant of the right to float logs on the Carson River. Chapter CXXVIII, enacted on December 20, 1862, was an act to provide for the improvement of navigation on the Carson and Humboldt Rivers. These two statutes, enacted by the Second Session of the Territorial Legislature, were never repealed by either the Territorial Legislature or the State Legislature.

A stream with sufficient capacity to float logs has been deemed to be a navigable stream. *Shoemaker v. Hatch*, 13 Nev. 261 (1878). *Nekoosa Edwards Paper Co. v. Railroad Commission*, 228 N.W. 144 (1929). *Collins v. Gerhart*, 211 N.W. 115 (1926). Attorney General's Opinion No. 59 of May 17, 1951. Additionally, the legislative declaration to improve navigation indicates that the Legislature assumed that the stream is navigable.

The Carson River is, or can be, a channel for useful trade or commerce. A grant of the right to float logs on the river indicates that the Territorial Legislature considered the river as a tool of trade or commerce. 56 Am. Jur. Waters §§ 179, 180, 181. If the Carson River is capable of being used or is used as a tool of commerce, it is a navigable stream.

The common law boundary line of a navigable stream is the low water mark. The State owns the land between and under the low water marks. *Shoemaker v. Hatch*, supra. It should be noted that legislative declarations of navigability in Nevada have extended State ownership to the high water mark. NRS 537.010, 537.020. This has not been done with the Carson River, however.

CONCLUSION

It is our opinion, therefore, that the Carson River is a navigable stream, and that the low water mark is the boundary line. The State owns the river bottom. Your department could initiate action for interference with the stream bed between the low water marks.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Michael L. Melner, Deputy Attorney General

OPINION NO. 1970-633 Local Governments—Insurance Bidding—Group insurance for local governments must meet the bidding requirements of Chapter 322 of Nevada Revised Statutes.

OPINION NO. 1970-633 Local Governments—Insurance Bidding—Group insurance for local governments must meet the bidding requirements of Chapter 322 of Nevada Revised Statutes.

Carson City, January 7, 1970

The Honorable Chic Hecht, State Senator, Clark County, No. 3, 413 Fremont Street, Las Vegas, Nevada 89101

Dear Mr. Hecht:

Many inquiries have been made to you concerning the requirement for bidding insurance contracts for cities and other political subdivisions of the State of Nevada. This has prompted you to ask the following question:

QUESTION

Are contracts for group insurance to local governments required to be let to bid?

ANALYSIS

We believe that such contracts should be let to bid.

Chapter 332 of NRS is our Local Government Purchasing Act. NRS 332.020 defines a local government and includes virtually every political subdivision of the State which has the right to levy or receive moneys from ad valorem taxes and enumerates without limitation certain local governments.

NRS 332.040 reads in part:

Notice to bid: Advertising where contract exceeds \$2,500; contents of notice; award of contract.

1. Except as otherwise provided by law, in letting all contracts where the estimated aggregate amount required to perform the contract exceeds \$2,500, the governing body shall advertise such contract or contracts twice within a period of 10 days, with at least 5 days intervening between such advertisements.

The remainder of this section deals with a particular type of notice for bidding. NRS 332.050 and NRS 332.060 diminish and eliminate, respectively, the requirements for bidding, based upon the amount involved. They should be consulted in connection with this opinion.

We see nothing in NRS 332.040 which exempts an insurance contract. In fact, the language of NRS 332.040(1) includes "all contracts." We have found no other statutes which would limit or exclude insurance contracts from the clear meaning of the words of that statute.

The purpose of these bidding statutes is to invite competition and guard the public against favoritism, extravagance, fraud, corruption, and secure the best performance at the lowest practical price. There is no difference to us between an insurance contract and any other contract coming under Chapter 332.

Other state with statutes more restrictive in their language have come to the same conclusion. For example, see *Austin v. Housing Authority of the City of Hartford* (1956) 122 A.2d 399 (wherein statute which required personal property contracts to be bid included fire insurance contracts).

We know of no reason why the clear statutory language should not apply. We have found no exemption, statutory or otherwise, which would exclude insurance contracts from the necessity of Nevada's bidding procedures under our Local Government Purchasing Act.

CONCLUSION

We conclude that group insurance contracts for local governments should be let to bid under Nevada's Local Government Purchasing Act.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Peter I. Breen, Deputy Attorney General

OPINION NO. 1970-633 (As Amended) Political Subdivisions—Group insurance—Group Insurance policies purchased by political subdivisions are not within the purview of NRS 332.040, and may be secured without competitive bidding.

OPINION NO. 1970-633 (As Amended) Political Subdivisions—Group insurance—Group Insurance policies purchased by political subdivisions are not within the purview of NRS 332.040, and may be secured without competitive bidding.

Carson City, January 22, 1970

Hon. Chic Hecht, State Senator, 413 Fremont Street, Las Vegas, Nevada, 89101

Dear Senator Hecht:

Early this year you requested an opinion from this office as to whether contracts for group insurance between insurance companies and local political subdivisions required bidding.

In an opinion written by this office under date of January 7, 1970, it was held that bidding was necessary. I have gone into the law of other states covering this problem and I have come to the conclusion that the opinion should be amended and rewritten.

ANALYSIS

NRS 332.040 requires that contracts exceeding \$2,500 shall be bid before an award is made. However, NRS 332.140 infers that contracts which by their nature are not adapted to award by competitive bidding are an exception to the general rule.

The sale of group insurance involves a service and not a product. In *Lynd v. Heffernan*, 146 N.Y.S.2d 113, a case involving a policy of fire insurance, the court held that the relationship between an insurance broker and his client is a relationship of personal trust and confidence, calling for a rendition of personal services of a type uniformly held to fall outside the scope of competitive bidding, citing 44 ALR 1150, 142 ALR 542.

As pointed out in leading cases in various jurisdictions the insurance company does more than write a policy. The drafting of such a contract involves frequent and efficient inspection of the needs of the insured,

and prompt, honest, and efficient service in the settlement of claims. All insurance companies are different both as to policy and to the terms of their policies. Thus the selection of an insurance company and the necessary adoption of a policy meeting the requirements of the political subdivision should not be restricted.

Group insurance is the coverage of a number of individual persons by one comprehensive policy for the primary purpose of protecting and providing for the employees. The governing board of the procuring agency is only involved to the extent of securing the most advantageous policy in line with the needs of the covered group. Thus to impose on the political subdivision the requirement of securing the insurance which costs the least may well result in a policy which does not, in all respects, meet defined requirements.

NRS 287.101 gives the governing body of a political subdivision the power to purchase group policies of life, accident or health insurance, and to defray part or all of the cost of the premiums.

CONCLUSION

It is the opinion of this office that group insurance policies purchased by political subdivisions are not within the purview of NRS 332.040, and may be secured without competitive bidding.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-634 Nevada Securities Act (Chapter 90 of NRS) Construed—Present law forbids offers as well as sales prior to the effectiveness of a registration statement whether under state or federal law, unless expressly excepted or exempted under applicable law. Nevada law contains no such exception or exemption. Distribution of a preliminary prospectus, containing a legend expressly stating that the same shall not constitute an offer to sell or the solicitation of an offer to buy the securities therein described or mentioned, is prohibited prior to the time the registration statement is effective. Clarified by Attorney General's Opinion 650 dated March 25, 1970.

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Carson City, January 8, 1970

The Honorable John Koontz, Secretary of State, Carson City, Nevada 89701

Attention: Mr. Ford E. Holmes, Deputy, Division of Securities

Dear Mr. Koontz:

You have requested our legal opinion and advice on the following two questions:

QUESTIONS

1. Are offers of securities to be registered under Securities Act of 1933 permissible in Nevada before the registration is effective under the Securities Act?

2. May a broker-dealer registered in Nevada distribute to the public a preliminary prospectus relating to securities, prior to registration of same in Nevada, if an appropriately qualifying legend (hereinafter set forth) appears on such preliminary prospectus?

ANALYSIS

Chapter 90, Nevada Revised Statutes, substantially adopts major provisions of the Uniform Securities Act but contains numerous variations, omissions and additional matter. There is therein no express provision for the permissibility of offers of securities which are to be exempt once registration is effective under the Securities Act of 1933.

The Nevada Securities Act (Chapter 90 of NRS), as relevant hereto, provides as follows:

NRS 90.075:

“Public intrastate offering” means every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security of value made solely within this state to 25 persons or more by means of any news media . . . or through the use of the United States mails, or by direct solicitation by an agent, except such offerings as are registered under the Securities Act of 1933 (15 U.S.C. §§ 77a et seq.) or exempt from registration thereunder other than by reason of the intrastate character thereof. (Italics added.)

NRS 90.140:

1. It is unlawful for any person to offer or sell any security in this state by means of a public intrastate offering unless:

(a) He has filed a statement with the administrator concerning such security as described in NRS 90.150;

* * * * *

(c) The administrator has approved such statement;

* * * * *

Section 8(a) of the Securities Act of 1933, as relevant hereto, provides:

Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after filing thereof or such earlier date as the Commission may determine. * * *

Obviously, before effectiveness of registration, the same may be amended for incompleteness or inaccuracy in any material respect, either by the registrant of his or its own accord, or upon notice by the commission therefor. Until effectiveness, therefore, mere filing or registration is inconclusive and may perhaps contain uncertain data, information, or desired disclosures.

It has been suggested that, since sales would be exempt after effectiveness of registration, offers may properly be made once the registration statement has been filed with the Securities and Exchange Commission, as is the case under § 5(b) of the Securities Act of 1933. However, in conjunction with such suggestion, it has also been properly noted that Nevada law presently appears to be susceptible of the interpretation that offers are not permitted, but prohibited, prior to effectiveness, unless registered under NRS 90.140, inasmuch as the exemption from the definition of “public intrastate offerings” under NRS 90.075 for securities registered under the Securities Act of 1933, arguably, does not arise until effectiveness, or when registration is completed.

In point of fact, there is substantial basis for such a contention or conclusion. Corresponding to NRS 90.140, cited above in relevant part, section 301 of the Uniform Securities Act (on which the Nevada act is based) provides:

It is unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act or (2) the security or transaction is exempted under section 402.

Note: Section 402 of the Uniform Securities Act enumerates a number of exemptions not provided for in the Nevada adaptation thereof. In fact, except as indicated in NRS 90.075 and 90.140, only the securities of insurance companies are additionally exempt from the requirements of NRS 90.140 and 90.150. (See NRS 90.153.)

The following "Commissioner's Note" to the foregoing section 301 of the Uniform Securities Act, therefore, is cogently pertinent hereto, as it manifestly correctly indicates how the registration requirement relative to securities should be construed and applied:

This section forbids offers as well as sales prior to the effectiveness of a registration statement. "Offer" and "sale" are defined in § 401(j). The 1954 amendment of the Securities Act of 1933 to permit certain types of offers during the waiting period between the filing and the effectiveness of the registration statement is recognized in a special exemption for securities which are in process of registration under both the federal and state statutes * * *. (Italics added.)

Your inquiry does not clearly indicate whether, in the particular premises, registration of the involved securities is being made "under both the federal and state statutes." In any case, present Nevada law (Chapter 90 of NRS) contains no express, equivalent "special exemption" provision even remotely corresponding to the said 1954 amendment of the Securities Act of 1933; nor have we found in said Nevada law any other provision reasonably manifesting legislative intent to afford such "special exemption" so as to permit the making of "offers" during the waiting period between the filing and the effectiveness of the registration statement under the Securities Act of 1933.

In the foregoing connection, NRS 90.100 pertinently provides as follows:

In any proceeding under this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

Turning next to the second question, would the following legend, intended to appear on a preliminary prospectus, distributed in Nevada prior to registration of the involved securities in Nevada, be authorized?

A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. Information contained herein is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective. This prospectus shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any state in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state.

We are aware of the fact that the Securities Act of 1933, and the general rules and regulations thereunder, contain more particularized and qualified definitions of such terms as "offer" and "offer to sell," and that certain communications under the said federal law and rules and regulations are "not deemed a prospectus," thus affording greater latitude in their interpretations and applications. Present Nevada law (Chapter 90 of NRS), legislatively intended primarily to safeguard and protect the general public interest, however, affords no reasonable basis for similar or extended liberal interpretations or applications, as under the federal law and rules and regulations. We are constrained to construe Nevada statutes and law essentially as we find it.

Thus, NRS 90.080, in relevant part, defines "offer" or "offer to sell" in the following manner:

2. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

The Nevada act provides no express exemption or authorization for such qualified offer "prior to the time the registration statement becomes effective." Except as an "attempt or offer to dispose of, or solicitation of an offer to buy a security or interest in a security for value," distribution of a preliminary prospectus containing such a qualifying disclaimer would have no proper purpose, and could induce proffer by a Nevada resident of the very "offer to buy" which the statutory prohibition was legislatively intended generally to prevent. Otherwise stated, the proposed preliminary prospectus, despite the qualifying and disclaiming legend, still remains and constitutes an "attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value."

The purpose and object of the definition and of the law as a whole could well be defeated by allowance of such deviation from the prohibition expressly stated in such definition. Clearer and more definite statutory authority or basis for such exemption or exception must exist, before the same may be adjudged proper or valid.

CONCLUSION

1. Present Nevada law (Chapter 90 of NRS) forbids offers as well as sales prior to the effectiveness of a registration statement, whether under said state law or under the (federal) Securities Act of 1933.

2. Prior to the time the registration statement becomes effective, present Nevada law (Chapter 90 of NRS) prohibits the distribution of a preliminary prospectus relative to securities within the State, even though a legend thereon were expressly to state that said prospectus shall not constitute an offer to sell or the solicitation of an offer to buy. Such qualifying disclaimer does not render any such preliminary prospectus any less an "attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value."

Respectfully submitted,

Harvey Dickerson, Attorney General
By John A. Porter, Deputy Attorney General

OPINION NO. 1970-635 Motor Vehicle Department—Implied Consent Law—Chemical test requirements for determination of alcohol content of the blood under Chapter 341 of the 1969 Statutes of Nevada, and sanctions for refusal to give consent to the chemical test, are applicable to drivers under the age of majority.
OPINION NO. 1970-635 Motor Vehicle Department—Implied Consent Law—Chemical test requirements for determination of alcohol content of the blood under Chapter 341 of the 1969 Statutes of Nevada, and sanctions for refusal to give consent to the chemical test, are applicable to drivers under the age of majority.

Carson City, January 9, 1970

The Honorable William J. Raggio, Washoe County District Attorney, Washoe County Courthouse, Reno, Nevada 89501

Dear Mr. Raggio:

You have requested an opinion from this office as to whether Chapter 341 of the 1969 Statutes of Nevada, better known as the Implied Consent Law, applies to drivers under the age of majority.

facts

During the 1969 legislative session, the Legislature passed into law Chapter 341, which amends [NRS] Chapter 484, Traffic Laws, by adding thereto sections which provide in substance that persons driving on the highways of this State impliedly consent to the taking of a chemical test to determine alcoholic content of their blood where such person has been placed under arrest for violation of a traffic law, and where the arresting officer has reasonable cause to believe such person has been driving under the influence of intoxicating beverages.

ANALYSIS

Chapter 341, section 2(1), provides:

Except as provided in subsections 4 and 5, any person who drives a vehicle upon a highway in this state shall be deemed to have given his consent to a chemical test of his blood, urine, breath, or other bodily substance for the purpose of determining the alcoholic content of his blood when such test is administered at the direction of a police officer having reasonable grounds to believe that such person was driving a vehicle under the influence of intoxicating liquor and after such person is arrested for any offense allegedly committed while such person was driving a vehicle under the influence of intoxicating liquor. (Italics added.)

At the outset, it should be noted that a person suspected of driving under the influence of alcohol cannot be compelled to take a chemical test to determine the alcoholic content of his blood; however, if such person refuses, his driver's license is automatically suspended for a period of 6 months by the Department of Motor Vehicles. It should further be noted that the suspension provision for refusal to submit to a chemical test is independent of any criminal proceedings for driving under the influence of intoxicating liquor. *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75; *Gottschalk v. Suepple* (Iowa), 140 N.W.2d 866, 1966; See also 88 A.L.R.2d 1064.

It is important to note that the portion of the statute quoted above utilizes the terms "any person who drives a vehicle upon a highway in this state." The use of the term "any person" makes it clear that the Legislature intended to include every person of any age who drives a motor vehicle upon a Nevada highway. This construction is reinforced by the definition of "person" found in NRS 484.0041 under the chapter on traffic laws. The definition provides: " 'Person' means every natural person, firm, trust, co-partnership, association or corporation." The remaining language of the Implied Consent Law is in terms equally broad, and no language can be found in this chapter or in case law interpreting similar state laws which would exclude a minor driver from the requirements of the statute. To make it even clearer, section 3(1)(c) of Chapter 341, 1969 Statutes of Nevada, which deals with the punishments where a person refuses to take a chemical test, provides: " * * * If such person is a resident without a license or instruction permit to drive, deny to such person the issuance of a license or permit for a period of 6 months after the date of the alleged violation." (Italics added.)

CONCLUSION

It is therefore the opinion of this office that Chapter 341 of the 1969 Statutes of Nevada, known as the Implied Consent Law, applies with equal force and to the same extent to a minor as to an adult.

Respectfully submitted,

Harvey Dickerson, Attorney General
By William L. Harper, Deputy Attorney General

OPINION NO. 1970-636 Witnesses—Municipal Courts—Municipal courts are not courts of record and therefore the provisions for witness fees of NRS 48.290 as amended by 1969 Statutes Chapter 247 do not apply.

OPINION NO. 1970-636 Witnesses—Municipal Courts—Municipal courts are not courts of record and therefore the provisions for witness fees of NRS 48.290 as amended by 1969 Statutes Chapter 247 do not apply.

Carson City, January 12, 1970

Mr. Willis A. Diess, President, Las Vegas Police Protective Association, 5500 West Seabaugh Avenue, Las Vegas, Nevada 89107

Dear Mr. Diess:

You have asked this office for an opinion concerning Chapter 247 of the 1969 Statutes of Nevada. You want to know if the provisions thereof apply to municipal courts.

ANALYSIS

Chapter 247 amended several sections of NRS. Among them are NRS 18.010, NRS 18.020, NRS 18.040, NRS 37.190 and NRS 48.290. We assume you are referring to NRS 48.290 because the other noted statutes do not concern municipal court proceedings.

The amendment to NRS 48.290 increased compensation for witnesses. Section 1 now provides:

For attending in any criminal case, or civil suit or proceeding before a court of record, master, commissioner, justice of the peace, or before the grand jury in obedience to a subpoena, \$10 for each day's attendance, which shall include Sundays and holidays.

The question you pose is essentially whether or not a municipal court, and specifically the City of Las Vegas Municipal Court, is a court of record.

There are various constitutional provisions dealing with this subject. We quote them as follows:

Article 6, Section 1:

The Judicial power of this State shall be vested in a Supreme Court, District Courts, and in Justices of the Peace. The Legislature may also establish Courts for municipal purposes only in incorporated cities and towns.

Article 6, Section 8:

* * * The Supreme Court, the District Courts, and such other Courts, as the Legislature shall designate, shall be Courts of Record.

Article 6, Section 9:

Provision shall be made by law prescribing the powers, duties and responsibilities of any Municipal Court that may be established in pursuance of Section One, of this Article; and also fixing by law the jurisdiction of said Court so as not to conflict with that of the several courts of Record.

A reading of these provisions leads us to the following conclusions:

That the Legislature can designate courts of record in addition to the Supreme Court and district courts. Sections 1 and 9 of this article indicate that the Legislature is restricted in the creation of municipal courts and the fixing of their jurisdiction. They may be created for municipal purposes only and their jurisdiction cannot conflict with courts of record.

There are many cases and opinions of this office which seem to conclude that municipal courts cannot be courts of record. See *In the Matter of the Application of Dixon*, 40 Nev. 228, 161 P. 737 (1916); *Meagher v. County of Storey*, 5 Nev. 244 (1869); Attorney General's Opinion No. 561, January 20, 1948; Attorney General's Opinion No. 64, June 16, 1959.

Thus it would seem that there is a constitutional prohibition against designating a municipal court as a court of record. However, it is not necessary to base our conclusion upon this constitutional argument. This is because we have found no municipal charter which designates municipal courts as courts of record. (For the Las Vegas charter see Statutes of Nevada 1911, Ch. 132, p. 157, amended by Statute of Nevada 1963, p. 824.)

The net result of the foregoing is that NRS 48.290 specifically provides for fees in proceedings before courts of record, masters, commissioners, justices of the peace or grand juries. In specifically enumerating these bodies the statute excludes all others. Municipal courts would have to be considered courts of record if they are to be included within the purview of this statute. Because they are not, we must conclude that the amendments concerning NRS 48.290 of Chapter 247, 1969 Statutes of Nevada do not apply to municipal courts.

CONCLUSION

We, therefore, conclude that the amendments contained in Chapter 247 of the 1969 Statutes of Nevada do not apply to municipal courts.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Peter I. Breen, Deputy Attorney General

OPINION NO. 1970-637 State Contractors Board—A subdivider-owner of real property who hires a duly licensed state contractor to construct homes in any subdivision owned by him, and who contracts with the general public for the sale of such homes, is required to be licensed as a state contractor.

OPINION NO. 1970-637 State Contractors Board—A subdivider-owner of real property who hires a duly licensed state contractor to construct homes in any subdivision owned by him, and who contracts with the general public for the sale of such homes, is required to be licensed as a state contractor.

Carson City, January 13, 1970

Mr. Robert L. Stoker, Secretary, State Contractors Board, Post Office Box 7497, Reno, Nevada 89502

Dear Mr. Stoker:

You have requested this office for an opinion as to whether a subdivision developer who hires a licensed contractor to build the homes in such subdivision, should himself be licensed by your board.

ANALYSIS

NRS 624.020 reads as follows:

1. For the purpose of this chapter "contractor" is synonymous with "builder."
2. Within the meaning of this chapter, a contractor is any person, except a licensed architect or a registered professional engineer, acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to, or offers to undertake to, or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others,

construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction project shall be accepted by the board or any court of this state as prima facie evidence that the person securing such permit or employing any person on a construction project is acting in the capacity of a contractor under this chapter.

3. A contractor within the meaning of this chapter includes subcontractor or specialty contractor, but does not include anyone who merely furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of a contractor.

It will be noted that, within the meaning of Chapter 624 of Nevada Revised Statutes "a contractor is any person * * * who * * * undertakes to, or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does by himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building * * * project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. * * *"

This question was answered by the Attorney General of Arizona on May 9, 1962, in a letter opinion to the Registrar of Contractors of Arizona, in an affirmative decision that under the Arizona law defining contractors is substantially the same as that of Nevada. To quote that opinion:

In our opinion the subdivider-owner of land described above, (a subdivision), comes within the definition of a contractor. He is a person who, for a fixed sum, undertakes to, by, or through others to construct a building. * * *

The mere fact that a prime contractor (such as a subdivider-owner of land) subcontracts with one licensed general contractor, rather than numerous licensed contractors, to construct a building, does not obviate the need of the public to be protected in its dealings with the prime contractor (subdivider-owner).

The intent and purpose of the laws relating to licensing requirements for contractors is to protect the public against unscrupulous or unqualified persons purporting to have the capacity, knowledge or qualifications of a contractor. (Northen v. Elledge, 72 Ariz. 166, 232 P.2d 111 (1951).) The only person with whom the home buying citizen has any dealing is with the subdivider. He is the one purporting to build the home and obviously protection is as much needed in this area as any other and the statute was drawn so as to provide protection in this area as well as other areas.

We concur completely with this learned opinion.

CONCLUSION

It is the opinion of this office that a subdivider-owner of real property who hires a duly licensed state contractor to construct homes in any subdivision owned by him, and who contracts with the general public for the sale of such homes, is required to be licensed as a state contractor.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-638 Labor; Employment Agencies—An employment agency may not charge any fees in excess of the statutory maximum, nor may it add any charges no matter how denominated, which result in a payment in excess of the statutory maximum.

OPINION NO. 1970-638 Labor; Employment Agencies—An employment agency may not charge any fees in excess of the statutory maximum, nor may it add any charges no matter how denominated, which result in a payment in excess of the statutory maximum.

Carson City, January 14, 1970

Mr. Stanley P. Jones, Labor Commissioner, Carson City, Nevada 89701

Dear Mr. Jones:

You have asked for an opinion as to the validity of a \$50 nonrefundable "administrative" fee and a \$10 "retail installment contract" fee charged a prospective employee by an employment agency in addition to 25 percent of the first month's salary authorized the agency by NRS 611.220 as amended by Chapter 75 of the 1969 Statutes.

ANALYSIS

For the reason set out below, it is our opinion that neither the \$50 "administrative" fee nor the \$10 "retail installment contract" fee are permitted by the statute, and directly contravene both the spirit and the language of NRS 611.220, as amended.

Regulation of maximum fees chargeable by private employment agencies is a permissible function of government, and does not alone violate constitutional due process. *Olsen v. Nebraska* (1941), 313 U.S. 236, 85 L.Ed. 1035, 61 S.Ct. 862. The imposition of financial hardship on a private employment agency does not invalidate the legislative exercise of the police power in protecting job seekers from the abuses of employment agencies. *Gail Turner Nurses Agency, Inc. v. State* (1959), 17 Misc.2d 273, 190 N.Y.S.2d 720; 20 A.L.R.3d 599, *Employment Agencies—Regulation*, § 6(c). The State of Nevada has the right to exercise this type of police power and if the power is properly exercised, no violation of due process will be found.

The exercise of this power is found in NRS 611.220, as amended which states:

No person licensed pursuant to the terms of NRS 611.020 to 611.320, inclusive, shall charge, accept or collect from any applicant for employment as a fee for securing such employment any sum or sums of money in excess of 25 percent of the first month's salary or compensation received or paid for such employment. (Italics added.)

"Sum" is defined as "the entire quantity, number, or substance; the whole." It is synonymous with "aggregate" or "total amount." The addition of the words "or sums" immediately after "sum" in the statute implies that no limited meaning is to be put on the word "sum," and that no combination of sums may be put together to exceed the statutory amount.

A fee is a payment for services done. The statute allows one fee, whose total sum or sums can be no more than a fixed percent of the first month's salary.

An employment agency's overhead is comprised of nothing more than administrative costs. Clearly, administrative costs were considered by the Legislature in its original enactment, and increased overhead was recognized by the 1969 Legislature by increasing the percentage allowed an agency. All costs of doing business must come out of the 25 percent. It is a maximum. If the agency is unable to make a profit, it still may not increase its fees. 20 A.L.R.3d 599, § 6(c). Calling an excessive charge by another name does not change the nature of the charge. In addition, the fact that the charge is non-refundable is in direct contradiction to NRS 611.250.

CONCLUSION

The term "sum or sums" implies that cumulative fees in excess of 25 percent of the first month's salary are not permitted by the statute. The two aforementioned fees are cumulative and therefore illegal. Your office is justified in pursuing any action appropriate to terminate this violation.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Michael L. Melner, Deputy Attorney General

OPINION NO. 1970-639 Taxation; U.S. Postage Stamps—The sale of U.S. postage stamps through vending machines is not subject to sales tax.

OPINION NO. 1970-639 Taxation; U.S. Postage Stamps—The sale of U.S. postage stamps through vending machines is not subject to sales tax.

Carson City, January 13, 1970

The Honorable Harry M. Reid, Assemblyman, Clark, No. 4, 302 Carson Avenue, Suite 1000, Las Vegas, Nevada 89101

Dear Mr. Reid:

You have asked this office to determine whether the sale of United States postage stamps through privately owned vending machines is subject to the State's sales tax.

ANALYSIS

NRS 372.105 imposes a sales tax "for the privilege of selling tangible personal property at retail." It is well established that retail sales made through vending machines are subject to the tax to the same extent as retail sales made in any other manner. The controlling factor in the determination that you have requested is whether the sale of U.S. postage stamps constitutes the sale of tangible personal property.

39 U.S.C. § 2501 authorizes the Postmaster General to issue stamps "for use in payment of postage or fees for special services." In other words, postage stamps may be used only for payment of the charges of the U.S. Post Office in handling the mail and for directly related services performed by the Post Office. Postage stamps evidence the prepayment of the charges imposed by the government for carrying matter through the mails. *United States v. One Zumstein Briefmarken Katalog 1938*, 24 F.Supp. 516 (E.D. Pa. 1938).

The right to receive services, as evidenced by postage stamps, constitutes a chose in action. A chose in action is a species of intangible personal property. *State v. Earl*, 1 Nev. 394 (1865); *Ellis v. People*, 199 Ill. 548, 65 N.E. 428 (1902). Since the sales tax is imposed for the privilege of selling tangible personal property only, the sale of such intangible personal property as postage stamps is outside of the coverage of both the Sales and Use Tax Act (Chapter 397, Statutes of Nevada 1955, incorporated into the Nevada Revised Statutes as Chapter 372) and the Local School Support Tax Law (Chapter 374 of Nevada Revised Statutes).

This opinion refers only to the sale of U.S. postage stamps which are to be used as payment for services to be rendered by the Post Office. As indicated above, the stamps then serve merely as evidence of the prepayment of the government's charges for its services in carrying matter through the mails. Virtually all postage stamps purchased through vending machines are used for said purpose. The sale of postage stamps to philatelists would be treated differently, for stamp collectors purchase the stamps for their own sake, and not merely as evidence of a right to receive services from the Post Office. The stamps themselves are perceptible to the senses and within the definition of "tangible personal property" as set forth in NRS 372.085, therefore the sale of postage stamps for philatelic purposes would be subject to the sales tax. California is in accord with the foregoing, that is, the sale of postage stamps for use as postage is not within the ambit

of the sales tax, whereas their sale for philatelic purposes is subject to the tax. Sales Tax Letter Ruling of California State Board of Equalization, dated September 19, 1950.

CONCLUSION

It is therefore the opinion of this office that the sale of U.S. postage stamps through vending machines is not subject to the Nevada Sales and Use Tax nor to the Local School Support Tax Law.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Irwin Aarons, Deputy Attorney General

OPINION NO. 1970-640 State Employees; Collective Bargaining—State employees cannot engage in collective bargaining under the present status of Nevada law.
OPINION NO. 1970-640 State Employees; Collective Bargaining—State employees cannot engage in collective bargaining under the present status of Nevada law.

Carson City, January 19, 1970

Walter E. Ward, M.D., State Health Officer, Division of Health, Carson City, Nevada 89701

Dear Dr. Ward:

statement of facts

Staff nurses of the Nevada Division of Health have joined the Nevada Nurses Association and have requested the association to represent them as their exclusive negotiating representative with the Nevada Board of Health. Pursuant to this request, the Nurses Association has submitted a copy of its constitution and bylaws, a roster of its officers, and a no-strike pledge to the State Board of Health, and requested recognition under Chapter 650 of the 1969 Statutes of Nevada, the "Local Government Employee-Management Relations Act." The nurses in question are state employees, as distinguished from employees of local governmental units.

QUESTION

May state employees engage in collective bargaining with state boards and agencies under present Nevada law?

ANALYSIS

The answer is negative. The 1969 Legislature simply and clearly passed a law that allows employees of local governmental units to engage in collective bargaining, but which discriminated against approximately 5,600 state employees by not according the same right to public employees at a state level. Teachers, police, firemen and other local public employees can join unions and engage in collective bargaining, but a nurse, typist, clerk, or any other employee of the State of Nevada may not.

Prior to 1969, no public employee on a local or state level could engage in collective bargaining. See Attorney General's Opinion No. 233, dated June 1, 1965, and Attorney General's Opinion No. 494, dated March 4, 1968. Such activity was illegal until specifically authorized by the Legislature. Prior to and during the 1969 session of the Legislature, local public employee groups exerted pressure for passage of a law that would allow collective bargaining. State employees, however, had not threatened government with strikes and demands, as had local employees. The Legislature reacted only to the pressure of the local groups and

passed what it termed the "Local Government Employee-Management Relations Act." This act only allows employees of local governmental units such as counties, cities, and school districts to engage in collective bargaining with a "local government employer." The only place this law recognizes a state employee is to provide that a state employee may be fined, imprisoned, and dismissed from public service if he organizes or engages in a strike.

The law raises the questions of improper class legislation and invidious discrimination, which cast doubt on the constitutional validity of the act. A state employee is a public employee and should be accorded the same privileges. The last Legislature failed to recognize this principle. For example, a college graduate in such areas as economics, social work and accounting commences state employment at \$7,100 per year for 12 months work and does not have the right to bargain collectively with the State concerning his wages, hours, or working conditions. A beginning teacher on a local level commences public service at \$7,200 for 9 months work, and does not have the right to bargain collectively.

Regardless of the validity of the act and the problems it has created, state employees cannot bargain collectively with their state employer under the present status of the law. There is nothing, however, that would preclude this association, or any association or individual, from taking the matter up with members of the Legislature.

CONCLUSION

State employees cannot engage in collective bargaining under the present status of Nevada law.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Daniel R. Walsh, Chief Deputy Attorney General

OPINION NO. 1970-641 Department of Education—"Teachers" as defined by NRS 391.311 includes those employed before as well as after the effective date of the amendment to NRS 391.311.

OPINION NO. 1970-641 Department of Education—"Teachers" as defined by NRS 391.311 includes those employed before as well as after the effective date of the amendment to NRS 391.311.

Carson City, February 19, 1970

Mr. Burnell Larson, Superintendent of Public Instruction, Department of Education, Carson City Nevada
89701

Attention: Mr. John R. Gamble, Deputy Superintendent

Dear Mr. Larson:

You have asked this office for an opinion concerning the amendment to NRS 391.311(4) by the 1969 Legislature (Ch. 196, page 272, 1969 Statutes).

That portion of the statute now reads:

4. "Teacher means any certified employee of a board of trustees of a school district who has been employed by such board of trustees for 2 consecutive contract periods.

QUESTION

Does the modified definition of "teacher" apply only to teachers hired after the effective date of the act?

ANALYSIS

The answer is no. The definition applies to any teacher who "has been employed for 2 consecutive contract periods" regardless of whether the teacher's employment commences before or after the effective date of the act. The use of the words "has been" leads us to this conclusion. Cf. *Com. v. Snyder*, 233 A.2d 530, 541.

In addition we note that NRS 391.311 to 391.3196, inclusive, provides for the dismissal and refusal to reemploy teachers, and for hearings, investigations, and attendant rules of procedure.

Thus these sections provide for forfeitures and penalties and in the absence of clear language to the contrary we believe that as many teachers as the statute can allow are entitled to the protective provisions of these statutes.

We are mindful that the Legislature intended to restrict the definition of teachers by this amendment. We do not believe that they intended a further limitation as the question posed would suggest.

CONCLUSION

We thus conclude that teachers as defined by the 1969 amendment applies to teachers employed before as well as after the effective date of the amendment.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Peter I. Breen, Deputy Attorney General

OPINION NO. 1970-642 Title Risk Insurance Premium Tax—NRS 695.160 construed; held as requiring payment of such tax solely and exclusively as therein prescribed. Insurance Commissioner neither had, nor does he presently have, legal authority and power to approve and accept other and lesser payment of any such accrued taxes, if consistent with and contrary to applicable statutory provisions therefor. Administrative and legal action to recover accrued and unpaid risk premium taxes not barred by applicable statute of limitations (NRS 11.190) recommended.

OPINION NO. 1970-642 Title Risk Insurance Premium Tax—NRS 695.160 construed; held as requiring payment of such tax solely and exclusively as therein prescribed. Insurance Commissioner neither had, nor does he presently have, legal authority and power to approve and accept other and lesser payment of any such accrued taxes, if consistent with and contrary to applicable statutory provisions therefor. Administrative and legal action to recover accrued and unpaid risk premium taxes not barred by applicable statute of limitations (NRS 11.190) recommended.

Carson City, January 27, 1970

Mr. Louis T. Mastos, Insurance Commissioner, Department of Commerce, State of Nevada, Carson City, Nevada 89701

Dear Mr. Mastos:

You have requested our formal legal opinion and advice relative to the question raised by First Title Insurance Company as to the construction and proper application of NRS 695.160, as the same pertains to

levy and payment of the premium tax on total title risk insurance premium of all classes of business covering property or risks located in this State during the next preceding calendar year.

In explanation of the premium tax actually paid (which involved an accrued shortage of \$27,616.37 as of December 31, 1966, presently increased to \$38,717.46 as of the close of 1969, according to examiner's report thereof contained in letter dated January 8, 1970), said company claims and alleges that your predecessor in office verbally approved and agreed that the prescribed 2 percent premium tax was to be on the basis of the involved premium risk, not the amount of the actual premium itself, and that said "premium risk" might be computed at 20 percent of 2 percent of the total taxable insurance annual premium income. In other words, the remaining 80 percent of the 2 percent premium tax levy statutorily prescribed presumably was to be deemed allocable and allocated to untaxable "service fees," e.g., conveyances, escrow charges, etc.

QUESTIONS

1. Are all proper service charges and fees, as authorized in subparagraph 4 of NRS 695.160, already properly excludable and excluded in the filed schedule of prices for title risk insurance prescribed in subparagraph 1(a) of said statute?

2. Is "the total title risk insurance premium income" subject to the 2 percent tax levy prescribed in NRS 695.160 properly based upon the aggregate amount of risk premium paid as stipulated on the faces of policies issued or in force and effect for the State of Nevada for the preceding calendar year?

3. In the involved years for which accrued premium taxes are sought to be recovered, has the Insurance Commissioner of the State of Nevada ever had, or does he presently have, the legal authority and power officially to agree to and approve payment of risk insurance premium taxes in any amount otherwise than as prescribed and determinable under the provisions of NRS 695.160, as amended?

4. Based upon the filed examination report, dated December 11, 1969, concerning First Title Insurance Company, and other pertinent records submitted to us for review in connection herewith, may the unpaid and accrued title risk premium taxes for the years or period not barred by the applicable statute of limitations (NRS 11.190, subparagraph 3(c)) be recoverable through commencement of legal suit therefor?

ANALYSIS

NRS 695.160, as amended, relating to "annual tax on total risk insurance premiums," provides as follows:

Every title insurance company subject to the provisions of NRS 695.010 to 695.210, inclusive, shall:

1. For the calendar year 1965:
 - (a) File with the commissioner of insurance its schedule of prices for title insurance; and
 - (b) Pay to the commissioner of insurance a tax of 2 percent upon the total title risk insurance premium income of all classes of business covering property or risks located in this state during the next preceding calendar year. The fee paid pursuant to NRS 695.140 [Ed.: renewal of certificate of authority] shall be deducted from this tax if the tax exceeds the amount of the fee.
2. Annually, beginning January 1, 1966, pay to the commissioner of insurance a tax of 2 percent upon the total risk insurance premium income covering property or risks located in this state during the next preceding calendar year. The provisions of subsection 3 of NRS 686.101 [Ed.: Retaliatory provision and authority to equalize taxes as imposed by other states on Nevada insurers] apply to this tax.
3. The tax shall be paid:
 - (a) On or before March 1 of each year; and
 - (b) As a condition precedent to the issue of the company's renewal certificate of authority.
4. Title insurance risk rates shall not include charges, for services performed by a title insurance company preliminary to the issuance of any title insurance policy, such as are, in the ordinary course of its

business, performed for and charged to any of its clients who do not obtain from such company title insurance on the property involved in such service

The provisions of subparagraph 4, above, were the result of an amendment contained in Chapter 233, 1955 Statutes of Nevada.

Your predecessor had occasion to request an opinion of the Attorney General's office as to the meaning of the statutory language (Chapter 282, 1951 Statutes of Nevada, relative to section 13 of the then act) which the above 1955 amendment replaced. Attorney General's Opinion No. 109, dated October 22, 1951, was in reply to your predecessor's request for a legal opinion and advice on the following specific question: Whether or not a title insurance company may compute its tax upon the gross title insurance premium less the cost of maintaining an abstracting and record searching department? The said legal opinion from this office at that time properly pointed out that in order to determine upon what the 2 percent tax was to be levied, it was necessary to read together the first and last sentences of the then section 13 of the act, which read as follows.

Every title insurance company under the provisions of this act, doing business in this state, shall annually file with the insurance commissioner of the State of Nevada its schedules of prices for title risk insurance, and shall annually pay to the insurance commissioner of the State of Nevada, a tax of two percent (2 percent) upon the total title risk insurance premium income of all classes of business covering property or risks located in this state during the next preceding calendar year. * * * Such title insurance risk rates shall not include service charges for abstracting, record searching, certificates as to the record title to real estate that are not in form or substance an insurance of the title, escrow, closing and other services that may be offered by such company or to such company's costs and expenses of procuring examination of titles by attorneys approved or selected by it for such purpose.

The said Attorney General's opinion thereupon concludes as follows:

When read as above, it is manifest that the schedules of prices or rates for title risk insurance to be annually filed are not to include service charges for abstracting, record searching, etc. Hence the computation of the tax must therefore be upon the title insurance risk premium less only that deduction provided by section 13 as to the annual licenses paid by such title companies. [Ed.: The annual license fee was the only deduction specifically set forth in the then section 13. Exclusion of service charges for abstracting and record searching was then apparently authorized under the provisions of Chapter 57, section 4, 1925 Statutes of Nevada, now contained in NRS 695.100.]

It is the presumption when one person or thing is expressly mentioned in a statute, that all other persons and things are to be excluded. 5 Nev. 358.

Expressio unius est exclusio alterius. 44 Nev. 30.

Viewed in the light most favorable to the taxpayer, it may be assumed (but not admitted) that the present wording of subsection 4, NRS 695.160, quoted above, is a generalized statement of the service charges which the preceding section 13 of the then act had provided should be excluded from the filed title insurance risk rate. On such assumption, our conclusion would be similar to that set forth in Attorney General's Opinion No. 109, dated October 22, 1951, quoted above in relevant part. In other words, any and all such service charges, presumptively, might be omitted with impunity in connection with the preparation of the schedules of prices or rates, prior to filing thereof with the office of the Nevada Insurance Commissioner, but once filed and as filed, such title risk premium rate was conclusive and, in aggregate amount, determinative of the premium tax base upon which the 2 percent Nevada levy should apply, as statutorily required.

Any alleged but undocumented "oral understanding" had with your predecessor that such premium tax levy might be computed at 20 percent of the 2 percent of the total taxable insurance annual premium income, of course, would have been patently contrary to, and violative of, the clear and mandatory requirements of NRS 695.160, and in any event, in excess of or beyond the authority and power either then or now vested in the Insurance Commissioner of the State of Nevada. Absent any documentary support

whatsoever for any such "oral understanding" in the official records of your office, it is, of course, impossible to confirm the same. Conversely, it may not properly be presumed, and as already stated, such alleged oral understanding could in no event supersede or reduce the tax levy of 2 percent as prescribed by statute.

We are aware of the fact that there has existed some question concerning the construction and application of NRS 695.160, subsection 4, on the part of some representatives of the title insurance industry in Nevada, and that meetings were held relative to sections 547-551 of the revised "Proposed Insurance Code of the State of Nevada," intended to provide some desired clarification of statutes relative to title insurance. The 1969 Nevada Legislature unfortunately did not see fit to enact such proposed and revised insurance code.

We have also reviewed the contents of the examination report dated December 11, 1969, relative to First Title Insurance Company, and we note therefrom that said company has taken the position that it does not and has never operated as a title insurance company, but merely as an agent producing business for the insuring company, namely, First American Title Insurance Company, a California corporation authorized to write title insurance in the State of Nevada. (Examination Report, pp 6-7, attached exhibit "A" agreement.) It appears from said examination report that policies issued by First Title Insurance Company prior to January 1, 1969, bore the name of said First American Title Insurance Company as insurer; and that, beginning with January 1, 1969, the policies issued by First Title Insurance Company did not contain such or any other reference to said First American Title Insurance Company.

The underwriting agreement dated November 28, 1967, between the two companies (exhibit "A" attached to the examination report), paragraph 2(h), provides that First Title Company shall remit to First American Title Company, on or before the 15th day of each calendar month, an amount equal to 10 percent of the total amount of the fees billed for title insurance policies issued during the preceding calendar month; "and shall also annually reimburse insurer for amounts paid by insurer under section 695.160 of the Nevada Insurance Code." (Title risk insurance premium annual income subject to the 2 percent premium tax levy.)

American Land Title Association's "A Model Title Insurance Code, page 1, section 101(e)," defines risk premium for title insurance as follows:

"Risk Premium" for title insurance means that portion of the fee charged by a title insurance company, agent of a title insurance company or approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for the assumption by the title insurance company of the risk created by the issuance of the title insurance policy.

Section 101(f) of the same model code defines "fee" for title insurance as including not only "risk premium," but also abstracting, searching, examination, and every other charge, exclusive of settlement, closing or escrow charges, whether denominated premium or otherwise, made by a title insurance company, agent, or an approved attorney, to an insured or to an applicant for insurance, for any policy of title insurance.

Appleman, "Insurance Law and Practice, Vol. 19, Sec. 10587, Supplement, states as follows:

Title insurance companies are liable for taxes on amounts of gross premiums received by them at rates including charges by such companies or their agents for preparing abstracts of title, examining titles, issuing title certificates and closing deals, as fixed by Board of Insurance Commissioners under statutory authority. Citing Vernon's Ann. Civ.St., Art. 1302, § 3, 24a; Art. 7064; Lawyers Title Ins. Corp. v. Board of Ins. Comm'rs, TexCiv.App., 207 S.W.2d 972.

Sec. 10592 (p. 309), same citation, defines the term "gross premiums" as meaning the amount stipulated on the face of the policy, citing State v. Tomlinson, 1919, 124 N.E. 220, 99 Ohio St. 233.

As applied to title insurance, this can only mean the "risk premium" stipulated on the face of the title insurance policy and paid by the insured for assumption of the risk covered in the issued insurance policy.

Such "risk premium," so stipulated on the face of the title insurance policy, must be deemed conclusive in any determination of annual risk premium income subject to the State's 2 percent premium tax levy.

CONCLUSION

1. All service charges and fees, as authorized by NRS 695.160, subparagraph 4, should and properly may only be excluded and deducted in connection with the preparation of the schedule of prices or rates for title risk insurance, prior to the filing of such rate or price schedules.

2. The 2 percent tax levy prescribed in NRS 695.160 is properly applicable to the aggregate amount of annual risk premium income as computed on the basis of "risk premium" charged and paid, as stipulated on the faces of policies of title insurance issued or in force and effect within Nevada for the preceding calendar year.

3. At no time relevant hereto, has the Nevada Insurance Commissioner ever had, nor does he presently have, the legal authority and power to approve and accept payment of risk insurance premium taxes otherwise than as determinable under the provisions of NRS 695.160 (as amended) as applicable hereto, nor otherwise than as therein prescribed.

4. Except as barred by applicable statute of limitations to recovery of accrued but unpaid taxes (cf. NRS 11.190), the Nevada Insurance Commissioner is herewith advised to institute immediate administrative or legal action for recovery of all unpaid risk premium taxes, for the years or period here in question, as prescribed in NRS 695.160, as amended. Said administrative or legal action apparently lies against both First American Title Insurance Company, a California corporation admitted to write insurance in Nevada, and First Title Insurance Company, a Nevada corporation, which issued the involved title insurance policies in Nevada. The latter company, per the cited agreement with First American Title Insurance Company, is ultimately obligated or liable for payment of such unpaid and accrued risk premium taxes.

Respectfully submitted,

Harvey Dickerson, Attorney General
By John A. Porter, Deputy Attorney General

OPINION NO. 1970-643 Schools—School authorities do not have the authority to open and search a student's private locker without his consent. Such search can only be made by a law enforcement officer in possession of a proper warrant.

OPINION NO. 1970-643 Schools—School authorities do not have the authority to open and search a student's private locker without his consent. Such search can only be made by a law enforcement officer in possession of a proper warrant.

Carson City, February 20, 1970

Robert L. Petroni, Legal Counsel, Clark County School District, 2832 East Flamingo Road, Las Vegas, Nevada 89109

Dear Mr. Petroni:

You have requested this office to advise you whether school authorities may search students' lockers, without their consent, for contraband, narcotics, and offensive and obscene materials when in their opinion there is reason to believe that certain lockers contain such material.

ANALYSIS

In an opinion issued on March 3, 1969, we held that University authorities had the right to enter college students' dormitory rooms where the dormitory is operated by the University. Such right was a part of the contract for residence and in pari-materia to a similar provision upheld in Moore v. Student Affairs Committee, 284 F.Supp. 725.

The situation where a student's private locker is concerned is completely different. Here the entry is not for the purpose of inspection, repairs, nor in the truest sense for official business. It is an invasion of privacy not supported by law, nor by agreement with the students. If school authorities have reason to believe that a certain student's locker contains narcotics or contraband, the proper course is to direct the attention of law enforcement officials to the situation. Such officials may then, upon proper complaint, secure a warrant to open and search the designated locker or lockers.

CONCLUSION

It is the opinion of this office that school authorities do not have the authority to open and search a student's private locker without his consent. Such search can only be made by a law enforcement officer in possession of a proper warrant.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-644 Nevada Athletic Commission; Tax on Gross Receipts of Boxing Contest—Donation of money by third party to national athletic entity outside Nevada in inducement to hold bouts in specific city in Nevada not part of gross receipts defines in NRS 467.107, and thus not subject to tax.

OPINION NO. 1970-644 Nevada Athletic Commission; Tax on Gross Receipts of Boxing Contest—Donation of money by third party to national athletic entity outside Nevada in inducement to hold bouts in specific city in Nevada not part of gross receipts defines in NRS 467.107, and thus not subject to tax.

Carson City, March 4, 1970

The Honorable Vernon E. Bunker, 511 East Sahara Avenue, Apt. C203, Las Vegas, Nevada 89105

Dear Senator Bunker:

You have requested this office to give an interpretation of NRS 467.107, which reads as follows:

1. In addition to the payment of any other fees and moneys due under this chapter, every promoter shall pay an additional license fee of 3 percent of the total gross receipts of any boxing contest, wrestling exhibition, or combination of such events, exclusive of any federal tax or tax imposed by any political subdivision of this state.

2. For the purposes of this section, total gross receipts of every promoter shall include:

(a) The gross price charged for the sale, lease or other exploitation of broadcasting, television or motion picture rights of such contest or exhibition without any deductions for commissions, brokerage fees, distribution fees, advertising or other expenses or charges.

(b) The face value of all tickets sold and complimentary tickets issued.

facts

In the fall of 1969, the Amateur Athletic Union of Southern Nevada, in an effort to develop amateur sports and to develop good will between the United States and the Soviet Union, and in cooperation with the national office of the Amateur Athletic Union, arranged amateur boxing bouts between teams of the two

nations, to be held at Las Vegas, Nevada. In furtherance of the object, Caesar's Palace, a Las Vegas hostelry, donated to the A.A.U. and the U.S. Olympic Development Fund the sum of \$25,000.

Caesar's Palace made no charge for its facilities and at the bouts no admission was charged, but television rights, taxed at 3 percent, resulted in a revenue of \$1,200 to the State.

The question arises as to whether the \$25,000 donated by Caesar's Palace to the A.A.U. and the U.S. Olympic Development Fund is subject to the 3 percent tax under NRS 465.107, subsection 2(a).

ANALYSIS

In analyzing NRS 467.107, this office is unable to conceive of the \$25,000 donation by Caesar's Palace being subject to the 3 percent tax. The donation was not a part of the gross receipts identified in NRS 467.107, for no part of this money came into the hands of the local entity of the A.A.U. of Southern Nevada.

The provisions of NRS 467.107, subsection 2(a), were complied with when the promoters paid the 3 percent tax on the \$40,000 received for television rights. Caesar's Palace, except for the publicity attendant upon having the bouts on their premises, received no remuneration in the way of rent or otherwise.

It was not the intent of the Legislature in enacting the provision for taxing promoters on their gross receipts or for the exploitation of broadcasting and television or motion picture rights, to extend the provisions beyond the literal translation of the statute.

CONCLUSION

It is therefore the opinion of this office that the \$25,000 donation by Caesar's Palace to the national organization of the Amateur Athletic Union, was not taxable under NRS 467.107.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-645 Cemeteries—Provisions in Chapter 452 of NRS pertaining to Endowment Care and Maintenance Funds construed. Held: Applicable statutes do not authorize deferment of deposits or payments required in connection with such funds. State Board of Finance may not properly negotiate and legally approve funding of any deficiency therein over any period of time, nor accept a performance bond to guarantee eventual full payment of any deficiency in such funds.

OPINION NO. 1970-645 Cemeteries—Provisions in Chapter 452 of NRS pertaining to Endowment Care and Maintenance Funds construed. Held: Applicable statutes do not authorize deferment of deposits or payments required in connection with such funds. State Board of Finance may not properly negotiate and legally approve funding of any deficiency therein over any period of time, nor accept a performance bond to guarantee eventual full payment of any deficiency in such funds.

Carson City, March 5, 1970

State Board of Finance, Room 16, State Capitol, Carson City, Nevada 89701

Attention: Mr. Robert Cameron, Secretary

Gentlemen:

You have requested our legal opinion and advice on a question, hereinafter stated, based upon the following submitted facts:

facts

1. The Endowment Care Fund, as established under Chapter 452 of the Nevada Revised Statutes, of the Memory Gardens of Las Vegas, is deficient by the amount of \$56,479.75.

2. Memory Gardens of Las Vegas agrees that the Endowment Care Fund is deficient by the above amount.

3. Memory Gardens of Las Vegas proposes to fund the deficiency over a period of time, not to exceed 24 months.

4. Memory Gardens of Las Vegas has agreed to post a sufficient performance bond with the Board of Finance to guarantee full payment of the deficiency.

QUESTION

If the Board of Finance agreed to allow Memory Gardens of Las Vegas to fund the deficiency as proposed in Fact No. 3, could the Board of Finance legally accept the performance bond described in Fact No. 4?

ANALYSIS

As applicable and pertinent hereto, statutory provisions are:

NRS 452.120:

An "endowment care cemetery" is one which shall hereafter have deposited in its endowment care fund, at the time of or not later than completion of the initial sale, not less than the following amounts for plots sold or disposed of * * *. (Italics added.)

NRS 452.130:

In addition to the requirements of NRS 452.120, any endowment care cemetery hereafter established shall also have deposited in its endowment care fund the additional sum of \$25,000 before disposing of any plot or making any sale thereof. (Italics added.)

NRS 452.230:

* * * .

3. No mausoleum, vault, crypt or structure so erected shall be used for the purpose of interring or depositing therein any dead body until * * * the maintenance fund require by NRS 452.250 has been deposited as provided in NRS 452.250. (Italics added.)

NRS 452.250:

1. There shall be deposited with the board of trustees or board of directors of any cemetery corporation or association where the mausoleum, vault or crypt is to be erected a maintenance fund in such sum as shall be determined and fixed by the state board of finance. (Italics added.)

* * * .

[Note: Chapter 105, 1961 Statutes of Nevada, amended the foregoing provision by substituting the "state board of finance" for the "state board of health." Apparently, the State Board of Finance continued in effect the regulation of mausoleums promulgated by the State Board of Health, as follows:

Maintenance Fund. The sum of money that must be deposited with the board of trustees or the board of directors of the cemetery association authorized to receive the same in the building of a mausoleum must not be less than 15 percent of the cost of such structure. (Italics added.)

In any event, Facts Nos. 1 and 2 indicate agreement as to the amount of the deficiency on the part of all concerned parties, precluding any possible question or dispute on such score.]

Quite clearly, the statutory provisions regulating the care and maintenance of cemetery graves, niches, and crypts (NRS 452.050 to 452.200) are capable of application, and should properly be applied, separately from the statutory provisions (NRS 452.210 to 452.270) pertaining to the construction and administration of mausoleums. The cost of keeping up a cemetery is more or less directly proportional to its area and the number of deceased persons interred therein. The fund established under the provisions of NRS 452.120, considered with reference to the building up of a fund, the earnings from which would in theory be sufficient to provide perpetual care and maintenance, is a growing fund. The fund established under the provisions of NRS 452.250 as respects mausoleums and their perpetual care and maintenance, is a one-time affair, properly based on a percentage of the construction cost, and without regard to the number of deceased persons interred therein, be they many or few. (Attorney General's Opinion No. 408, dated September 24, 1958.)

The purposes of both said funds are to make “* * * provision for the discharge of a duty due from the persons contributing to the persons interred and to be interred in the cemetery (Ed., and mausoleum) and a provision for the benefit and protection of the public by preserving and keeping cemeteries from becoming unkempt and places of reproach and desolation in the communities in which they are situated.” (NRS 452.110, subsection 2.)

Consistently with said purposes, Attorney General's Opinion No. 531, dated August 29, 1968, properly noted as follows:

We do not believe that the phrase “at the time of, or not later than, the initial sale” in NRS 452.120 was meant to prolong the deposit of required sums in the endowment care fund. In short, whether the sale of graves, niches, or crypts is for cash or for extended credit, the protection of purchasers is only established by the deposit of the required funds in the endowment care fund at the time the cash is paid or the time the contract for extended payments is signed. (Italics added.)

Turning to Fact No. 3 above, submitted for our consideration herein, it would be unquestionably true that funding of the deficiency over a period of time, “not to exceed twenty-four (24) months,” would be contrary to the foregoing determination and conclusion contained in Attorney General's Opinion No. 531, dated August 29, 1968. A fair or reasonable reading of the statutory provisions, excerpted above and applicable, does not justify or support a different statutory construction.

Our foregoing conclusion is additionally based on certain other legal principles pertinent to the problem and question here involved, namely:

1. The applicable statutory provisions are clear and definite, or without evident ambiguity; statutory construction or interpretation to attain a result at variance with and contrary to plainly expressed legislative aim or intent is therefore neither required nor proper.

2. Boards and commissions “* * * have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect.” State ex rel. King v. Lothrop, 55 Nev. 405, 36 P.2d 355; Sadler v. Board of Commissioners of Eureka County, 15 Nev. 39; State ex rel. Wood v. Haeger, 55 Nev. 331, 33 P.2d 733.

Careful review of the applicable statutory provisions, set forth above in excerpted form and content, does not provide any reasonably proper basis for exercise of the authority and powers by the State Board of Finance which are entailed in permitting and approving deferment of deposits or payments required in connection with Endowment Care and Maintenance Funds (NRS 452.120, 452.250). While this

determination and conclusion may be unfortunate and regrettable in this particular case, since we understand that the existing deficiency was "inherited" in large measure from previous owners, rather than caused or created by the present parties in interest, we feel it proper to limit ourselves to interpreting and applying the statutory provisions of law as we find them.

For the same reason, it is our considered opinion and advice that the State Board of Finance may not legally accept a performance bond to guarantee eventual or future full payment of the amount of the deficiency, mutually agreed as presently existing in the involved Endowment Care and Maintenance Funds. Such guarantee for future full payment of an existing deficiency is not the same as present proper compliance with requirements for such funds, for protection of purchasers and the deceased and the public interest as respects proper maintenance and care of cemeteries. Only if and when payments or contributions to said funds have actually and substantially been made, as prescribed by statute, can it properly be said that applicable requirements therein provided have, in fact, been fully and regularly met and satisfied.

CONCLUSION

The State Board of Finance may not legally permit Memory Gardens of Las Vegas to fund the agreed-upon and existing deficiency in its Endowment Care Fund over a period of time not to exceed 24 months, nor accept a performance bond to guarantee eventual or future payment in full of the amount of any such deficiency in its said Endowment Care Fund.

Respectfully submitted,

Harvey Dickerson, Attorney General
By John A. Porter, Deputy Attorney General

OPINION NO. 1970-646 Refunding Bonds—Effect on amount of total bonded indebtedness of county school district.

OPINION NO. 1970-646 Refunding Bonds—Effect on amount of total bonded indebtedness of county school district.

Carson City, March 5, 1970

The Honorable Merlyn H. Hoyt, District Attorney, White Pine County Courthouse, Ely, Nevada 89301

Dear Mr. Hoyt:

At the request of the Board of County Commissioners of White Pine County, you have asked for an opinion regarding the effect of refunding bonds upon the total bonded indebtedness of the White Pine County School District.

statement of facts

Acting pursuant to the applicable statutory provisions, the White Pine County School District has, over a period of years, issued refunding bonds to replace existing bond issues, thereby taking advantage of better interest rates. The refunding bonds have gradually been paying off the issues which they replaced.

The White Pine County School District is planning a number of new schools which will require a bonding program. The Board of County Commissioners of White Pine County desires to know the effect of the refunding bonds on the total bonded indebtedness of the White Pine County School District, so that there will be no violation of the provisions of NRS 387.400 when bonds are issued for the new school building program.

The alternatives as set out in your request for opinion appear to be determining the total amount of bonded indebtedness of the White Pine County School District by either (1) counting only the amount of the original bonds issued prior to the issuance of any refunding bonds; (2) counting the amount of the refunding bonds as replacements for the amount of the original issues refunded; or (3) adding the amount of refunding bonds to the amount of original bonds. For the reasons stated below, we are of the opinion that refunding bonds replace the original bonds issued and refunded, for the purposes of determining the total amount of bonded indebtedness.

ANALYSIS

The 1969 session of the Nevada Legislature repealed NRS 387.725 and 387.730, which specifically governed refunding bonds of county school districts. It also repealed NRS 350.241 et seq. The provisions governing refunding bonds of county school districts now appear in the Local Government Securities Law (NRS 350.500 et seq.) as amended by Chapter 681 of the 1969 Statutes.

NRS 387.400 provides the bond debt limitation, as follows:

1. The total bonded indebtedness of a county school district shall at no time exceed an amount equal to 15 percent of the total of the last assessed valuation of taxable property (excluding motor vehicles) 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.
2. In computing the limitation of the total bonded indebtedness of a county school district the outstanding bonded indebtedness of the school districts and educational districts abolished by NRS 386.020 expressly assumed by the county school district by a vote of the electors as provided in NRS 387.520 shall be deemed to constitute bonded indebtedness of the county school district.

Subsection 3 and 4 of NRS 350.694 establish certain limitations on the amounts of refunding bonds:

3. The principal amount of the refunding bonds may exceed the principal amount of the refunded bonds if the aggregate principal and interest costs of the refunding bonds do not exceed such unaccrued costs of the bonds refunded, except to the extent any interest on the bonds refunded in arrears or about to become due is capitalized with the proceeds of the refunding bonds. Principal may also then be increased to that extent. In no event, however, in the case of any bonds constituting a debt shall the principal of the bonds be increased to any amount in excess of any municipal debt limitation.
4. The principal amount of the refunding bonds may also be less than or the same as the principal amount of the bonds being refunded so long as provision is duly and sufficiently made for their payment.

Section 51 of Chapter 681 of the 1969 Statutes amends NRS 350.674 and provides, in subsection 4:

4. If a debt limitation pertains to any general obligation bonds or other securities of a municipality constituting an indebtedness and relating to any project, no general obligation securities pertaining to the project and creating an indebtedness, by funding or refunding special obligation securities or otherwise (in contradistinction to funding or refunding bonds merely reevidencing an indebtedness formerly evidenced by the securities funded or refunded), shall be issued in a principal amount exceeding such debt limitation.

Refunding bonds are nothing more than a change in the form of a bonded indebtedness. *Citrus Growers Development Assn. v. Salt River Valley Water Users Assn.*, 268 P. 773 (Arizona). A refunding bond replaces or pays off an outstanding bond which is surrendered in exchange for the new security. *Fore v. Alabama State Bridge Corp.*, 6 So.2d 508 (Alabama). Refunding bonds are authorized extensions and continuations of obligations represented by the bonds refunded. 43 Am.Jur., *Public Securities and Obligations*, § 156. Refunding itself therefore is merely the replacement of one obligation with another. *State v. Citrus County*, 157 So. 4 (Florida).

If only a change in form of an indebtedness has occurred when bonds are refunded, no additional debt is created for the purposes of NRS 387.400. Adding the amount of the refunding bonds to the amount of bonds refunded can not in any way represent the amount of bonded indebtedness.

The total bonded indebtedness of a county school district limited by NRS 387.400 is nothing more or less than the total amount of the district's obligation to pay a specific dollar amount under existing bonds to bondholders. Jones, Bonds and Bond Securities, Fourth Edition, § 75 et seq. NRS 350.694, subsection 3, establishes that the Legislature intended refunding bonds to completely replace bonds refunded, since it assumes changes in amount as well as in form.

Since the bonds refunded no longer exist, they are not part of the total bonded indebtedness, either alone or in addition to the refunding bonds. They have been completely replaced by refunding bonds.

CONCLUSION

It is therefore our opinion that the refunding bonds and not the bonds refunded constitute the bonded indebtedness limited by NRS 387.400.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Michael L. Melner, Deputy Attorney General

OPINION NO. 1970-647 National Guard, Air National Guard—Veterans' Exemption—Members of the National Guard and the Air National Guard, assigned to training for a period of 90 or more days during a period of armed conflict on the part of the United States, are not entitled to veterans' exemption under NRS 361.090 in the absence of legislation specifically calling the Guard to active duty as reserve components of the United State Armed Forces.

OPINION NO. 1970-647 National Guard, Air National Guard—Veterans' Exemption—Members of the National Guard and the Air National Guard, assigned to training for a period of 90 or more days during a period of armed conflict on the part of the United States, are not entitled to veterans' exemption under NRS 361.090 in the absence of legislation specifically calling the Guard to active duty as reserve components of the United State Armed Forces.

Carson City, March 10, 1970

The Honorable James A. Bilbray, Assessor, Clark County, Clark County Courthouse, Las Vegas, Nevada 89101

Dear Mr. Bilbray:

You have requested this office to advise under what circumstances a member of the National Guard is entitled to the veterans' exemption under NRS 361.090

ANALYSIS

You advise that Nation Guard Headquarters in Clark County contends that service in the Nation Guard for a period of 90 or more days continuously constitutes "active duty" entitling a national guardsman to the exemption set forth in NRS 361.090.

This is not true. This office has been advised that if the National Guard is called to active duty in their status as units of Army or Air National Guard pursuant to emergency legislation such as was enacted at the

time of the Berlin wall or Cuban missile crises, and service was for 90 days or more on such duty, benefits would accrue.

On the other hand assignment to training for a period of from 4 to 6 months, does not entitle the guardsman to wear the National Defense Service Medal, and is not considered active duty, notwithstanding the fact that the United States is engaged in armed conflict abroad.

CONCLUSION

It is therefore the opinion of this office that members of the National Guard, or Air National Guard, not called to duty pursuant to national legislation as hereinbefore prescribed, but assigned to training duty for a period of time constituting 90 or more days, are not entitled to the veterans' exemption set forth in NRS 361.090.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-648 State Planning Board—Variance in Bid Proposal—Failure to include certification of power of attorney, authorizing attorney in fact to execute bid bond on behalf of insurance company, when power of attorney is on file with the State of Nevada, not such a variance from bid requirements as to warrant non-acceptance of lowest bid on public building by State of Nevada.

OPINION NO. 1970-648 State Planning Board—Variance in Bid Proposal—Failure to include certification of power of attorney, authorizing attorney in fact to execute bid bond on behalf of insurance company, when power of attorney is on file with the State of Nevada, not such a variance from bid requirements as to warrant non-acceptance of lowest bid on public building by State of Nevada.

Carson City, March 12, 1970

Mr. William E. Hancock, Secretary and Manager, Nevada State Planning Board, Carson City, Nevada 89701

Dear Mr. Hancock:

You have requested this office to rule on the legality of a bid submitted by Ben O. Davey Construction Co. of Las Vegas, Nevada, for construction of a Computer Facility on the Capitol Complex, Carson City, Nevada.

facts

Invitation to bid was made according to law and instruction to bidders was forwarded to interested construction firms together with bid proposal forms.

Article 3 of said instruction to bidders deals with bid security, and subsection 3.2 reads as follows:

Each bid bond shall be executed by both the Bidder and the Attorney in Fact representing the Insurance Company acting as the surety issuing the bond. A certified copy of a Power of Attorney authorizing the Attorney in Fact to execute the bid bond on behalf of the Insurance Company as surety shall be submitted with the bid bond. (*Italics added.*)

Pursuant to the invitation to bid the State Planning Board received bids for the construction of the Computer Facility on March 10, 1970. There were seven bids received, all within the budget of the board.

The low bid submitted was that of Ben O. Davey Construction Co. of Las Vegas, Nevada in the amount of \$402,072. Accompanying this bid was a bond in the required amount. However, no certified copy of the power of attorney authorizing the attorney in fact to execute the bid bond on behalf of an insurance company as surety accompanied the bond as required by subsection 3.2 of the instruction to bidders.

The second low bidder objected to the awarding of the contract to Ben O. Davey Construction Co. of Las Vegas, Nevada, on the ground that failure to accompany the bid bond with the certified copy of the power of attorney hereinbefore described was fatal, and contended the second low bidder should be awarded the contract.

QUESTION

Was the failure of Ben O. Davey Construction Co. to accompany its bid with a certified copy of the power of attorney authorizing an attorney in fact to execute the bid bond on behalf of the insurance company a material defect compelling the State Planning Board to reject its bid?

ANALYSIS

With the exception of the missing certified power of attorney, the bid of Ben O. Davey Construction Co. was in all other legal aspects complete and in accord with the invitation to bid.

Let us begin by stating the statutes requiring contractors to give bonds, and governing the provisions of the bond have usually been, and should be, given a liberal construction so as to carry out the legislative intent and to effect the purpose contemplated by the law. In this case the legislative intent and the purpose contemplated by the law, was to secure the construction of a Computer Facility, by a reliable contractor, at the lowest cost to the State of Nevada.

Ipsa facto, when the State of Nevada receives a bid for the construction of a public building from a reliable contractor, which is \$9,418 lower than the next lowest bid, only a substantial variance from bid requirements should support a decision of the State to throw out such bid.

Even though there was no power of attorney on file with the State, it would not affect this opinion if, in fact, there was in existence a power of attorney which could be made available for State inspection upon request. It would seem that the State, prior to awarding a bid, could, if any question presented itself as to the power of the attorney in fact to sign the bid bond on behalf of the surety, require its presentation.

The courts have held that a variation from the specifications in an advertisement for bids for a public work will not destroy the competitive character of a bid unless it affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders. (*Pascoe v. Barium*, 247 Mich. 243, 225 N.W. 506.)

An analysis of the situation confirms the conclusion that the bids would have been the same with, or without, the absence of the certified copy of the power of attorney. The bidding should be so construed in the interest of the taxpayers as to accomplish the best work at the lowest possible price.

CONCLUSION

It is the opinion of this office that the failure of Ben O. Davey Construction Co. of Las Vegas, Nevada, to accompany their bid bond on the Computer Facility, Capitol Complex, Carson City, Nevada, with a certified copy of the power of attorney authorizing the attorney in fact to sign the bond on behalf of the surety is not such a substantial variance with the invitation to bid and instruction to bidders as to warrant nonacceptance by the State of Nevada, active by and through its State Planning Board.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-649 Cities—A preventive program of counselin...

OPINION NO. 1970-649 Cities—A preventive program of counseling and educating alcoholics is a proper function for a city. Prior budgeting for the program may not be required.

Carson City, March 18, 1970

The Honorable Mario G. Recanzone, City Attorney, 65 South Maine Street, Fallon, Nevada 89406

Dear Mr. Recanzone:

You have asked for an opinion regarding the propriety of the City of Fallon establishing the position of "alcoholics counselor." This officer would engage in a program, the desired result of which would be the return of alcoholics to the rolls of useful citizens. The two specific questions posed by you are:

QUESTIONS

1. Would such a program be proper for a city to engage in?
2. Could the city enter into such a program without having first budgeted funds for the same?

ANALYSIS

NRS 266.350(1), by express statutory grant, gives city councils the power "to prevent intoxication, * * *." Valid preventive techniques include education, guidance and counseling, and these techniques may be used either alone or in conjunction with pre-existing law enforcement programs.

The Alcoholism Division of the Department of Health, Welfare, and Rehabilitation does not have, nor does it desire, exclusive jurisdiction of alcoholism control. It is the division's belief that control programs at the local level are both feasible and desirable. Chapter 597 of the 1969 Statutes has provided and will continue to provide your city with funds from alcohol taxes. As we advised you in our letter of October 30, 1969, the Alcoholism Division feels that a local program of counseling alcoholics is an appropriate use of these funds.

NRS 266.600 permits city councils to appropriate money for corporate purposes. Since a program of educating and counseling alcoholics comes from an express power of the council, it is a corporate purpose. All city appropriations must be made in accordance with the provisions of the Local Government Budget Act (NRS 354.470 et seq.), which prohibits expenditures in excess of amounts appropriated through the adoption of a city budget. Chapter 457 of the 1969 Statutes amended the Local Government Budget Act by adding the following sections:

1. In any year in which the legislature by law increases the revenues of a local government, and such increase was not included or anticipated in the local government's final budget as adopted pursuant to NRS 354.598, the governing body of any such local government may, prior to July 15 of the budget year, file an amended budget with the Nevada tax commission increasing its anticipated revenues and expenditures over that contained in its final budget to the extent of the actual increase of revenues made available by such legislative action.
2. Such amended budget, as approved by the Nevada tax commission shall be the budget of such local government for the current fiscal year.

Your city certainly may provide funds for counseling alcoholics in future budgets. The extra revenues received by your city as a result of Chapter 597 of the 1969 Statutes did not begin until after July 1, 1969, or in the current fiscal year, so that a budget amendment for this fiscal year, under the provisions of Chapter 457 of the 1969 Statutes, may still be possible. We would also point out that the creation of a program alone does not require budgeting or appropriations if no new expenditure is to be made. Alcoholic counseling, as

part of a pre-existing law enforcement or educational activity, would not require a new expenditure, and therefore not effect a pre-existing budget.

CONCLUSION

Both questions are therefore answered in the affirmative. The city may enter into such a program of preventing intoxication through counseling without prior budgeting.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Michael L. Melner, Deputy Attorney General

OPINION NO. 1970-650 (Attorney General's Opinion No. 634, dat...
OPINION NO. 1970-650 (Attorney General's Opinion No. 634, dated January 8, 1970, clarified as to interpretation and application.) Nevada Securities Act (Chapter 90 of NRS) Construed—Present Nevada law forbids offers as well as sales or purchases of any security prior to effectiveness of a registration statement. Also, Nevada law sufficiently authorizes prohibition of delivery of any preliminary prospectus, prior to effectiveness of a registration statement other than to underwriters or dealers invited to participate in the distribution of the described security offering, even though such prospectus contains an express statement that the same shall not constitute an offer to sell or the solicitation of an offer to buy the describes security. As respects interstate public security offerings, applicable federal law and rules or regulations afford certain exceptions or exemptions in the foregoing connections. Such is not the case with Nevada law. Only if in proper compliance with applicable federal law and rules or regulations, and also not specifically violative of applicable Nevada express law and supervisory regulatory controls thereunder, shall interstate public security offerings be deemed exempt from the foregoing restrictions.

Carson City, March 25, 1970

The Honorable John Koontz, Secretary of State, Carson City, Nevada 89701

Attention: Mr. Ford E. Holmes, Deputy, Division of Securities

Dear Mr. Koontz:

Clarification is indicated as to the interpretation and application of our Opinion No. 634, dated January 8, 1970, and our legal opinion and advice therein on the following two questions:

QUESTIONS

1. Are offers of securities to be registered under the Securities Act of 1933 permissible in Nevada before the registration is effective under said Securities Act?
2. May a broker-dealer registered in Nevada distribute to the public a preliminary prospectus relating to securities, prior to registration of same in Nevada, if an appropriately-qualifying statement (hereinafter set forth) appears in such preliminary prospectus?

ANALYSIS

Chapter 90, Nevada Revised Statutes, substantially adopts major provisions of the Uniform Securities Act but contains numerous variations, omissions and additional matter. There is therein no express provision for the permissibility of offers of securities which are to be exempt once registration has been filed, or is effective, under the Securities Act of 1933.

NRS 90.075:

“Public intrastate offering” means every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value made solely within this state to 25 persons or more by means of any news media * * * or through the use of the United States mails, or by direct solicitation by an agent, except such offerings as are registered under the Securities Act of 1933 (15 U.S.C. § 77a et seq.) or exempt from registration thereunder other than by reason of the intrastate character thereof. (Italics added.)

NRS 90.140:

1. It is unlawful for any person to offer or sell any security in this state by means of a public intrastate offering unless:

(a) He has filed a statement with the administrator concerning such security as described in NRS 90.150;

* * * * *

(c) The administrator has approved such statement;

* * * * *

NRS 90.110:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

1. To employ any device, scheme or artifice to defraud.
2. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
3. To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person. (Italics added.)

Section 8(a) of the Securities Act of 1933, as relevant hereto, provides:

Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after filing thereof or such earlier date as the Commission may determine. * * *

Obviously, before effectiveness of registration, the same may be amended for incompleteness or inaccuracy in any material respect, either by the registrant of his or its own accord, or by commission request therefor. Until effectiveness, therefore, mere filing of a registration statement is inconclusive, perhaps involving uncertain data or information, and lacking desired or required disclosures, as respects potential or prospective actual buyers of the security.

It has been suggested that, since sales would be exempt after effectiveness of registration, offers may properly be made once the registration statement has been filed with the Securities and Exchange Commission, as is the case under section 5(b) of the Securities Act of 1933. However, in conjunction with such suggestion, it has also been properly noted that Nevada law presently appears to be susceptible of the interpretation that offers are not permitted, but prohibited, prior to effectiveness, unless registered under NRS 90.140, inasmuch as the exemption from the definition of “public intrastate offerings” under NRS 90.075 for securities registered under the Securities Act of 1933, arguable, does not arise until effectiveness, or when registration is completed.

In point of fact, there is substantial basis for such a contention or conclusion. Corresponding to NRS 90.140, cited above in relevant part, section 301 of the Uniform Securities Act (on which the Nevada act is based) provides:

It is unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act or (2) the security or transaction is exempted under section 402.

Note: Section 402 of the Uniform Securities Act enumerates a number of exemptions not provided for in the Nevada adaptation thereof. In fact, except as indicated in NRS 90.075 and 90.140, only the securities of insurance companies are additionally exempt from the requirements of NRS 90.140 and 90.150. (See NRS 90.153.)

The following "Commissioner's Note" to the foregoing section 301 of the Uniform Securities Act, therefore, is cogently pertinent hereto, as it manifestly correctly indicates how the registration requirement relative to securities should be construed and applied:

This section forbids offers as well as sales prior to the effectiveness of a registration statement. "Offer" and "sale" are defined in § 401(j). The 1954 amendment of the Securities Act of 1933 to permit certain types of offers during the waiting period between the filing and the effectiveness of the registration statement is recognized in a special exemption for securities which are in process of registration under both the federal and state statutes * * *. (Italics added.)

Your inquiry does not clearly indicate whether, in the particular premises, registration of the involved securities is being made "under both the federal and state statutes." In any case, present Nevada law (Chapter 90 of NRS) contains no express, equivalent "special exemption" provision even remotely corresponding to the said 1954 amendment of the Securities Act of 1933; nor have we found in said Nevada law any other provision reasonably inferring legislative intent to afford such "special exemption" so as to permit the making of "offers" during the waiting period between the filing and the effectiveness of the registration statement under the Securities Act of 1933.

In the foregoing connection, it is to be noted that NRS 90.100 pertinently provides as follows:

In any proceeding under this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

NRS 90.075, as noted, excepts from the definition of "public intrastate offering," and from state required registration, under NRS 90.140 et seq., interstate offerings registered under the Securities Act of 1933, and rules and regulations thereunder, as administered, interpreted, and enforced by the United States Securities and Exchange Commission.

As respects registration requirements, therefore, interstate offerings, if in proper compliance with federal law, and rules or regulations thereunder, may properly be deemed excepted and exempt from Nevada registration requirements on the basis of registration of their offering with the federal Securities and Exchange Commission.

As respects fraudulent or deceptive practices, and protection of the public interest, NRS 90.110 (cited above), because applicable to "the offer, sale or purchase of any security," is interpreted and construed as encompassing and applicable to both intrastate and interstate public offerings. Even though in compliance with federal requirements, interstate offerings are not, therefore, exempt from complying with Nevada law in such respect, with regard to transactions as to such security within the State of Nevada. In short, there exists dual, or state-federal jurisdiction for proper protection of the public interest and the potential or prospective buyer or buyers of such involved interstate security offerings, corresponding to that similarly provided as regards intrastate offerings.

Within the foregoing frame of reference, we now consider the question whether the following included statement in a preliminary prospectus, to be distributed in Nevada prior to registration of the involved securities in Nevada, may legally be authorized:

A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. Information contained herein is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective. This prospectus shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any state in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state.

(Note: We appreciate the fact that such a statement is authorized by Rule 433, General Rules and Regulations under the Securities Act of 1933, as respects interstate offerings.)

Significantly, the statement as worded illustrates that state law is to some extent inextricably and properly involved and applicable to interstate offerings, and their legality, even under federal law may be brought into question, if they are not also, and additionally, in compliance with state law. (Cf., Rule 460(d), General Rules and Regulations, Securities Act of 1933, for example.)

We are also aware of the fact that under the Securities Act of 1933, and the aforementioned General Rules and Regulations thereunder, such terms as "offer" and "offer to sell" are defined in more particularized and qualified fashion than under Nevada law; that certain communications are "not deemed a prospectus"; and that under Rules 433 and 460, for example, preliminary prospectuses, in compliance with all substantial requirements, except for omission of information "with respect to the offering price, underwriting discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price * * *" (as to which post-filing is authorized) may be distributed or delivered, prior to effectiveness of registration " * * * to each underwriter and dealer who it is reasonably anticipated will be invited to participate in the distribution of the security * * *." (Italics added.)

As regards Nevada law solely, we are of the opinion that it was legislative intent and purpose definitely to protect the actual potential or prospective buyer of securities offered or sold within the State, as evidenced in NRS 90.080, containing the following definition:

2. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. (Italics added.)

As above indicated, Rule 433, General Rules and Regulations under the Securities Act of 1933, does authorize such qualified statement relative to intrastate offerings in a preliminary prospectus prior to effectiveness of registration, but on a prescribes basis. Nevada law, contrariwise, provides no express exemption or authorization for use of such qualified statement in a preliminary prospectus prior to effectiveness of a registration statement. Even though so silent, because consistent with legislative intent and purpose for protection of the actual potential or prospective buyer of securities offered or sold within the State, Nevada law is believed sufficient to permit restricted use of such qualified statement in a preliminary prospectus, to be delivered solely to underwriters or dealers participating, or invited to participate, in the distribution of the proposed security offering. Such authorized restricted use is predicted on the same justification or grounds advanced for similar authorized use as regards interstate offerings under federal regulatory controls, namely, that distribution or delivery of a preliminary prospectus containing such qualified statement to involved underwriters or dealers, through prior to effectiveness of registration, would afford them with a means of informing themselves in advance so that they can better advise their customers (buyers) of the investment merits of the security. (See Release No 4968, Securities Act of 1933, as of April 24, 1969.)

No corresponding justification for use of such a qualified statement in a preliminary prospectus, intended to be delivered prior to effectiveness of registration, can be adduced as respect the actual potential or prospective buyer, presumptively less knowledgeable and more unsophisticated than underwriters or dealers, and therefore the class of persons principally entitled to full protection under the Nevada Securities Act. (Chapter 90 of NRS.) As to prospective buyers, delivery and receipt of a preliminary statement containing such a qualified statement, prior to effectiveness of registration, would still constitute and "attempt or offer to dispose of, or solicitation of an offer to buy a security or interest in a security for value." (Italics added.) Receipt thereof is evocative of the buyer's interest and for the ostensible purpose of inducing proffer by a Nevada recipient of the very "offer to buy" which the statutory prohibition was generally intended to prevent, until after the effectiveness of registration. Especially since we are satisfied that present Nevada law forbids offers as well as sales or purchases prior to effectiveness of registration.

As respects interstate offerings, federal rules and regulation essentially also recognize that delivery of such a preliminary prospectus, containing such a qualified statement, prior to effectiveness of registration, should properly be limited also to underwriters and dealers, invited to participate in distribution of the involved security offering, rather than potential or prospective actual buyers thereof. Absent appropriate implementation of Nevada law, through rules and regulations similar or corresponding to those applicable to interstate offerings, we are constrained to reach a more restrictive conclusion as to permissible and

authorized use of such a qualified statement under present Nevada law. In short, clearer and more definite statutory authority or basis for such exemption or exception must exist before the same, as respects use of such qualified statement in a preliminary prospectus, and delivered to other than underwriters or dealers prior to effectiveness of registration, may be adjudged legally proper and authorized.

recapitulation and CONCLUSIONS

1. As respects interstate public security offerings, applicable federal law and rules and regulations thereunder, provide for and afford certain exceptions or exemptions, presently not contained in Nevada law.

2. Present Nevada law (Chapter 90 of NRS) forbids offers as well as sales or purchases as respects "intrastate public offerings" prior to the effectiveness of a registration statement.

3. Present Nevada law sufficiently authorizes delivery of a preliminary prospectus, prior to effectiveness of registration of an "intrastate public offering," only to underwriters or dealers invited to participate in the distribution of the described security offering, provided, however, such prospectus includes an express statement that the same may be incomplete and subject to amendment, that registration is not yet complete or effective, that the same shall not constitute an offer to sell or the solicitation of an offer to buy the described security, and that sale of the described security or acceptance of an offer to buy the same is not authorized prior to effectiveness of the registration statement.

Delivery or distribution of any such preliminary prospectus, generally or to a prospective buyer or buyers, prior to effectiveness of the registration statement, even though it contain such qualified statement or disclaimer therein, is prohibited since not legally authorized.

4. Only if in proper compliance with applicable federal law and rules and regulations thereunder, as administered, interpreted, prescribed, and enforced by the United States Securities and Exchange Commission, and also only if specifically not violative of applicable Nevada express law and supervisory regulatory controls thereunder, shall interstate public offerings be deemed exempt from the foregoing restrictions pertaining to "intrastate public offerings," as stated.

5. As worded, the two questions submitted apparently have reference to interstate offerings only. Involved is the determination as to whether they are in fact in proper compliance with applicable federal requirements. If so, then both questions are answered in the affirmative. If not, then determination must be made as to whether there is any violation of applicable Nevada law and supervisory regulatory controls thereunder. Only such violation is determined to exist on a substantial legal basis, should state law be deemed to apply. In such case, the answer to both questions would probably be in the negative.

As respects intrastate public offerings solely, both said submitted questions are answered in the negative, except as qualified in No. 3 above.

Respectfully submitted,

Harvey Dickerson, Attorney General
By John A. Porter, Deputy Attorney General

OPINION NO. 1970-651 Housing Authorities—Housing authorities ...

OPINION NO. 1970-651 Housing Authorities—Housing authorities may contract to incur indebtedness at an interest rate not to exceed 7 percent per annum.

Carson City, April 9, 1970

Rulon A. Earl, Esq., Robert E. Jones, Esq., P.O. Box 959, Las Vegas, Nevada 89101

Gentlemen:

As attorneys for the Housing Authority of the City of Las Vegas, Nevada and the Housing Authority of the County of Clark, State of Nevada, respectively, you have requested on behalf of said housing authorities an opinion from this office based on the following facts:

statement of facts

The housing authorities have been created by enabling legislation passed by the Nevada Legislature. In past years, the City Housing Authority has constructed several low rent public housing projects with assistance from the Department of Housing and Urban Development, hereinafter referred to as HUD. Prior to the commencement of any low rent housing project, the local housing authority, pursuant to the provisions of the enabling legislation, enters into a contract with HUD for the necessary financial assistance. In connection with the execution of this contract, the local housing authority executes a note for the required amount of financial assistance, which note contains the repayment provisions and the interest rate for the money loaned. At the present time, because of the high interest rates, the contracts with HUD and the accompanying promissory notes for low cost housing projects call for an interest rate of 6 3/8 percent. The present language of NRS 315.630, subsection 4, appears to preclude the housing authorities from contracting for or executing obligations and notes which carry an interest rate in excess of 6 percent per annum.

There is an immediate need in the City of Las Vegas and the County of Clark for low rent housing projects. However, no housing project can be commenced until the issue of permissible rates of interest is resolved, by reason of the fact that HUD, pursuant to its governing statutes and regulations, is precluded from contracting for interest at less than the prevailing rate, which in turn is currently fixed by such governing statutes and regulations at 6 3/8 percent.

QUESTION

You have asked whether or not the local housing authorities may legally contract with HUD and execute promissory notes bearing interest in excess of 6 percent per annum.

ANALYSIS

The housing authorities in question are created pursuant to Title 25, Chapter 315 of Nevada Revised Statutes. Examination of this chapter discloses that it is subdivided into three parts. The first part encompasses NRS 315.010 through 315.130 and is denominated "Housing Authorities Laws—1943." The second part encompasses NRS 315.140 through 315.790 and is denominated "Housing Authorities Law—1947." The third part encompasses NRS 315.800 through 315.950 and is denominated "Housing Law—1951." It is the second part with which this inquiry and analysis are concerned. The specific problem arises by reason of the provisions of NRS 315.630, the pertinent language of which reads as follows:

By resolution, an authority may authorize bonds. The resolution, its trust indenture or mortgage may provide for:

* * * * *

- 4. The interest rate, not exceeding 6 percent per annum.

* * * * *

In passing, it is to be noted that the term "bonds" as used in the foregoing section means any and all monetary or fiscal obligations issued by an authority. NRS 315.180.

Standing alone, the foregoing limitation would appear to preclude an authority from incurring an interest obligation at a rate in excess of 6 percent per annum. However, the Local Government Securities Law, which is NRS 350.500 through 350.720, must be considered together with Chapter 315. The purpose of the Local Government Securities Law, succinctly stated, is to provide a procedure for financing any projects authorized by law, and for the issuance of securities to evidence obligations incurred in connection therewith. See NRS 350.502. That the Local Government Securities Law and Chapter 315 of Nevada Revised Statutes are to read in conjunction with one another is evidenced by two additional facts. First, each chapter contains a cross reference to the other, and second, the Local Government Securities Law reads in terms of

municipalities and defines municipalities as expressly including any district governed by Title 25 of Nevada Revised Statutes.

Both the Local Government Securities Law and Chapter 315 clearly contemplate participation by the United States government in the programs authorized. See NRS 350.516, which includes in the cost of any project funds advanced by the federal government. See also NRS 315.560, which empowers housing authorities to receive said aid. Of particular significance is subsection 3 thereof, which reads as follows:

3. It is the purpose and intent of NRS 315.140 to 315.790, inclusive, to authorize every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the Federal Government in the undertaking, construction, maintenance or operation of any housing project by such authority.

The Local Government Securities Law, prior to the effective date of amendments by the 1969 Legislature, imposed maximum interest rates of 6 percent per annum. See NRS 350.614, 350.630, 350.678, and 350.694. The 1969 Legislature amended the foregoing sections and raised the permissible interest rate to 7 percent. See 1969 Statutes of Nevada, Chapter 644, sections 12.3 through 12.9, pp. 1292 to 1295.

The 1969 amendment creates what appears to be an inconsistency. We conclude that the inconsistency must be resolved by finding that the over-all legislative intent is to permit all municipalities encompassed by the terms of the Local Government Securities Law to incur indebtedness at an interest rate up to 7 percent per annum. Our conclusion is reinforced by the fact that the Housing Authorities Law—1943 contained a specific provision to the effect that insofar as the provisions therein contained were inconsistent with those of any other law, the provisions of the Housing Authorities Law—1943 shall be controlling. See NRS 315.130. The Housing Authorities Law—1947, with which we are presently concerned, contains no counterpart of the earlier legislation in this respect. This can only mean that the Legislature, in enacting the Housing Authorities law—1947, did not intend inconsistencies which might occur to be similarly resolved. This conclusion is also consistent with the provisions of NRS 315.560, subsection 3, quoted above. Any other conclusion would render Chapter 315 useless and unworkable solely because of today's interest market.

CONCLUSION

It is therefore the opinion of this office that housing authorities may contract to incur obligations which bear interest at a rate not to exceed 7 percent per annum.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Robert A. Groves, Deputy Attorney General

OPINION NO. 1970-652 Trade Schools—A school that trains indiv...

OPINION NO. 1970-652 Trade Schools—A school that trains individuals as dealers of "21," keno, and dice gaming is a trade school within the meaning of NRS 394.280 through 394.420; and when operated by a private, non-profit corporation, even though funded by the federal government, such school must be licensed and supervised by the Nevada State Board of Education.

Carson City, March 31, 1970

Mr. LaMar LeFevre, Assistant Superintendent, State of Nevada Department of Education, Room 213, State Office Building, Las Vegas, Nevada 89101

Dear Mr. LeFevre:

You have requested an opinion from the Attorney General's Office on the following questions:

QUESTIONS

1. Can the Concentrated Employment Program Board of Directors legally operate a school with federal funds to train card dealers, "21," dice, keno without a state license?
2. If this question is answered in the affirmative, is any supervision from the State Board of Education necessary while the school is in operation?

statement of facts

The Office of Economic Opportunity is a private, non-profit corporation organized under the laws of the State of Nevada. It is not a part of any government office, federal, state, or local. It is largely funded by the United States Department of Labor with whom it enters contracts that meet certain qualifications set by the Department of Labor, principally being job placement of individuals who are either unemployed, nonemployable, or under-employed.

The Clark County Office of Economic Opportunity, through its "Concentrated Employment Program," has commenced operation of a private school to train dealers in dice, "21," and keno. There is no tuition charged, but funds are provided through a contract with the United States Department of Labor.

query

Must the Office of Economic Opportunity obtain a license from the State Board of Education to operate such a school?

answer

Yes.

ANALYSIS

Regulation of trade schools by the Department of Education is obviously for the benefit of students who attend the schools. NRS 394.280 through 394.420 obviously is for the protection of students, so that when they do attend a private trade school, they will not waste their time or money. It is submitted that whether tuition is paid by the student is immaterial, because the student's time can be considered as valuable as his money and he is entitled to a training program that meets the standards of the Nevada State Department of Education.

CONCLUSION

A school that trains individuals as dealers of "21," keno, and dice gaming is a trade school within the meaning of NRS 394.280 through 394.420. Such a school operated by a private, non-profit corporation, even though funded by the federal government, must be licensed and supervised, by the Nevada State Board of Education.

Respectfully submitted,

Harvey Dickerson, Attorney General
By John G. Spann, Deputy Attorney General

OPINION NO. 1970-653 Employment Agencies—Employment agencies ...

OPINION NO. 1970-653 Employment Agencies—Employment agencies may not take into consideration travel pay, subsistence, per diem, and mileage in arriving at a determination of the 25 percent of the first month's salary to be paid by a placed applicant.

Carson City, March 31, 1970

Mr. Stanley P. Jones, State Labor Commissioner, Carson City, Nevada 89701

Dear Mr. Jones:

You have asked this office for an interpretation of NRS 611.220, which reads as follows:

No person licensed pursuant to the terms of 611.220 to 611.320, inclusive, shall charge, accept or collect from any applicant for employment as a fee for securing such employment any sum or sums of money in excess of 25 percent of the first month's salary or compensation received or paid for such employment.

You then ask whether a private employment agency may add travel pay, subsistence, per diem, and mileage to the base monthly salary of a placed person in arriving at the 25 percent due the agency under the foregoing statute.

ANALYSIS

To begin with the statute provides that the 25 percent fee due the placing agency is to be based on the first month's salary or compensation. Black's Law Dictionary, Fourth Edition, defines salary as "a stated compensation, amounting to so much by the year, month, or other fixed period. * * *" The same dictionary defines "compensation" as "salary, pay or emolument."

Travel pay, subsistence, per diem and mileage are illusory benefits which may or may not accrue. They arise by reason of duties assigned whereby the employee may be required to meet expenses out of pocket, and thus authorized to itemize such moneys expended in the firm's interests so that the firm can repay them. Thus the basic salary remains undisturbed.

At the time the employment agency enters into the agreement with a person seeking employment it knows the basic monthly salary to be paid the applicant, or can with little difficulty ascertain such amount. It cannot determine what moneys will be paid to the employee, after placement, for travel pay, subsistence, per diem, and mileage, so that these items cannot be made a part of the contract at the time it is signed. These items are not salary.

CONCLUSION

It is therefore the opinion of this office that employment agencies may not take into consideration travel pay, subsistence, per diem, and mileage in arriving at a determination of the 25 percent of the first month's salary to be paid by a placed applicant.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-654 Taxation; Sales And Use Tax—Drugs admini...

OPINION NO. 1970-654 Taxation; Sales And Use Tax—Drugs administered by treating physician for which patient is charged are not subject to sales tax.

Carson City, April 6, 1970

Mr. Floyd N. Heffron, Inspector, Nevada State Board of Pharmacy, P.O. Box 1087, Reno, Nevada 89504

Dear Mr. Heffron:

You have requested that this office issue an opinion on the question of whether medication and drugs furnished or administered to a patient by the treating physician, for which a charge is made, are subject to sales tax.

ANALYSIS

We have previously ruled that if the sale of an article is made in the necessary course of the rendition of a service under circumstances in which the article has value particularly in connection with such service, then the seller is rendering a service and not selling at retail. On the other hand, if the article sold has value unconnected with the rendition of a service, and the service is merely incidental to the sale, then the seller is actually in the business of selling at retail and the tax applies. See Attorney General's Opinion No. 546, dated November 12, 1968.

In the case of a treating physician, that which the patient primarily seeks is the professional services of the physician. In many instances, medications or drugs may be prescribed but are not necessarily administered in the course of medical treatment by the physician. If drugs are administered in such a case, the administration of drugs is incidental to the professional services and would not therefore be subject to tax. The result would not be different merely because the cost of the drug so administered is separately itemized from the cost of the service rendered by the physician, in his statement to the patient. This is merely a matter of form, and does not alter the substance of the transaction.

CONCLUSION

It is the opinion of this office that when medication or drugs are administered by a physician to a patient in the course of treatment, the sale of such drugs is incidental to and a necessary part of the services rendered, and therefore not subject to sales tax.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Robert A. Groves, Deputy Attorney General

OPINION NO. 1970-655 Property Taxation—Campers—An equipment i...

OPINION NO. 1970-655 Property Taxation—Campers—An equipment item installed by a dealer on a motor vehicle held as part of his stock in trade is exempt from property taxation, pursuant to NRS 361.067, only if it can be used only in conjunction with a vehicle, facilitates transportation and becomes a structural part of the vehicle.

Carson City, April 6, 1970

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

A taxpayer has questioned you as to the proper tax treatment when a dealer mounts a camper upon a motor vehicle and holds the combined vehicle/camper as part of his dealer's stock in trade. The taxpayer contends that the camper becomes an integral part of the motor vehicle and is therefore, exempt from property taxation pursuant to the exemption granted vehicles in NRS 361.067.

In support of the taxpayer's contention, he alleges that an automobile air conditioner, when kept in a dealer's stockroom, is included the dealer's stock in trade and thereby subjected to property tax by county assessors; however, if the dealer installs the air conditioner in a motor vehicle that he holds for sale, the assessors consider the air conditioner to be exempt from property tax by virtue of the aforementioned NRS 361.067.

In order to provide a guide to county assessors and to camper dealers, you have requested the opinion of this office as to the following questions:

QUESTIONS

1. If a dealer installs a "camper" on a motor vehicle held in the dealer's inventory, is such camper exempted from the property tax under authority of NRS 361.067?

2. If the answer to question No. 1 is in the negative, are air conditioners and other optional and extra equipment items installed by the dealer on motor vehicles held in his inventory also subject to the property tax?

ANALYSIS

NRS 361.067 reads: "All vehicles, as defined in NRS 371.020, shall be exempt from taxation under the provisions of this chapter." The particular chapter covers property tax.

NRS 361.562(2), NRS 361.563, NRS 361.5641, and NRS 361.5644 clearly indicate that the person who purchases a camper is liable for the payment of personal property tax thereon. This establishes that a camper, by itself, is not a vehicle meant to be exempted for property taxation pursuant to the provisions of NRS 361.067.

Chapter 609, Statutes of Nevada 1969, adds to Chapter 361 of Nevada Revised Statutes a new provision which states, among other things:

As used in NRS 361.562 to 361.5644, inclusive:

1. "Camper" means an enclosed attachment which is designed for mounting on a motor vehicle and which is intended for temporary living purposes. "Camper" does not include a covered canopy mounted on a motor vehicle and which is not equipped with permanent facilities for the preparation or storage of food or for sleeping purposes.

Thus, if a camper is to be entitled to the exemption from property taxation afforded vehicles by NRS 361.067, it must be because it has been mounted on a motor vehicle in such a manner as to become a structural part of the motor vehicle.

In virtually all instances, campers are mounted on motor vehicles in one of two ways. Most campers are designed to fit right onto a pickup body, and are mounted so as to rest on the bed of a pickup truck. A lesser number of campers are designed to be attached directly to the frame of a truck chassis. One of the advantages of those campers that are designed to be used in conjunction with the body of a pickup truck is the relative ease with which they can be mounted on and removed from the truck. On the other hand, those campers that are designed for attachment directly to the frame of a truck chassis are considerably more difficult to install and remove. Once installed, such a truck chassis/camper unit usually is left as is as a permanent arrangement.

The case of *King Trailer Company v. United States*, 228 F.Supp. 1013 (S.D. Calif. 1964), aff'd *United States v. King Trailer Company*, 350 F.2d 947 (9th 1965), although deciding the applicability of a federal excise tax and not a property tax, contains a lengthy discussion of "pickup coaches," which coaches fit within the Nevada statutory definition of "camper." The case states that the understanding of most people, including legislators, is that a truck is comprised of a chassis and a body. If the body is removed, what remains is not a truck, but merely a truck chassis. In other words, the body is a structural part of any truck. This is so, according to the King Trailer Company opinion because a truck is made for the purpose of carrying things; without a body it would be incapable of performing its purpose. The case involved the type of camper that is designed for mounting on a pickup truck body. The court points out that an integrated whole pickup truck remains even after camper is removed.

On the other hand, where the camper is of the type that is designed for attachment directly to a truck chassis, there is no complete truck until the camper is attached. The camper constitutes the body of the truck and, as such, is a structural part of the truck.

The answer to question No. 1, then, is that a camper which has been installed on a motor vehicle by a dealer is exempted by NRS 361.067 from property taxation only if the camper fits directly to the frame of the motor vehicle and constitutes the body of the vehicle. If the removal of a camper leaves a vehicle with

both chassis and body, then the camper was not a structural part of the vehicle, and not entitled to the exemption granted vehicles by NRS 361.067.

It should be emphasized that campers are part of the stock in trade of camper dealers, therefore all campers held for sale by such dealers are subject to the property tax in accordance with NRS 361.227(3), with the sole exception of those that have been attached to vehicle chassis frames so as to constitute the bodies of the vehicles, as above discussed.

Since the answer to question No. 1 is a qualified no, question No. 2 shall also be answered. It asks whether air conditioners and other optional and extra items, installed by a dealer on motor vehicles held for sale as part of his stock in trade, are subject to the property tax.

The case of *Burdett Oxygen Co. v. Kauer*, 117 N.E.2d 211 (Ohio Com.Pl. 1955) construed an Ohio law that concerned itself with the taxation of certain automotive equipment and, while not really in point with question No. 2 herein, provides a certain logical guideline that might be use in determining whether particular equipment items become structural parts of the vehicles on which they are installed. The court attempted to determine whether particular items were "inherently motor vehicle equipment" by deciding whether each item helps effectuate the purpose of a motor vehicle, which is transportation of goods or persons, or whether each item serves some other purpose.

A prerequisite for any item to be "inherently motor vehicle equipment," according to the *Burdett* case, is that it become a part of the structure of the vehicle; an item fastened to the body of the vehicle for the purpose of being transported is not a structural part of the vehicle.

The guideline offered by *Burdett* is to determine whether the particular item is usable only as a part of a vehicle or whether it is usable when not installed in a vehicle. If the item is usable without a vehicle, it is a piece of equipment for some trade or type of service rather than a part of the structure of a vehicle. Examples given are bakery racks, compressed gas cylinders, grinding mills, and hoisting winches; all of said items may be attached to trucks, but the purpose of such attachment is to transport the items to where they are to be used. The items themselves are not structural parts of the vehicles to which they are attached.

An automobile air conditioner is not installed in a vehicle for the purpose of being transported to the place where it is to be used; rather, such an air conditioner is meant to be used during transit in order to facilitate the transportation of persons. In addition, an automobile air conditioner is so specialized in design as to be practically unusable except in conjunction with a motor vehicle. Once installed it becomes a structural part of the vehicle.

The answer to question No. 2, therefore, is that an air conditioner installed by a dealer on a motor vehicle held in his inventory is exempted from property taxation by NRS 361.067.

CONCLUSIONS

Any optional or extra equipment item installed by a dealer on a motor vehicle that is held by him as part of his stock in trade is exempt from property taxation only if the item:

1. Can be used only in conjunction with a motor vehicle;
2. Is designed to facilitate the transportation of goods or persons; and
3. Becomes a structural part of the motor vehicle upon installation.

A camper, as defined in Chapter 609, Statutes of Nevada 1969, which has been installed on a motor vehicle by a dealer who holds the vehicle as part of his stock in trade, is exempt from property taxation only if the camper is attached directly to the frame of the vehicle and constitutes the body of the vehicle.

An automobile air conditioner that has been installed in a motor vehicle by a dealer who holds the vehicle as part of his stock in trade is exempt from property taxation.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Irwin Aarons, Deputy Attorney General

OPINION NO. 1970-656 Nepotism—State Employment—Department head in a state institution or organization who hires a relative within the third degree of consanguinity or affinity, even though the ultimate power to hire and to fire rests with the head of the institution or organization, violates the Nepotism Act, NRS 281.210.

Carson City, April 9, 1970

Mr. James F. Wittenberg, State Personnel Administrator, Blasdel Building, Carson City, Nevada 89701

Dear Mr. Wittenberg:

You have set forth a situation where a state official has the ultimate power of hiring and firing of employees, but has designated this power to various functionaries heading departments.

Your question is whether the appointment of a relative within the third degree of consanguinity or affinity by one of the designated appointing heads of a department violates NRS 281.210.1, which reads as follows:

Except as provided in this section, it shall be unlawful for any individual acting as a school trustee, state, township, municipal or county official, or for any board, elected or appointed, to employ in any capacity on behalf of the State of Nevada, or any county, township, municipality or school district thereof, any relative of such individual or of any member of such board, within the third degree of consanguinity or affinity.

ANALYSIS

The evil contemplated by the Legislature was the packing of state employment with relatives of those having the appointing power, thus denying an equal opportunity to those not in the same category. It can readily be seen that one is less disposed to fire a relative regardless of ability, than to dispense with the services of one not so related.

If each department head of a large state institution were permitted to hire relatives, under the subterfuge that such person was not related to the person having the ultimate power to hire and fire, the employment roster would have the appearance of a group of family reunions.

CONCLUSION

It is the opinion of this office that a department head in a state organization who hires a relative within the third degree of consanguinity or affinity, even though the ultimate power of hiring and firing such employee rests with the head of the institution or organization, violates the Nepotism Act, NRS 281.210.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-657 State Labor Commission—Wage Garnishment—...

OPINION NO. 1970-657 State Labor Commission—Wage Garnishment—The scheme for prejudgment wage garnishment in Nevada, as it now stands under NRS 21.090, as amended, violates due process under the U.S. and Nevada Constitutions.

Carson City, April 16, 1970

Mr. Stanley P. Jones, State Labor Commissioner, Carson City, Nevada 89701

Dear Mr. Jones:

Your inquiry concerns wage garnishment. From information received by your office, it appears to be general practice that employees whose wages are garnished are not informed of this fact until payday. The wage earner then learns that his earnings have been paid over to someone else without his knowledge and without a prior hearing.

Your specific questions are as follows:

QUESTIONS

1. May a wage garnishment be issued without due notice and hearing?
2. May the entire amount of accrued wages be garnished or attached?

ANALYSIS

Our conclusions upon your first question make it unnecessary to issue an opinion on your second question.

Before the 1969 changes on our garnishment law, NRS 21.090 was quite similar to California's counterpart, CCP § 690. NRS 21.090(h) reads:

The earnings of the judgment debtor for his personal services rendered at any time within 30 days next preceding the levy of execution or attachment, when it appears, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family residing in this state, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessities of life, or have been incurred at a time when the debtor had no family residing in this state, supported in whole or in part by his labor, the one-half of such earnings above mentioned is nevertheless subject to execution, garnishment or attachment to satisfy debts so incurred.

California has recently declared its statute unconstitutional, in light of *Sniadach v. Family Finance Corp.* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 349 (1969). The California court recognized its law varied from the Wisconsin statute, which was passed upon by the United States Supreme Court. Nevertheless, their statute was struck down. We note that CCP § 690.11 required that the defendant have notice of the action prior to garnishment. Also, like Nevada's former statute, one-half of the defendant's earnings were exempt upon claim, and one-half was automatically exempt. *McCallop v. Canberry*, 83 Cal.Rptr. 666 (1970). See also *Termpian, Inc. v. Superior Court of Mariposa Co.*, 463 P.2d 68 (1969).

The 1969 amendment to Nevada's law, Chapter 474, 1969 Statutes of Nevada, p. 884, exempts 25 percent of the disposable wages of a defendant:

1. The following property is exempt from execution, except as herein otherwise specifically provided:

* * * * *

(h) For any pay period, 25 percent of the disposable earnings of a judgment debtor during such period, or the amount by which his disposable earnings for such period exceed 30 times the minimum hourly wage prescribed by section 6(a)(1) of the federal Fair Labor Standards Act of 1938 and in effect at the time the earnings are payable, whichever is less. The exemption provided in this paragraph does not apply in the case of any order of a court of competent jurisdiction for the support of any person, any order of a court of bankruptcy or of any debt due for any state or federal tax. As used in this paragraph, "disposable earnings" means that part of the earnings of a judgment debtor remaining after the deduction from those earnings of any amounts required by law to be withheld.

There is no provision by which the defendant can claim exemption as existed before 1969. Thus, we believe that Nevada's garnishment law, as it now stands, is more restrictive and less favorable to the defendant than it was before its amendment.

While the cases cited above discuss the hardship prejudgment garnishment places on wage earners (we doubt that 25 percent of a week's wages is sufficient to support a wage earner in Nevada), the constitutional principle upon which they rest is that the defendants are deprived of their property without due

process of law. That is, their wages can be taken from them, and held for a period of time, without notice, and before they have an opportunity to be heard.

CONCLUSION

We find a similar absence of such procedural due process standards in Nevada's garnishment scheme, and thus conclude that the scheme for prejudgment wage garnishment in Nevada, as it now stands under NRS 21.090, as amended, violates due process under the United States and Nevada Constitutions.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Peter I. Breen, Deputy Attorney General

OPINION NO. 1970-658 Insurance—Statutory provisions of Nevada...
OPINION NO. 1970-658 Insurance—Statutory provisions of Nevada law relative to annuities, and as applicable to Investment Annuity Contract proposed to be sold in Nevada, construed. Held: While technically distinguishable from the general format, and incidentally at variance with regulatory provisions, otherwise substantively applicable thereto, both individual and group formats of the Investment Annuity Contract, as a matter of legal substance, properly constitute an entire contract and variable annuity within the meaning and intent of existing Nevada statutes. Such contracts, therefore, are subject to, and must comply with, statutory provisions and all regulatory requirements applicable to variable annuities.

Carson City, April 16, 1970

Mr. Louis T. Mastos, Insurance Commissioner, Department of Commerce, Carson City, Nevada 89701

Dear Mr. Mastos:

The First Investment Annuity Company (FIAC) has submitted certain individual and group forms of its Investment Annuity Contract relative to qualified tax-sheltered and tax-deferred profit-sharing, pension, and retirement plans proposed for sale in Nevada, for your approval. Their design and content involve somewhat of a departure from the usual and generally accepted concept and format of annuities, both fixed and variable, and also incidentally are at variance with statutory provisions and regulatory requirements which otherwise are clearly applicable.

You have therefore requested our review of said submitted contract forms and related material in light of applicable Nevada statutes, and our legal opinion and advice on the following two questions:

QUESTIONS

1. Is the annuity effected and provided by means of the individual and group contract forms of the investment annuity properly classifiable as a fixed or a variable annuity within the meaning and intent of existing and applicable Nevada regulatory statutory provisions?
2. Are the statutory provisions contained in NRS 690.460 et seq., pertaining to life insurance contracts providing for payments on a variable basis, applicable to both the individual and group formats of the Investment Annuity Contract?

answers

1. While technically different and distinguishable from the general format, and also incidentally somewhat at variance with regulatory provisions otherwise substantively applicable thereto, both individual and group concepts and formats of the Investment Annuity Contract, as a matter of legal substance, properly constitute an entire contract and variable annuity within the meaning and intent of present Nevada statutes.

2. Both said individual and group contractual forms and formats of the investment annuity, therefore, are subject to and must be in compliance with all statutory provisions and requirements pertaining to variable annuities, before the same may properly be approved.

statement of facts

Preliminarily, annuities generally are classified as of two types, either fixed or variable. The terms "fixed" and "variable," strictly speaking are actually only relative, but they commonly connote or have reference to dollars, and not to purchasing power. The fixed-dollar annuity (sometimes also called "conventional annuity") guarantees the annuitant a fixed, minimum number of dollars during each pay-out period, upon termination of the accumulation period and commencement of the annuity benefits. In its general format, the variable annuity expresses its promise in terms of a fixed number of units, the dollar value of which fluctuates according to the experience of the company, in some cases limited solely to investment fluctuations, in other cases additionally inclusive of mortality and expense experience as well.

essential format of the investment annuity contract

In an article by George E. Johnson and Donald S. Grubbs, Jr., significantly entitled "Media for Funding Variable Annuities," the investment annuity is therein briefly described as follows:

Combination of Insurance Company and Trust: "Investment Annuities" were designed by the First Investment Annuity Company of America (FIAC), incorporated in Pennsylvania, to provide equity variable annuities under a system similar to that developed by the National Life Assurance Company of Canada. The principal difference is that the trust is not restricted to investment in a particular mutual fund. A separate trust is established for each annuitant. Within limitations laid down by the insurance company, the annuitant may control the investment of the trust, which may be in mutual fund shares, common stocks, bonds or other investments.

The ability to manage his own investments may appeal to some annuitants. It will allow him to switch from equities to fixed dollar investments and stabilize the amount of the annuity at any time he desires, and to switch back to equities at a later date if he desires.

The investments are held in a trust or in a custody account at a bank.

Each year a withdrawal is made from the trust to be applied as a premium to purchase a one year temporary annuity from the First Investment Annuity Company of America. The premiums are set forth in the contract as a percentage of the market value of the trust, the percentage being based upon the annuitant's age at issue and sex and the number of years from the effective date. The premiums are actuarially determined so that they will continue to be paid during the lifetime of the annuitant and never be exhausted. Each year the premium paid to the insurance company is less than the annuity payments to be paid, so that each year that the annuitant lives there is a mortality loss. In the year in which the annuitant dies, the balance of the trust is paid to the insurance company as a "termination premium." This "termination premium" is comparable to the reserve released on ordinary annuities and is a mortality gain.

To date the First Investment Annuity Corporation of America has been issuing its "Investment Annuities" only under qualified pension plans, although it has stated its intention to issue them to individuals if certain tax laws are revised. (*Italics added.*) (Note: Both individual and group investment annuity contracts are presently involved herein.)

additional contract features pertinent hereto

In its total operation, the investment annuity involves (a) a custodian agreement between FIAC and a bank or trust company selected by the participating employer or individual purchaser, with FIAC's approval, (b) a joinder agreement between the participating employer-purchaser and the approved bank or trust company custodian, and (c) in the case of an employer joinder agreement, an enrollment application of a participating employee, which authorizes payroll deductions and their deposit in the custodian account.

All custodian account assets, by mutual agreements among all parties, are contractually constituted an irrevocable trust, legally committed to payment of premiums to FIAC by the custodian bank or trust

company administering and managing the account, for ultimate purchase of a term annuity contract of 1 year, renewing annually for life or a period certain.

The FIAC-custodian agreement obligates the latter "irrevocably" to make payment of prescribed premiums as determined by FIAC and to make reports to FIAC concerning investments and the status and valuation of account assets; it authorizes FIAC to terminate the custodian agreement if deemed proper or desirable, upon notice; and empowers FIAC to restrict investment of account assets by the custodian to an FIAC-approved list of investments, as is also the case with the annuitant himself.

If participation is terminated before normal retirement date, the amount in the custodial account is applied toward an optional settlement. If such settlement is a 1-year term annuity, the cash value is the commuted value of such annuity payment. This is the only apparent means by which the money in the custodial account can be recovered. If participation is terminated because of death prior to commencement of annuity payments, the value of the account assets is payable to the beneficiary in a lump sum, subject to any limitation or conditions specified by the annuitant, such as a particular settlement option. Withdrawal of deposited securities in specie, or of cash deposited as such, apparently is not possible at the time of such termination, because of the irrevocable nature of the custodial agreement.

Other than as above indicated, with commencement of annuity benefit payments the annuitant, of course, is not entitled to withdraw or have refunded his contributed cash or other deposited assets in his account; and in the event of his death after retirement and commencement of annuity payments, benefits would be paid to his designated beneficiary or survivor in accordance with the settlement option and for the period chosen by the annuitant. The value of the account, in specie, would accrue to FIAC as a "terminal premium" comparable to the reserve on ordinary annuities—actuarially, a mortality gain.

The custodian and FIAC are irrevocably committed to the purchase of successive 1-year term annuities, with the terminal premium of the remainder in the annuitant's custodial account, on termination of the annuity, accruing to FIAC. Moreover, on enrollment and on each succeeding contribution to the custodial account, FIAC receives an "initial premium." All such receipts, prior to the date the annuity commences, cover commissions and other expenses of promoting and marketing the Investment Annuity Contract.

The table in the Investment Annuity Contract (setting forth the percentage of account assets withdrawable for payment of annual premium on each successive annual valuation date) is so constructed that if the contract holder achieves by the end of the year an increase in the value of the assets (over the value present in the account at the beginning of the year) equal to the percentage increase assumed in the premium rate structure of the contract, the new annual premium will produce a monthly annuity payment for the ensuing year which will be equal in amount to the monthly annuity paid in the preceding year. Thus, if the increment in value is greater on the basis of the preceding year's investment experience, the new year's annuity payments are more, and vice versa.

Finally, since the term annuity for 1 year (even though noncancellable and "irrevocably" renewing annually for life or years-period certain) presumptively merely obligates FIAC to the making of annuity payments in 12 equal monthly installments of a predetermined, fixed amount, FIAC creates reserves only in respect of such 12-month obligation, and received annual premiums solely are deemed properly required to be invested by FIAC in traditional reserve assets.

Insofar as employer contributions may be involved in the investment annuity, they, too, are irrevocably committed and unrefundable, being treated as vesting in the employee for purposes of the retirement or annuity plan, the benefits of which are payable to the annuitant or to his beneficiaries.

FIAC is contractually relieved of all responsibility for any and all losses connected with the administration and investment of the custodian account assets. There is no profit-sharing among annuitants and, of course, the annuitants do not share in any of FIAC's profits.

Thus, as far as the insurer (FIAC) is concerned, the operation of the total arrangement is the same as a fixed annuity. Insofar as the annuitant is concerned, however, since both for payment of prescribed premiums to FIAC and his receipt of the corresponding amount of his annuity payments or benefits, the Investment Annuity Contract is clearly and substantively predicated upon and determined by preceding investment experience, such total arrangement is the same as a variable contract.

Whether the Investment Annuity Contract, therefore, is properly to be deemed a fixed or a variable annuity will ultimately turn upon the different state statutes and the varying or different interpretations and application given to the investment annuity format at any particular time.

ANALYSIS

The following excerpted Nevada statutory provisions are deemed pertinent and applicable hereto:
NRS 690.460: (Domestic life insurance companies to establish separate accounts for payment of variable basis contracts; adjustment, additions to accounts.)

1. Every domestic life insurance company which issues contracts providing for payments which vary directly according to investment experience shall establish one or more separate accounts in connection with such contracts, as directed by the commissioner.

2. Any surplus or deficit which may arise in any such separate account by virtue of mortality experience shall be adjusted by withdrawals from or additions to such account so that the assets of such account shall always equal the assets required to satisfy the company's obligations for such variable payments.

3. All amounts received by the company which are required by contract to be applied to provide such variable payments shall be added to the appropriate separate account, and the assets of any such separate account shall not be chargeable with liabilities arising out of any other business the company may conduct. (*Italics added.*)

NRS 690.470: (Qualifications required of life insurance company to issue contracts on variable basis; duties of commissioner of insurance.)

1. No domestic or foreign life insurance company shall undertake the issuance of any contract on a variable basis until such has shown to the satisfaction of the commissioner * * * that its condition and methods of operation in connection with the issuance of such contracts on a variable basis will not be such as to render its operation hazardous to the public or its policyholders in this state.

2. In determining the qualifications of a company requesting authority to issue or deliver contracts on a variable basis within the state, the commissioner shall consider * * * whether the regulation provided by laws of its state of domicile provides a degree of protection to policyholders and the public substantially equal to that provided by the laws of this state. (*Italics added.*)

NRS 690.480: (Required contents of contracts, certificates providing for payments on variable basis.)

Any contract on a variable basis delivered or issued for delivery in this state, and any certificate evidencing variable benefits issued pursuant to any such contract on a group basis, shall contain a statement of the essential features of the procedure to be followed by the insurance company in determining the dollar amount of variable benefits, or other contractual payments or values thereunder, shall state in clear terms that such amount may decrease or increase according to such procedure. Any such contract delivered or issued for delivery in this state, and any such certificate, shall contain on its first page, in a prominent position, a clear statement that the benefits or other contractual payments or values thereunder are on a variable basis. (*Italics added.*)

That life insurance laws and regulations are primarily designed to protect policyholders and annuitants, i.e., to assure as nearly as possible that the company will meet its obligations in the future as they mature, is certainly no longer open to question. There also seems to be no present dispute about the jurisdiction of insurance commissioners over annuity contracts, both fixed and variable, even in the absence of specific language in some of the state statutes clearly spelling out this jurisdiction. (See "The Variable Annuity—Insurance Investment, or Both?", by George E. Johnson, *Georgetown Law Journal*, Vol. XLVIII, No. 4, p. 664 (1960), citing *Carrol v. Equitable Life Assur. Soc'y of United States*, 9 F.Supp. 223 (W.D.Mo. 1934); *Appleman, Insurance Law and Practice*, Vol. 1, § 81 et seq.)

The decisions of the Supreme Court in the VALIC and Prudential litigation removed the last possible doubts that a variable annuity must also be deemed a "security," and that the separate account used to segregate funds in connection therewith, often designated as an "open end" investment company or a unit investment trust, and the sales organization marketing such annuity, are additionally subject to federal law and Securities and Exchange Commission regulation, unless specifically exempted. (See *SEC v. Variable*

Annuity Life Ins. Co., 359 U.S. 65 (1959); Prudential Ins. Co. of America v. SEC, 326 F.2d 383, cert. denied 377 U.S. 953 (1964); Sec. 3(8), Securities Act of 1933; Rule 3(c)-3, Investment Company Act of 1940; Rule 156, Securities Act of 1933.)

Insurance policies and annuities are governed by the same principles of law as govern contracts generally; they may consist of several interrelated or interdependent documents connected or incorporated by reference; and they must be liberally construed in favor of the insured or annuitant, and consistently with legislative intent and purpose to protect and safeguard their interests. (See *In re Cohen's Estate*, 23 Ill.App.2d 411, 163 N.E.2d 533 (1960); *Pioneer Life Ins. Co. v. Alliance Life Ins. Co.*, 374 Ill. 576, 30 N.E.2d 66 (1941); *Schmidt v. Equit. Life Assur. Soc. of U.S.*, 376 Ill. 183, 33 N.E.2d 485, 136 A.L.R. 1036 (1941); *Appleman*, *ibid.*, Vol. 19, § 10321 et seq.)

We fully appreciate the seriousness of the regulatory problem, particularly as respects variable annuities, which are subject to the regulatory jurisdictions of the Securities and Exchange Commission, the state insurance departments, the state securities commissions (operating under blue sky laws), and the Internal Revenue Service. We therefore understand the continuing and persistent efforts properly made by insurers to so design and market their products, inclusive of annuities, so as to avoid, or at least minimize, their difficulties, as caused by the limiting or restrictive requirements on the part of regulatory agencies deemed necessary and imposed for proper safeguard and protection of the public interest.

FIAC's Investment Annuity Contract, viewed in such light, is concededly an ingenious or unique product design, substantially intended to cope with and resolve the regulatory problem, as respects both the SEC and the state insurance departments. Apparently said contract has already gained approval in a number of states. Most notable among such approving states, and mainly relied upon FIAC for Nevada approval, are Pennsylvania (FICA's domiciliary state, 1963), Illinois (1967), and New York (1968). A "no action" SEC letter (March 21, 1966), relative to the Investment Annuity Contract, has also been submitted in support of the present approval request to your office. Our inquiry and survey indicates that at least ten other states have also given their approval, either on the basis of the favorable action taken by the three named states and the SEC "no action" letter, or routinely on the basis that said contract, at the least, is not in conflict with their laws, regulations, standards, or principles, as applicable thereto.

We shall hereafter advert to the approval of the Investment Annuity Contract on the part of the aforementioned three states and the SEC "no action" letter for additional comment. Presently, it must suffice to note that involved were differences in applicable statutory provisions or regulations, inclusive of the construction or interpretations made thereof. Consequently, such approvals are not necessarily controlling herein, since Nevada regulatory statutes, as applicable to the Investment Annuity Contract format, alone are properly involved and determinative.

In addition to the observations already noted, our contrary opinions and conclusions may be summarized, based on the following considerations:

1. That the effectiveness of the Investment Annuity Contract, for its intended purpose, assumes and requires all of its operational provisions, and associated interdependent agreements, legally constituting an inseparable and entire contract. This specific conclusion is based upon the following: The relationship of and the references to the associated agreements contained in each of them; the "irrevocable" application and commitment of the custodian account assets to payment of prescribed premiums to FIAC; FIAC-reserved power of approval and for dismissal of the custodian; reserved but exercisable FIAC power over both the annuitant and custodian to regulate and restrict or control investments; reserved right of FICA to exact and receive from the custodian scheduled reports concerning the status and results of investments made, and valuation status of the annuitant's account assets, among others.

2. That, under the principle and doctrine of "mutuality of obligations" in contract law, or in legal substance, the lifetime commitment and obligation of the purchasing annuitants assumes, and actually is intended to be exchanged for, FIAC's corresponding obligation to pay annuity benefits for the annuitant's lifetime, or years-certain period (optionally chosen by the annuitant), and not only and merely in exchange for the 12 consecutive, equal monthly benefit installments solely provided for in the 1-year term annuity. For it is to be noted that such 1-year term annuity contract is one "renewing annually for life or a period of certain," irrevocably requiring lifetime payment of prescribed premiums to FICA, and also committing (beyond annual premiums for only 1 year!) the entire custodian account assets for funding of the annuity benefit payments for which FIAC has substantively and legally actually obligated itself—not necessarily limited to 1 year, or 12 equal monthly installments only, but presumptively and generally extending beyond, or exceeding merely the 1-year term or period.

3. That the Nevada regulatory and statutory provisions (hereinabove cited) are clear and legally sufficient to encompass the Investment Annuity Contract as a "variable annuity," subject to all the regulatory requirements applicable to such type of annuity.

4. That it is legislative intent and purpose, as embodied in the cited statutory provisions, that the insurer shall design the format of his "variable annuity" product so that it will conform to and comply with statutory requirements; not that applicable statutory provisions shall be so interpreted and departed from as to accommodate and promote the insurer's interests, especially if in doing so prejudice will, or may, result to purchasing annuitants.

5. That, as respects affording to a purchasing annuitant any substantial control over the investment of his custodian account assets, there is involved, policy-wise, a questionable and serious regressive operational method and probable consequences of the kind which led to and resulted in the establishment of SEC jurisdiction over investment activity, inclusive of "variable annuities."

It must be remembered that a prime motive for establishment of SEC regulatory jurisdiction was the protection of the unsophisticated buyer. Of course, a reasonable argument has consistently been made that, while valid insofar as individual variable annuities may be concerned, group contract holders are to be considered and recognized as sophisticated buyers, presumptively on equal ground with the insurer.

Parenthetically, it was on the basis of such equivalent expertise on the part of both group contract holders and the insurers, that SEC presumably responded to the Prudential decision, *supra*, by issuance of ruling exempting from its jurisdiction certain group annuities meeting specified requirements. And it was the existence of these rulings at the time, which completely explains the "no action" letter, dated March 21, 1966, which FIAC received from the SEC relative to the Investment Annuity Contract. (See, Investment Company Act of 1940, 1963 Rule 3(c)-3; Securities Act of 1933, 1963 Rule 156; and exemptions presently additionally available for plans under the Keogh Act (HR 10), as commented upon in this particular connection at page 24 of Paul a. Campbell's "The Variable Annuity.")

At this point, brief comment is in order concerning certain substantial differences in the correspondingly-applicable laws of Pennsylvania, Illinois, and New York relative to the Investment Annuity Contract, as compared with applicable Nevada law, hereinabove set forth. (See Pennsylvania Insurance Laws, § 406.2(g); Illinois Insurance Code, 857.51 § 245.51 and Rule 14 1/2.2; and New York Insurance Law, §§ 46 and 227-a.)

As pertinent hereto, the Illinois statute more broadly and comprehensively authorizes multi-agreement establishment and administration or management of separate annuity accounts than does Nevada law. On the other hand, Pennsylvania law strictly prohibits insurance companies from engaging in the security investment business, and "variable" annuities are statutorily defined as "securities." Significantly, Pennsylvania law does not provide any definition of an annuity, while New York law similarly fails to define a "variable" annuity. Such is not the case as respects Nevada law.

Additionally, based upon contract provision and/or opinion and conclusion that the annuitant alone controls investment of his custodian account assets; that the insurer (FIAC) has nothing to do with said custodian account other than to receive therefrom periodic, prescribed premium payments applicable to annuitant's 1-year term annuity contract; that the Investment Annuity Contract is properly and effectively, legally separable and divorce from the custodian agreement, or not interdependent therewith; and that, from the standpoint of the insurer, there is essentially and merely involved the payment of determinably-prescribed premiums in fixed amount exchanged for agreed payment of only 12 consecutive, equal monthly benefit installments at any time under the 1-year term annuity contract (even though "renewing annually for life or period certain") in a fixed amount as determined by the amount of premium paid; therefore, the Investment Annuity Contract could properly be considered and regulated as a "fixed," rather than a "variable" annuity.

Each state, of course, is entitled to interpret and exercise its regulatory authority and powers as it deems proper under its own laws, and we do not presume to question such right. However, it may not be entirely improper or out of order on our part respectfully to suggest that such interpretations, or opinions, determinations and conclusions as above indicated may possibly be too narrowly conceptualistic in the involved fact pattern, as we believe our analysis herein has shown. At the very least, it can certainly be concluded that approval of the Investment Annuity Contract on the basis of such stated reasons manifests principal concern for the insurer, rather than the insured or the annuitant, as we submit it is general legislative intent and purpose to achieve through enactment of regulatory statutes of the kind here applicable.

Finally, possible comment on other miscellaneous items or details noted by us as open to some question, relative to the Investment Annuity Contract, is dispensed with, as relatively unimportant and unnecessary, in light of our stated opinion and conclusion on the involved principal issues.

CONCLUSION

It our considered opinion and advice that the Investment Annuity Contract formats, both individual and group, which have been submitted for your review and approval, substantially and legally constitute an entire and variable annuity contract subject to and governed by all regulatory requirements applicable to such type of annuity under present Nevada law.

Respectfully submitted,

Harvey Dickerson, Attorney General
By John A. Porter, Deputy Attorney General

OPINION NO. 1970-659 County Hospitals—Counties having no publ...
OPINION NO. 1970-659 County Hospitals—Counties having no public hospitals, and depending on the public hospital of another county, are responsible to the servicing county for indigent patients treated, and for injured, maimed, or ill from the transmitting county. Moneys due from affluent patients and uncollectible are debts of transmitting county.

Carson City, April 20, 1970

The Honorable Mario L. Ventura, District Attorney of Esmeralda County, Post Office Box 527, Goldfield, Nevada 89013

Dear Mr. Ventura:

You have posed to this office three questions involving an interpretation of Chapter 450 of Nevada Revised Statutes. The questions are as follows:

QUESTIONS

1. Does one county have any liability to another county for medical services rendered by a public hospital in the second county for an "affluent" resident of the first county or an "affluent" non-resident of the first county who falls sick or is injured in the first county?
2. If the answer to Question No. 1 is yes, is that liability primary and immediate or must the servicing county make any and all attempts to collect from the "affluent" before billing the county of residency, illness or injury?
3. Did or does NRS 450.420 (amended 1969) grant to the board of trustees of a treating hospital an irrebuttable power to determine the status of indigency when the injured or sick person was a resident of another county or state?

ANALYSIS

In order to approach the problem in a rational manner we shall answer the questions in the order in which they appear in your inquiry.

In answer to Question No. 1 we set forth the sections of our statutes which we deem helpful in arriving at a solution. NRS 450.390.1 reads as follows:

1. Every county hospital in this state being supported by public funds, and every hospital established under this chapter, shall be for the benefit of such county or counties and of any person falling sick or being

injured or maimed within its limits, but the governing head may extend the privileges and use of such hospital to persons residing outside of such county or counties upon such terms and conditions as the governing head may, from time to time by its rules and regulations, prescribe.

Thus it can be determined that where a county does not have a public hospital, the privileges of a hospital in an adjoining county may be extended to it upon such terms and conditions as may be equitably arrived at.

NRS 450.420, as amended, reads as follows:

1. The board of county commissioners of the county in which a public hospital is located shall have power to determine whether or not patients presented to the public hospital for treatment are subjects of charity. The board of county commissioners shall establish by ordinance criteria and procedures to be used in the determination of patient eligibility for medical care as medical indigents or subjects of charity.

2. The board of hospital trustees shall fix the charges for occupancy, nursing, card, medicine and attendance, other than medical or surgical attendance, of those persons able to pay for the same, as the board may deem just and proper. The receipts therefor shall be paid to the county treasurer and credited by him to the hospital fund. In fixing charges pursuant to this subsection the board of trustees shall not include, or seek to recover from paying patients, any portion of the expense of the hospital which is properly attributable to the care of indigent patients.

3. The county is chargeable with the entire cost of services rendered by the hospital and any attending staff physician or surgeon to any person admitted for emergency treatment, but the hospital and any such attending physician or surgeon shall use reasonable diligence to collect such charges from the emergency patient or any other person responsible for his support. Any amount so collected shall be reimbursed or credited to the county.

It can thus be determined from section 2 of the above act that if it is determined that the patient is able to meet hospital expenses, payment for treatment can be secured from him, and the duty is imposed on the hospital and the physicians and surgeons to use reasonable diligence to collect such charges.

If reasonable effort is made to collect from the treated patient, and the sums due cannot be collected, the burden fall on the county of origin, and if uncollectible, it must pay the servicing county the sums due.

CONCLUSION

Question No. 1 is answered in the affirmative for the sums due and uncollectible.

Question No. 2 is answered by following the precepts establishing liability under Question No. 1.

Question No. 3, based on the statute as set forth in our analysis, is affirmative.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-660 Railroads—The matter of abandonment of r...

OPINION NO. 1970-660 Railroads—The matter of abandonment of railroad facilities used in interstate and intrastate commerce is within the exclusive jurisdiction of the Interstate Commerce Commission to the exclusion of the Public Service Commission.

Carson City, April 20, 1970

Mr. Reese H. Taylor, Jr., Chairman, Public Service Commission, Carson City, Nevada 89701

Dear Mr. Taylor:

statement of facts

The Southern Pacific Transportation Company has applied to the Interstate Commerce Commission for authority to abandon a portion of its main line located in Washoe and Lyon counties, Nevada. (See Finance Docket No. 26,022 before the Interstate Commerce Commission.) The section of main line sought to be abandoned extends from mile post 275.856 at Fernley, Nevada to mile post 336.503 at Flanigan, Nevada, a distance of approximately 60 miles. The Southern Pacific Transportation Company has not applied to the Public Service Commission of Nevada for authority to abandon the subject portion of its main line. The failure of the company to apply to the Public Service Commission raises the question of whether or not the Commission can aggressively assert jurisdiction over the proposed abandonment and compel the company to seek permission from the Commission for the proposed abandonment pursuant to NRS 704.390, which reads:

1. It shall be unlawful for any public utility to discontinue, modify or restrict service to any city, town, municipality, community or territory theretofore serviced by it, except upon 30 days' notice filed with the commission, specifying in detail the character and nature of the discontinuance or restriction of the service intended, and upon order of the commission, made after hearing, permitting such discontinuance, modification or restriction of service.

2. The commission in its discretion and after investigation, may dispense with the hearing on the application for discontinuance, modification or restriction of service, if, upon the expiration of the time fixed in the notice thereof, no protest against the granting of the application has been filed by or on behalf of any interested person.

QUESTION

Do the provisions of NRS 704.390 apply to the proposed abandonment as discussed above or has the Congress of the United States, by enactment of the Interstate Commerce Act, 49 USCA § 1, preempted the field to the exclusion of the State of Nevada?

ANALYSIS

If the State of Nevada, through the Public Service Commission, has jurisdiction regarding the proposed abandonment, it must be found in NRS 704.390. To test the applicability of that statute under this given set of facts we must view it in conjunction with section 1(18) and 1(20) of the Interstate Commerce Act, 49 USCA, as interpreted by the courts of this land. Those two sections of the act read:

Section 1(18):

After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *

Section 1(20):

The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than

such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. * * *

We are fortunate at this time to have several expression of judicial rationale announcing the thoughts of the courts relating to the jurisdiction of state regulating agencies in the matter in which we are here concerned.

An often cited case is *Colorado v. United State*, 271 U.S. 153, 70 L.Ed. 878 (1926). In this case suit was brought by the State of Colorado against the United States to enjoin and set aside an order issued by the Interstate Commerce Commission. The order was a certificate stating that present and future public convenience and necessity justified the abandonment by the Colorado and Southern Railroad Company of a branch line located wholly within that state. The certificate was issued pursuant to the above-quoted sections of the Interstate Commerce Act.

Mr. Justice Brandeis, in the course of the opinion, stated that the company operated in both interstate and intrastate commerce, partly in the State of Colorado and partly in other states. The section of line which was authorized to be abandoned was physically detached from the other lines of the company. However, it was interconnected with other lines and was in fact used and operated in both interstate and intrastate commerce.

The primary contention of the State of Colorado was that the Commission lacked power to authorize the company to abandon the line as respects intrastate traffic. The court set aside this argument on the grounds that section 1(18) and section 1(20) of the Interstate Commerce Act are designed to protect interstate commerce from undue burdens, and intrastate commerce may constitute an undue burden upon interstate commerce.

The court went on to state:

The exercise of federal power in authorizing abandonment is not an invasion of field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission v. Eastern Texas R.R. Co.*, 264 U.S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York v. United States*, 257 U.S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

This case has been relied upon on many occasions by the Supreme Court of the United States and other courts in many subsequent opinions as standing for the proposition that the Interstate Commerce Commission has authority to authorize the abandonment of railroad facilities which operate both interstate and intrastate.

The court pointed out, however, that there was, and is, an instance where the Interstate Commerce Commission should not assume jurisdiction. The court cited *Texas v. Eastern Texas R.R. Co.*, 258 U.S. 204, 66 L.Ed. 566 (1922). This case, just four years before the Colorado decision, held that the Interstate Commerce Commission did not have jurisdiction over the discontinuance of the purely intrastate business of a railroad whose situation and ownership are such that interstate and foreign commerce are not affected by the railroad's business. This is not the case, however, with respect to the lines sought to be abandoned in Washoe and Lyon counties, Nevada, for that line is interconnected with Southern Pacific Transportation Company's other facilities which clearly are used for interstate commerce.

In *Transit Commission v. United States*, 284 U.S. 360, 76 L.Ed. 342 (1932), the Supreme Court of the United States determined that the Interstate Commerce Act, section 1(18), authorized the Interstate Commerce Commission to allow the abandonment of an unprofitable branch line by a railway company

which was engaged in interstate commerce notwithstanding the fact that all of the lines of that railway company were situated wholly within one state. The fact that the bulk of the traffic of that company was intrastate likewise did not divest the Interstate Commerce Commission of jurisdiction. The court relied upon *Colorado v. United States*, supra, and specifically interpreted that decision as standing for the proposition that the assertion of jurisdiction by the Interstate Commerce Commission did not constitute an unconstitutional invasion of the state's sovereignty.

In *Yonkers v. United States*, 320 U.S. 685 (1944), Mr. Justice Douglas stated as the first sentence of the opinion:

The Interstate Commerce Act confers upon the Interstate Commerce Commission authority to issue certificates of public convenience and necessity, allowing any carrier subject to the Act to abandon all or any portion of its line of railroad.

Later in the opinion, Justice Douglas stated:

The power of the commission to control the abandonment of intrastate branches of interstate carriers stems from the power of Congress to protect interstate commerce from undue burdens or discriminations. (Cases cited.)

In *Purcell v. United States*, 315 U.S. 381 (1942), Mr. Justice Black held that it was not error for the Interstate Commerce Commission to authorize the discontinuance and abandonment of a railroad line approximately 20 miles long. In reviewing the action of the Commission, the court observed that the line did not constitute an unreasonable burden upon interstate commerce, but that due to a flood control project the line, as constructed, would soon be submerged. The Interstate Commerce Commission specifically found that the cost of rerouting the line would not be justified and therefore should be abandoned. The jurisdiction of the Interstate Commerce Commission in this matter was sustained.

In *Southern Railway v. South Carolina Public Service Commission*, 31 F.Supp. 707, at page 715 (1940), the court stated:

This court recognizes the important problems confronting the railroads as the result of changing conditions of transportation. Undoubtedly, unprofitable service must be curtailed if the great railway systems are to be preserved and the country is to be secured in the enjoyment of the transportational facilities which they afford. The problem is complicated by reason of the fact that lines of railroad made use of by railway systems are chartered by the several states and are subject to state regulations with respect to local operations, and that considerations of local pride and convenience are not infrequently allowed to outweigh, in the minds of local authorities, the interests of economical and efficient administration. The problem presented, however, is primarily one for Congress and not for the courts. As an aid in its solution, Congress has conferred upon the Interstate Commerce Commission authority to authorize the discontinuance of any line or part of a line of railroad, notwithstanding charter provisions or local laws requiring operation.

In *Gross v. Missouri & Arkansas Railway*, 74 F.Supp. 242 (U.S.D.C.W.D. Ark.), the court stated and quoted from other cases:

The law is well settled that under the Interstate Commerce Act, as amended or supplemented by the Transportation Act of 1920, 49 U.S.C.A. § 1 et seq., the Interstate Commerce Commission has power to authorize or require the abandonment of all or a portion of a line of railroad theretofore used in interstate commerce.

Other cases which would support the conclusion reached in the above-cited cases are: *Interstate Commerce Commission v. Railway Labor Association*, 315 U.S. 373 (1942); *Thompson v. Texas Mexican Ry.*, 328 U.S. 134; *Central New England Ry. v. Boston & Albany R.R.*, Assignor, 279 U.S. 415 (1929); *Western Pacific R.R. v. Nevada-California-Oregon Ry.*, 40 F.2d 731; *Gulf, Mobile & Ohio R.R. v. United States*, 28 F.Supp. 749; *In re Long Island R.R.*, 92 F.Supp. 85.

From the above, it is our considered opinion that the discontinuance of the Southern Pacific Transportation Company's line situated in Washoe and Lyon counties, Nevada is a matter solely within the

jurisdiction of the Interstate Commerce Commission to the exclusion of any authority possessed by the Public Service Commission of Nevada.

This conclusion is in no way intended to be interpreted as meaning NRS 704.390 is unconstitutional. Its provisions merely do not apply in this case due to preemption of the field by the United States Congress. Likewise, we do not intend to infer that in any other area the jurisdiction of the Public Service Commission has been restricted.

CONCLUSION

The matter of abandonment of railroad facilities used in interstate and intrastate commerce is within the exclusive jurisdiction of the Interstate Commerce Commission to the exclusion of the Public Service Commission.

Respectfully submitted,

Harvey Dickerson, Attorney General
By John J. Sheehan, Deputy Attorney General

OPINION NO. 1970-661 Irrigation Districts—For purposes of irr...

OPINION NO. 1970-661 Irrigation Districts—For purposes of irrigation district general elections, foreign corporate landholder is resident of and qualifies for district office from that division of the district in which the major portion of its lands is located.

Carson City, April 23, 1970

Mr. LeRoy Arrascada, Pershing County Water Conservation District, P.O. Box 425, Reno, Nevada 89501

Dear Mr. Arrascada:

You have asked for an opinion regarding the status of foreign corporate landholders in general elections held by districts formed under the provisions of Chapter 539 of the Nevada Revised Statutes (Nevada Irrigation District Act).

statement of facts

The Pershing County Water Conservation District includes lands owned by a foreign corporation. The foreign corporation in question owns at least 5 acres of land in three separate divisions of the Pershing County Water Conservation District, although the major portion of its lands is in one particular division. It further appears that the foreign corporation maintains a resident agent in a division of the district in which it also owns land, but the corporate ownership in that division is less than 5 acres. The foreign corporation is now seeking to elect its president as a director, from a division in which the major portion of its lands is not located.

QUESTIONS

The aforementioned facts have caused you to ask the following questions:

1. Does a foreign corporate landholder voted in that division or the Pershing County Water Conservation District where its principal land holdings are located, or does it vote in the division where it maintains its resident agent?
2. Can the president of a foreign corporate landholder hold office as a director of the Pershing County Water Conservation District from a division where the foreign corporation owns 5 acres of land, although the major portion of its lands is in another division of the district?

ANALYSIS

NRS 539.123 establishes voting qualifications for general elections of districts such as the Pershing County Water Conservation District. It provides, in pertinent part:

1. Any person, male or female, of the age of 21 years or over, whether a resident of the district or not, who is or has declared his intention to become a citizen of the United States is an "elector" for the purposes of this chapter and is entitled to one vote at any election held under the provisions of this chapter, except an election governed by NRS 539.553, if the following conditions as to ownership of land are met:

(a) The elector shall be the bona fide holder of title or evidence of title, as defined in NRS 539.020 and 539.023, to land within the district or have a contract right to acquire title to land within the district upon payment of a fixed sum to the record titleholder.

(b) The acreage of such land must be 5 acres or more. * * *

2. Any elector residing outside of the district owning at least 5 acres of land in the district, and qualified to vote at district elections, shall be considered as a resident of that division and precinct of the district in which the major portion of his lands are located, for the purpose of determining his place of voting and qualifications for holding office.

3. Any elector residing within the district boundaries shall be deemed a resident of the division in which he actually resides, for the purpose of determining his qualification for voting and holding office.

* * * * *

5. Corporations holding land in the district shall be considered as persons entitled to exercise all the rights of natural persons, and the president of the corporation, or other person duly authorized by the president of the corporation, or other person duly authorized by the president or vice president, in writing, may sign any petition authorized by this chapter, and register and cast the vote of the corporation at any election.

Divisions of irrigation districts may be determined by the original petition seeking to organize a district (NRS 539.025) and are designated by the original order of the county commissioners required by NRS 539.043, which provides:

Upon the completion of the hearing, the board of county commissioners shall forthwith make an order denying or granting the prayer of the petition, and if the same is granted shall, in the order, define and establish the boundaries and designate the name of such proposed district and divide the same into three, five or seven divisions, as prescribed in the petition, as nearly equal in size as may be practicable. (*Italics added.*)

NRS 539.045, subsection 2, provides that after the county commissioners make an order granting the prayer of a petition to organize a district as required by NRS 539.043, an election will be held at which

One director shall be elected from each division by the qualified electors of the district and shall be a qualified elector of the district and holder of title, or evidence of title as prescribed in NRS 539.020 and 539.023, to land within the division from which he is elected. (*Italics added.*)

The statutory mandate of having one director from each division of the district is then carried on by the provisions of NRS 539.065, which requires that directors elected at regular biennial elections subsequent to the original organizational election, "shall have the qualifications prescribed in this chapter for directors elected at the time of organization" and by NRS 539.070, subsection 1, which states:

Any vacancy in the office of director shall be filled from the division in which the vacancy occurs by the remaining members of the board.

From the above, it is clear that a director can only represent a division if he is holder of title to land within that division. He must also be a qualified elector of the district.

NRS 539.123, subsection 5, permits corporations holding land in the district to be considered as persons "entitled to exercise all the rights of natural persons." The president of the corporation or his duly authorized representative exercises these rights. NRS 539.123, subsection 5, therefore allows corporations to be qualified electors as though they were natural persons, if they otherwise qualify as electors. The corporation is also subject to the limitations of natural persons.

The foreign corporation in your example, if treated as a natural person, is not a resident of the district and is not governed by NRS 539.123, subsection 3. True enough, it may maintain a resident agent within the district, but as a foreign corporation its purpose in having a resident agent and qualifying under the provisions of Chapter 80 of Nevada Revised Statutes is to provide an appropriate representative for the service of process on the corporation (NRS 14.020 and 80.080), as well as to permit the foreign corporation to do business in Nevada and to have access to the courts of this State (NRS 80.210, 80.090, NRCP 17(b)). In our opinion, the existence of a resident agent within the district does not make the foreign corporation a resident of the district. While corporations can only act through agents, a resident agent of a foreign corporation had been appointed for limited purposes. His appointment does not make the foreign corporation a Nevada corporation. It remains a foreign corporation whose agent happens to be within the district and whose agency has been created for purposes unrelated to the district or the division within the district. The foreign corporation appears, instead, to be governed by NRS 539.123, subsection 2, as an elector residing outside the district owning at least 5 acres of land in the district. It resides elsewhere. It is "foreign."

The foreign corporation, therefore, must be considered to be a resident of the division of the district in which the major portions of its lands are located. If the foreign corporation is to be an elected or appointed director of the district (acting by or through its president or other duly authorized person), it must represent the division where it is considered to be a resident. (NRS 539.045, subsection 2.)

CONCLUSION

Your questions are therefore answered as follows:

1. A foreign corporate landholder must vote in the division of the irrigation district where its principal landholdings are located, and not in the division where it maintains a resident agent.
2. The president of a foreign corporate landholder cannot hold office as a director of the irrigation district from any division but the one in which the major portion of the foreign corporation's land is located.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Michael L. Melner, Deputy Attorney General

OPINION NO. 1970-662 Taxation; Sales Tax—Sales tax cannot be ...

OPINION NO. 1970-662 Taxation; Sales Tax—Sales tax cannot be imposed on a designated percentage of the sales price of food and beverages withheld by management to cover tips and gratuities to personnel, no part of which inures to the benefit of the seller.

Carson City, April 27, 1970

The Honorable Keith Ashworth, Member of the Assembly, P.O. Box 14066, Las Vegas, Nevada 89114

Dear Mr. Ashworth:

You and other hotel personnel have pointed out that the Tax Commission of Nevada indicates that assessments made by a seller of meals to cover tips or gratuities to waiters or waitresses, and added to the guests' checks, are a part of the sales price and are to be included in the sales price subject to sales tax.

ANALYSIS

Under a collective bargaining agreement entered into between the hotels and the union, it was agreed under section 17.02 that it is obligatory on the employer to pay to waiters, waitresses, busboys and girls, captains, hostesses, and banquet and catering managers a 15 percent service charge in addition to designated wages, at all banquets and cocktail parties.

Section 17.05 of the agreement provides that all gratuities, whether for banquets or otherwise, do not belong to the employer and are not a part of the basic wage established by the agreement.

Further sections of the agreement provide that at special events where meals and beverages are served, and where the required words "gratuity included" are placed on the menu or beverage checks, tickets or coupons, the 15 percent assessment shall be made for meeting tips and gratuities.

As further indication that the employers have no possessory interest in the 15 percent assessment for tips and gratuities, section 5.02 of the agreement provides that all tips left by customers, on occasions other than those where the 15 percent assessment is mandatory, belong to the employees exclusively.

NRS 372.060.2(c) defines the furnishings, preparing, and serving for a consideration of food, meals, and drink as a sale. NRS 372.065.1(b) defines the cost of materials used, labor or service cost, interest charged, losses, or any other expenses, as a "sales price."

The indication is clear that only those expenses incurred by the seller in arriving at a sales price, and which inure to his benefit, are taxable. In other words, as explained by NRS 372.105, the tax is imposed on the gross receipts.

Another indication that the 15 percent assessment for tips and gratuities is not a part of the gross sales is that no sales tax is collected on tips and gratuities left at the table by patrons of food and drink establishments.

In support of the position that "gross receipts" embraces only such receipts as are the property of the seller, the court in *City of Los Angeles v. Clinton Merchandising Corp.*, 375 P.2d 851, held that a license tax imposed upon the gross receipts of the taxpayer included only those sums received for the use and benefit of the taxpayer, but excluded those receipts held for the account of another.

In *State v. Coshocton Gas Co.*, 22 Ohio Dec. 412, the court held that "gross receipts" as used in a statute dealing with excise taxes embraces only such receipts as are the property of the taxpayer. See also *Anders v. State Board of Equalization*, 185 P.2d 883, where the gist of the court's opinion was that gratuities received by employees who perform services incident to the sale of food and beverages by a retailer are includable in the gross receipts of the retailer only to the extent that the gratuities become the property of the retailer. It should be mentioned that the definition of "gross receipts" as used in the California statutes does not differ in any material respect from Nevada's statutory definition.

In the Florida case of *Green v. Surf Club, Inc.*, 136 So.2d 354 (1961), the court, in ruling on a situation where the employer collected a fixed percentage of the sales price for food and beverages to be remitted monthly to the employees in lieu of tips or gratuities, stated:

There may be a situation wherein the collection of a fixed service charge is taxable, such as where the assessment and collection thereof has no relationship to the sums received by the personnel, but is retained by the employer as a portion of the gross proceeds on the sale of food and beverage. The determinative question in each instance should be whether or not the "dealer" receives a benefit from the involuntary charge. If he does, he should be taxed. If he does not, no tax should be levied.

The court found that the Surf Club was no more than an instrumentality or a conduit for the collection of gratuities or tips for its waiters or service personnel, and ruled that the service charge should not be included in the measure of sales tax liability.

The hotels party to the agreement with the union have invested millions of dollars in Nevada's economy. Their tax burden under ordinary circumstances is high. Where there is any doubt as to their tax liability under a statute, the doubt, under the doctrine of *State v. Tonopah Extension Mining Co.*, 49 Nev. 428, should be resolved in their favor.

CONCLUSION

It is therefore the opinion of this office that the sales tax established by statute cannot be imposed on a designated percentage of the sales price of food and beverages withheld by management to cover tips and gratuities to personnel, no part of which inures to the benefit of the seller.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-663 Meat Inspection Act—Retail meat dealers ...
OPINION NO. 1970-663 Meat Inspection Act—Retail meat dealers may conduct processing operations traditionally and usually conducted at the retail level without being subject to Nevada's Meat Inspection Act. Any exemption from the act shall apply only to that meat sold in the dealer's individual retail store directly to consumers. The Board of Health is authorized to adopt separate regulations for labeling and sanitation of meat processed in such retail stores.

Carson City, May 12, 1970

Mr. Webster B. Hunter, Commissioner of Food and Drugs, 201 South Fall Street, Carson City, Nevada 89701

Dear Mr. Hunter:

The Legislature in the last session adopted a comprehensive meat inspection law consistent with the mandate of the Federal Wholesome Meat Act, 21 U.S.C., § 601 et seq. The Nevada law, Chapter 546, Statutes of Nevada 1969 (NRS 583.255 to 583.565, inclusive), requires that regulations be adopted by the State Board of Health. (Chapter 564, Statutes of Nevada 1969, § 30 (NRS 583.535).)

In drafting these regulations, you are particularly concerned with the proper interpretation of section 28 (1)(b)(1) (NRS 583.515(1)(b)(1)):

The state board of health shall, by regulations and under such conditions as to labeling and sanitary standards, practices and procedures as it may prescribe, exempt from specific provisions of sections 2 to 33, inclusive, of this act: (NRS 583.255 to 583.565, inclusive)

* * * * *

- (b) Retail dealers with respect to:
 - (1) Meat sold directly to consumers in individual retail stores.

* * * * *

QUESTIONS

1. What persons should be exempted as "retail dealers with respect to meat sold directly to consumers in individual retail stores?"
2. What should be the scope of any exemption?

ANALYSIS

i

In order to arrive at a determination of that type of sale contemplated by section 28 (1) (b)(1) (NRS 583.515(1)(b)(1)), all of the statutory limitations on retail dealers must be explored.

“Retail dealer” is commonly construed as one who sells to the ultimate user. However, this definition was expanded somewhat in the law existing immediately prior to the passage of the Federal Wholesome Meat Act:

A “retail dealer” means any persons, partnership, association, or corporation chiefly engaged in selling meat or meat food products to consumers only except that the Secretary of Agriculture, at his discretion, may permit any retail dealer to transport in interstate trade or foreign commerce to consumers and meat retailers in any 1 week not more than five carcasses of cattle, 25 carcasses of calves, 20 carcasses of swine, 20 carcasses of goats, or 25 carcasses of goat kids, or the equivalent of fresh meat therefrom, and to transport in interstate or foreign commerce to consumers only meat and meat food products which have been salted, cured, canned, or prepared as sausage, lard, or other meat food products which have not been inspected, examined, and marked as “Inspected and Passed” in accordance with the terms of the Meat Inspection Act of March 4, 1907, and acts supplemental thereto, and with the rules and regulations prescribed by the Secretary of Agriculture.

In the Wholesome Meat Act, the authority of the secretary to issue retail exemption certificates was deleted and instead the following provision was passed:

The provisions of this chapter (Meat Inspection) requiring inspection of the slaughter of animals and the preparation of carcasses, part thereof, meat and meat food products shall not apply to operations of types traditionally and usually conducted at retail stores and restaurants, when conducted at any retail store or restaurant or similar retail-type establishment for sale in normal retail quantities or service of such articles to consumers at such establishments. * * *(21 USCA § 661(c)(2).)

Recognizing the broad possible definition of “retail dealer” the Nevada Legislature more fully limited the type of exempted sale. While a retail dealer might engage in wholesale sales, too, or in sales on a delivery basis, or in sales which might be considered too large in volume to fit the usual definition of a retail sale, such activities are not within the exemption. That exemption only applies to that meat which is sold directly to consumers in individual retail stores. Certain dealers might be exempt for some purposes, i.e. direct consumer sales within a retail store, and yet be required to fully comply with the Nevada act for all other sales. Since the exemption is designed to allow an individual retail store to conduct processing operations traditionally done on the retail level, no exemption may be granted to a processing plant simply because the meat being processed is destined for ultimate retail sale.

Our Legislature has declared that it is the policy of this State to provide for the inspection of meat to assure that such food supplies are unadulterated and otherwise fit for human consumption properly labeled. (Chapter 546, Statutes of Nevada 1969, § 20 (NRS 583.435).)

Because this act is designed to protect the health of the citizens, those sections authorizing exemptions should be strictly construed to assure high quality and healthful meat products to the consumers of this State.

It is therefore the opinion of this office that any person or firm dealing in meat or meat products must fully comply with the Nevada act unless all of the conditions specified in section 28(1)(b)(1) (NRS 583.515(1)(b)(1)) are met, and when such person or firm qualifies as an exempted retail dealer, the exemption applies only to the meat involved in such approved retail sales.

ii.

While certain meat may be exempt from the full application of the Nevada act, the Board of Health, pursuant to section 28(1)(b)(1) (NRS 583.515(1)(b)(1)), shall establish separate requirements for the labeling and control of sanitary standards.

It should be noted that no exemptions apply to NRS 583.010 to 583.050, inclusive.

These separate statutory provisions apply even to retail dealers exempted under Chapter 546, Statutes of Nevada 1969 (NRS 583.255 to 583.565, inclusive).

CONCLUSION

Retail meat dealers may conduct processing operations traditionally and usually conducted at the retail level without being subject to Nevada's meat inspection act. Any exemption from the act shall apply only to that meat sold in the dealer's individual retail store directly to consumers. The Board of Health is authorized to adopt separate regulations for labeling and sanitation of meat processed in such retail stores.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Robert A. Grayson, Deputy Attorney General

OPINION NO. 1970-664 General Improvement Districts—Television...

OPINION NO. 1970-664 General Improvement Districts—Television Districts—Two of the trustees of a television maintenance district should be elected at the 1970 general election. Three trustees should be appointed by the county commissioners to hold office until December 31, 1972. Three trustees should be elected at the general election of 1972. Thereafter the full membership of the board should be filled by election.

Carson City, May 12, 1970

The Honorable James L. Wadsworth, District Attorney, Lincoln County, Post Office Box 446, Pioche, Nevada 89043

Dear Mr. Wadsworth:

You have directed to this office an inquiry as to the procedure to be followed in the choice of trustees of a television district.

ANALYSIS

Section 74 of Chapter 542 of the 1967 Statutes of Nevada repealed Chapter 317 of NRS. Thereafter trustees were to be elected under Chapter 318 of NRS governing General Improvement Districts.

NRS 318.095, as amended by Chapter 58 of the 1969 Statutes, reads as follows:

1. There shall be held in conjunction with the first general election in the county after the creation of the district and in conjunction with every general election thereafter an election to be known as the biennial election of the district.
2. At the first biennial election in any district organized or reorganized and operating under this chapter, and each fourth year thereafter, there shall be elected by the qualified electors of the district two taxpaying electors as members of the board to serve for terms of 4 years; at the second biennial election and each fourth year thereafter, there shall be so elected three taxpaying electors as member of the board to serve for terms of 4 years.
3. No later than 60 days before any such election, nominations may be filed with the secretary of the board, who shall, not later than 30 days before any such election, certify such nominations to the county clerk of each county in which the district is located. If a nominee does not withdraw his name before the secretary certifies the nominations to the county clerk, his name shall be placed on the ballot. Nomination is a prerequisite to election. The secretary of the district shall give notice of election by publication, and shall arrange such other details in connection therewith as the board may direct. The returns of the election shall be certified to and shall be canvassed as provided by the general law concerning elections. The candidates receiving the most votes shall be elected.
4. Any new member of the board shall qualify in the same manner as members of the first board qualify.

It can be determined from the wording of the statute that staggered terms for the five member board were contemplated. At the 1970 election two taxpaying electors shall be elected as members of the board for a period of 4 years. In 1972 three taxpaying electors shall be elected for a period of 4 years. Thus at succeeding biennial elections there will be elected either two or three members, depending on the expiration of their terms.

It would appear from NRS 318.090 that nominations should be made by the trustees or the county commissioners (we suggest the latter) for three trustees to carry over until 1972, when the election of three trustees will fill the board, and thereafter the full board will be elected.

CONCLUSION

It is the opinion of this office that two of the three trustees of a television maintenance district should be elected at the 1970 general election. Three trustees should be appointed by the county commissioners to hold office until December 31, 1972. Three trustees should be elected at the general election of 1972. Thereafter the full membership of the board should be filled by election.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-665 Banks And Banking—NRS 661.110 Construed;...
OPINION NO. 1970-665 Banks And Banking—NRS 661.110 Construed; Limitations on Transfer of Bank Stock Mandatory—Statutory lien may not be waived by acceptance of any other security. Superintendent of Banks may not authorize transfer of shares in derogation of statute.

Carson City, June 8, 1970

Mr. Preston E. Tidvall, Superintendent of Banks, Department of Commerce, Carson City, Nevada 89701

Dear Mr. Tidvall:

You have asked two questions regarding NRS 661.110. These questions are:

QUESTIONS

1. Would a stock transfer be legal if the loan in question is adequately secured without consideration of the value of the bank stock in any manner?
2. Would a stock transfer be deemed legal if properly ratified by the board of directors of the bank and their action concurred in by the Superintendent of Banks?

ANALYSIS

NRS 661.110 provides as follows:

The shares of stock of any incorporate bank shall be deemed personal property, and shall be transferred on the books of the bank in such manner as the bylaws thereof may direct, but no transfer of stock shall be valid against a bank or creditor thereof so long as the registered holder thereof shall be liable, as a principal debtor, surety or otherwise, to the bank for any debt. No stock shall be transferred on the books of any bank where the registered holder thereof is in debt to the bank.

In effect, this statute establishes a statutory lien on behalf of a bank on its own shares for obligations of corporate shareholders to the bank. This lien did not exist at the common law, but it has become a common corporate protective device through bylaw, usage, certificate condition, or statute. 10

Am.Jur.2d Banks, § 55 et seq.; 2 A.L.R.2d 738. Historically, the strongest form of this type lien has been created by statute. Nevada has adopted this strong statutory form.

There is no applicable case law on the extent of the lien in Nevada. The fact that the lien has been created presupposes a public interest in the protection of the corporate assets, as well as the corporate structure of banking corporations. The creation of the lien in NRS 661.110 is in mandatory language, “* * * no transfer of stock shall be valid * * *. No stock shall be transferred. * * *” (Italics added.)

If a stock transfer is to be allowed in disregard of the lien, a right to waive the lien must exist in favor of banking corporations, beyond the strict language of NRS 661.110.

In our opinion, waiver may not be exercised by the bank in light of language of the statute. In re Thornton, 7 F.Supp. 613 (D. Colo. 1934) is a leading case in this area. In allowing the bank's lien to be a first lien in a bankruptcy proceeding, even though the shares had been assigned to the opposing first lien claimant on the bank's books, the court spelled out the public policy argument against waiver:

It must be remembered that banks are the creatures of the state and are affected with a public interest. Provisions of law, such as the one in question, are enacted for the protection of their depositors and other creditors, and cannot be set aside by the courts, except for the most cogent reasons., or waived by the officials of the bank.

The Colorado statute in question was as strict in language as is the Nevada statute:

No sale of the stock of any bank shall be valid as against the bank or any creditor thereof so long as the holder is indebted to the bank, either as principal or surety, on any past due obligations, nor in such case shall any dividend or interest be paid on such shares, but the same shall be retained by the bank and applied to the discharge of such liabilities. (C.L. Colo. § 2695.)

The bank's interests are greater than the limited sphere of a bank's affairs. The public interest in protecting the financial stability of banks overrides a bank's power to waive a statutory lien. See also 2 A.L.R.2d 762, § 10; 10 Am.Jur.2d Banks, § 65.

Prior to the enactment of NRS 661.110 in 1933, the Circuit Court of Appeals for the Ninth Circuit held that a Nevada bank, which by its own bylaws (and not by the stronger lien form created by statute), held a lien on its own shares for debts due it, could not waive its lien by taking other security for a loan to a stockholder. *Wight v. Washoe County Bank*, 251 Fed. 819 (CCA 9, 1918). The court relied on the case of *Union Bank v. Laird*, 2 Wheat. 390, in giving effect to the bylaw's restriction. The “waiver” involved was one of possible corporate negligence so that a public policy consideration of protecting banks and their corporate structures may have been involved though it was not discussed by the court.

While the finding in *National Bank v. Watsontown Bank*, 105 U.S. 217 (1881) allowed a waiver by bank authorities because of acts of its cashier, we believe that its result should not be relied upon in Nevada since the court was interpreting and relying upon a statute which specifically provided for the acceptance of an alternate security for the obligation to the bank. (Pennsylvania, Act Regulating Banks, § 10, Article 10, April 10, 1850.)

CONCLUSION

It is therefore our opinion that both your questions should be answered in the negative. The language of NRS 661.110 is strict. There is no provision for waiver by any method or in any form.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Michael L. Melner, Deputy Attorney General

OPINION NO. 1970-666 County School Districts—Candidates for county school district trustees who receive compensation for their services must pay the statutory filing fee to the county clerk at the time of filing their candidacy.

Carson City, May 18, 1970

Mrs. Grace W. Bell, Clerk of Humboldt County, P.O. Box 352, Winnemucca, Nevada 89445

Dear Mrs. Bell:

You have advised that the school trustees are elected in a school district where the minimum daily attendance of pupils between the ages of 6 and 17 years of age is over 1,000.

These trustees have served without compensation heretofore, but have established a salary schedule as of January 13, 1970, whereby the president of the board is to receive \$40 for each board meeting, not to exceed \$80 per month, and the members of the board are to receive \$35 per meeting, not to exceed for any one board member the sum of \$70 per month. In short, there can only be two board meetings a month where the president and members can be paid. This is in line with NRS 386.320 as amended by Chapter 356 of the 1969 Statutes of Nevada.

You then advise that the terms of four of the trustees expire as of the first Monday in January of 1971, which means they will have to run for election at the 1970 election. Your question is whether they will have to pay a fee to the county clerk for filing for these offices.

ANALYSIS

NRS 293.193.1 reads in part as follows:

Fees as listed in this section for filing declarations of candidacy * * * shall be paid to the filing officer by cash, cashier's check or certified check.

* * * * *

Any district office.....	\$75
Any county office.....	40

* * * * *

Thus, in the case of trustees of a consolidated school district, the filing fee would be \$75, and for a county school district \$40.

Section 2 of NRS 293.193 provides:

No filing fee shall be required from a candidate for an office the holder of which receives no compensation.

CONCLUSION

It is therefore the opinion of this office that candidates for the office of county school district trustee at the 1970 election, in counties where the trustees are on a salary basis, shall pay to the county clerk of the county in which the school district is located a filing fee of \$40.

Respectfully submitted,

Harvey Dickerson, Attorney General

OPINION NO. 1970-667 Taxation; Sales Tax—Exemption from sales...

OPINION NO. 1970-667 Taxation; Sales Tax—Exemption from sales and use taxes granted to motor vehicle fuels by NRS 372.272 and NRS 374.280 applies only if the fuel is of a kind in widespread use in motor vehicles on the highways and is actually used in an internal combustion engine.

Carson City, May 22, 1970

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

Certain petroleum products known as Navy Special fuel oil and Bunker "C" fuel oil are used in Nevada, in external combustion engines, for the purpose of generating steam with which to power turbines used in the generation of electrical power. You have requested a clarification of NRS 372.275, which exempts certain fuels from the sales and use taxes imposed by Chapter 372 of Nevada Revised Statutes (Sales and Use Tax Act). NRS 374.280 provides a similar exemption from the sales and use taxes imposed by Chapter 374 of Nevada Revised Statutes (Local School Support Tax Law).

ANALYSIS

NRS 372.275 reads as follows:

There are exempted from the taxes imposed by this chapter the gross receipts from the sale and distribution of, and the storage, use or other consumption in this state of, any combustible gas, liquid or material of a kind used in an internal or combustion or diesel engine for the generation of power to propel a motor vehicle on the highways.

On the other hand, the wording of NRS 374.280 is as follows:

There are exempted from the taxes imposed by this chapter the gross receipts from the sale and distribution of, and the storage, use or other consumption in a county of, any combustible gas, liquid or material of a kind used in an internal-combustion or diesel engine for the generation of power to propel a motor vehicle on the highways.

This office has previously indicated that it is of the opinion that the words "of a kind," as used in said statutes, means the same class, grade or sort, and that any combustible of a kind used to propel a motor vehicle on the highways is exempt, even though not actually used to propel a motor vehicle on the highways, provided that it is used in an engine of the type specified in the statutes. Attorney General's Opinion No. 53, dated April 29, 1955, as clarified by Attorney General's Opinion No. 61, dated May 16, 1955.

An apparent difference exists between the two above-quoted exemption statutes insofar as the type of engine is concerned. NRS 372.275 refers to "an internal or combustion or diesel engine * * *", whereas NRS 374.280 specifies "an internal-combustion or diesel engine * * *". This difference is one of the very few places where wording differs between the Sales and Use Tax Act and the Local School Support Tax Law. As pointed out in the case of *Mathews v. State ex rel. Tax Commission*, 83 Nev. 266, 428 P.2d 371 (1967), the two taxing laws are almost identical in language. Both laws deal with the same subject matter, that is, taxation of the sale and use of tangible personal property. Likewise, the method of collecting the tax is the same under both laws. Therefore, the question presents itself as to why there is the word "or" between the words "internal" and "combustion" in the one statute, whereas there is a hyphen between said words in the other statute.

NRS 372.275, which uses the word "or," as aforementioned, was enacted by the State Legislature in 1955. It was 12 years later, in 1967, that the Legislature enacted NRS 374.280. It is an accepted rule of statutory construction that where two statutes treat the same subject matter, the more recent one should be accepted as an expression of the will of the Legislature. *Thorpe v. Schooling*, 7 Nev. 15 (1871). Utilizing this rule, it must be said that only fuels used in internal combustion and diesel engines were meant to be exempted from taxation by the statutes.

Lending further support to the conclusion reached by this rule of construction is the fact that the Sales and Use Tax Act was a referendum measure approved by the voters of the State. As a result, the act may not be amended except by direct vote of the people of the State. Nevada Constitution, Art. 19, § 1. Such difficulty in amending the act has resulted in a complete absence of any amendments whatsoever during the entire period that said law has been in effect. It is most likely that the wording "an internal or combustion or diesel engine," as found in NRS 372.275, contains a clerical error in the use of the word "or." Extensive search in engineering literature has failed to discover any mention of an "internal engine." It is most probable that the Legislature intended to say "internal combustion engine" from the very start. When a clerical error is apparent upon the face of a legislative act, the error will be treated so as to carry out the intention of the Legislature. *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30 (1884). The failure to amend NRS 372.275 so as to delete the extra "or" is understandable due to the difficulty of amending a referendum measure.

The particular application of the Navy Special fuel oil and Bunker "C" fuel oil that gave rise to your inquiry is in external combustion engines, therefore, they are not exempted from the sales and use tax by exemption statutes which apply only to fuels used in internal combustion engines (a diesel engine is a type of internal combustion engine). Nevertheless, it seems appropriate to discuss whether said fuels would be exempt if they were used in internal combustion engines. In fact, your letter of inquiry indicates that an experimental type of vehicle which can utilize such fuels already may have been developed.

Whenever any doubt exists as to what was the legislative intent in enacting a statute, the doubt must be resolved in favor of what is reasonable, as against what is unreasonable. *Penrose v. Whitacre*, 61 Nev. 440, 132 P.2d 609 (1942). It is quite likely that an internal combustion engine could be developed or adapted to run on any combustible material that can be found or created. In fact, news items recently have reported the use of peanut butter and rum as fuels for engines. The diesel engine was invented by a man trying to develop an engine that would use coal dust as the fuel. In construing a statute granting a tax exemption to combustible materials used as fuels in the internal combustion engines of motor vehicles, it seems appropriate to say that what is "reasonable" is that which is "ordinary or usual." *Black's Law Dictionary*. Only when the use of a particular combustible as a fuel for motor vehicles on the highways is so widespread that such use is considered ordinary or usual should the exemptions granted by NRS 372.275 and NRS 374.280 be considered applicable. Any other interpretation would violate the universal rule of statutory construction that tax exemption statutes are to be construed strictly against the party claiming an exemption. 51 Am.Jur. Taxation, § 524.

CONCLUSION

The exemption from sales and use taxes that is granted to certain fuels by NRS 372.275 and NRS 374.280 is applicable only if such a fuel:

1. Is of a class, grade or sort that is ordinarily and regularly used in internal combustion engines that propel motor vehicles on the highways, and
2. Is actually used in an internal combustion engine.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Irwin Aarons, Deputy Attorney General

OPINION NO. 1970-668 Schools, Private And Parochial; Constitut...
OPINION NO. 1970-668 Schools, Private And Parochial; Constitutional Law—The Nevada Educational Communications Commission may contract to provide educational television to private and parochial schools, charging the same fee as it does to public schools.

Carson City, June 16, 1970

Mr. John R. Gamble, Chairman, Educational Communications Commission, Department of Education,
Carson City, Nevada 89701

Dear Mr. Gamble:

The Nevada Educational Communications Commission has embarked upon a program of providing instructional television to schools in Nevada. Eleven county school districts are presently being served, on a cost sharing basis of \$1 per kindergarten through 6th grade average daily attendance unit.

The commission desires to provide these services to private and parochial schools by contract, charging the same fee that it charges public school districts.

The commission has pointed out that the private and parochial schools have requested the program and that because of the fees charged, no financial burden is imposed on either the State or public school districts.

The present project with its pertinent financial aspects is essentially as follows: A committee, called the Nevada Instructional Television Network Committee submits a budget to the commission for its cost of operation. The committee is composed of one representative from each participating (contracting) school district. The budget is based upon a charge of \$1 per K-6 ADA (kindergarten through sixth grade average daily attendance) unit, using State Department of Education figures. All costs of program acquisition, equipment rental and maintenance, shipping and mailing et cetera are charged against this budget.

Approximately one-third of the time of the executive director and administrative secretary of the Educational Commission is devoted to this project but none of their time is charged against the project funds. Office expenses of the Educational Communications Commission attributed to the project are charged to project funds.

QUESTION

Can the Educational Communications Commission contract to provide educational television to private and parochial schools, charging the same fee as it does to public schools?

ANALYSIS

Article 1, section 4 of the Nevada Constitution provides, in part:

The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State. * * *

Article 11, section 2 provides:

The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.

These provisions, coupled with the first amendment to the United States Constitution, the due process and equal protection clause thereof, in essence prevent our government from giving aid to parochial schools. This is the issue raised by the Educational Communications Commission.

The statutory authority in support of the Educational Communications Commission's proposed activity can be found in NRS 398.090 through 398.230. In particular NRS 398.180 provides:

The commission shall advise local committees, when requested and practicable, and provide systems consultant services to any agency, public or private, within the state where consistent with the availability of funds and personnel.

The historical doctrine of the separation of church and state is to insure that there be no state-supported religious institutions, thus precluding governmental preference and favoritism of one or more churches. But this doctrine does not include total non-recognition of the church by the state, and vice versa.

Many courts, for example, have sustained the bussing of children and loaning of textbooks (see cases collected in 93 A.L.R.2d 986, 168 A.L.R. 1434), under the child benefit theory. That is, the "aid" accrues to the child and not to the religious order, and is so far removed from religious connotations that no problem is presented. Other examples more closely related to the present cases are: Leasing of a hospital to a Catholic nun order, in *Lien v. City of Ketchikan*, 383 P.2d 721; partial reimbursement for welfare benefits, *Community Council v. Jordon*, 432 P.2d 460; and exchange of janitorial services, *School District in Weld County v. Schmidt*, 263 P.2d 581.

In this case, certain facts emerge which, in our opinion, allow the scope of activity herein contemplated. First, the purpose of Educational Communications Commission is to promote and provide the dissemination of education throughout the State of Nevada to both public and private groups for the general benefit and welfare of the people of the State of Nevada.

Secondly, the program will cost the time of the executive director and administrative secretary whether or not the parochial schools participate. In this sense the costs are not unlike the costs of fire or police protection or other public services which are available to the public. Members of the police or fire department may instruct on safety in parochial schools free of charge, or the Board of Education certifies teachers including those who teach at parochial schools, without a charge for the time of its employees. In short, the director's and secretary's time is being used regardless of whether the parochial schools participate. Thus, the fact that these schools do participate is not related to the use of the director's and secretary's time.

The benefits that parochial schools do get is paid for at the same price as other schools. It does not extend to parochial schools as a result of their being religious organizations, nor does it further the teaching of religious beliefs.

The increased source of revenue will actually result in increased benefits to the overall program and thus the public schools, according to the Educational Communications Commission. There will be wider variety of programs, a possible reduction in costs, and an expansion of services such as technical assistance and professional workshops.

CONCLUSION

We conclude that since neither the purpose nor primary effect of selling educational television to private and parochial schools is the advancement of religion, the Educational Communications Commission may sell educational television to these schools and charge the same fee that it charges public schools.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Peter I. Breen, Deputy Attorney General

OPINION NO. 1970-669 Welfare—Aid to Dependent Children—Financ...
OPINION NO. 1970-669 Welfare—Aid to Dependent Children—Financial obligation of counties in connection with aid to dependent children who are placed in foster homes.

Carson City, June 18, 1970

Mr. George E. Miller, State Welfare Administrator, Department of Health, Welfare, and Rehabilitation, Welfare Division, Carson City, Nevada 89701

Dear Mr. Miller:

You have asked for our opinion on the financial obligation of counties in connection with aid to dependent children who are placed in foster homes.

ANALYSIS

Your inquiry deals with two different situations which are dealt with by different chapters of Nevada Revised Statutes.

Chapter 425 of Nevada Revised Statutes deals with aid to dependent children. If the child is covered by Chapter 425 of Nevada Revised Statutes, the counties do not participate. A "dependent child," as defined by NRS 425.030(5), is:

"Dependent child" means a needy child under the age of 16 years, or under the age of 18 years if found by the department to be regularly attending school, and obtaining a passing grade in his studies, who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their own home or in a foster home, group care facility or other care center or institution.

NRS 425.170 and NRS 425.190 provide that the aid given pursuant to this chapter is comprised entirely of state and federal funds.

If the child is covered by Chapter 432 of Nevada Revised Statutes, the county must participate in the manner set forth in NRS 432.040, which provides:

1. In the case of placement of a child under the provisions of paragraph (c) of subsection 1 of NRS 432.020, 100 percent of the nonfederal share of all expenses for special services, and sixty-six and two-thirds percent of the nonfederal share of all expenses for maintenance, shall be paid from moneys which may be provided to the welfare division by direct legislative appropriation. Thirty-three and one-third percent of the nonfederal share of all expenses for maintenance shall be paid by the county from which the child was placed.

2. In the case of unmarried mothers, children awaiting adoptive placement, children referred by the Nevada youth training center or Nevada girls training center as requiring foster home care and handicapped children who are receiving specialized care, training or education, 100 percent of the nonfederal share of expenses for maintenance and special services shall be paid from moneys which may be provided to the welfare division by direct legislative appropriation.

NRS 432.020(1) determines whether or not a child is within the provisions of Chapter 432 of Nevada Revised Statutes. It provides:

The welfare division is hereby authorized and empowered:

1. To provide maintenance and special services to:
 - (a) Unmarried mothers and children awaiting adoptive placement.
 - (b) Handicapped children who are receiving specialized care, training or education.
 - (c) Children who are placed in the custody of the welfare division, and who are placed in foster homes, group care facilities or other care centers or institutions, but payment for children who are placed in the Nevada state children's home shall be made in accordance with the provisions of NRS 423.210.
 - (d) Children under the jurisdiction and in the custody of the Nevada youth training center or the Nevada girls training center who are referred to the welfare division as requiring foster home care upon being paroled from such school.

By a comparison of the above-quoted section with NRS 425.030(5), it is clear that the child must meet different qualifications for the respective benefits of the two chapters.

CONCLUSION

We thus conclude that if aid is given pursuant to Chapter 432 of Nevada Revised Statutes, counties must contribute one-third of the nonfederal share of expenses. If aid is given pursuant to Chapter 425 of Nevada Revised Statutes, counties are not required to contribute anything to defray the cost of aid.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Peter I. Breen, Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1970

The following opinions have been furnished by this office in response to inquiries submitted by the various state officers and departments, district attorneys and city attorneys.

670 School District Trustee—Conflict of Interest—One holding a lucrative office with the federal government cannot at one and the same time hold the office of trustee of a school district, where remuneration in the nature of a salary is paid him for attendance at meetings of the board of trustees. (Modified by Attorney General’s Opinion No. 5, dated January 26, 1971.)

CARSON CITY, July 1, 1970

ROBERT L. PETRONI, *Legal Counsel, Clark County School District*, 2832 East Flamingo Road, Las Vegas, Nevada 89109

DEAR MR. PETRONI:

You have inquired of this office as to whether a person holding a lucrative position with the federal government can hold a position as a school trustee if elected, despite Section 9 of Article 4 of our Constitution which reads as follows:

No person holding any lucrative office under the Government of the United States or any other power, shall be eligible to any civil office of Profit under this State; Provided, that Post-Masters whose compensation does not exceed Five Hundred dollars per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office.

ANALYSIS

[NRS 386.320](#) provides that if the average daily attendance of pupils between 6 and 17 years of age exceeds 1,000, the clerk and president of the board may each receive a salary of \$40 for each meeting they attend, not to exceed \$80 a month. Other trustees are entitled to receive a salary of \$35 for each meeting they attend, not to exceed \$70 per month.

As early as 1892 our Supreme court in the case of *State v. Clarke*, [21 Nev. 333](#), decided that a notary public is a civil office for profit, and that therefore a federal officer could not hold a certificate for notary public in this State in that the two offices were incompatible under Section 9 of Article 4 of the Nevada Constitution.

The question arises as to whether a school trustee is the holder of a civil office of profit under this State. This question was answered by Attorney General’s Opinion No. 109, dated December 27, 1923.

In that opinion, relying on the California case of *Satterwhite v. Garrison*, 168 P. 1053, the Attorney General held that a county commissioner was the holder of a civil office of profit under the State.

The California Supreme Court in the above cited case in passing on whether a deputy district attorney was a holder of civil office under the State, stated:

It is next urged by appellant that the constitutional inhibition does not apply to him, for the further reason that a Deputy District Attorney is not the holder of an "office, trust, or employment under this State."

While it must be conceded that a Deputy District Attorney is not one of the state officers provided for by the Constitution, and is what is generally known as a county officer, we think the terms of the Constitution "office, trust, or employment under this State" have a much broader signification than that contended for by appellant, and that his office must be held to be covered by them. In *People v. Leonard*, 73 Cal. 230, 14 Pac. 853, it was held that a Supervisor (who also is a county officer) is a holder of a "civil office of profit under this State." So, also, of a County Superintendent of Schools in *Crawford v. Dunbar*, 52 Cal. 39; and of a Sheriff in *Searcy v. Grow*, 15 Cal. 117.

Thus we feel that a member of a county school board just as clearly falls within the language of Section 9 of Article 4 of our Constitution.

The word "salary" as used in [NRS 386.320](#) implies that the remuneration is not in the nature of an allowance for per diem. If this were not so the word "salary" would not be used. The word "profit" as contained in the phrase "civil office of profit" was not intended by the drafters of our Constitution to imply other than remuneration for prescribed duties, whether that remuneration be small or large.

CONCLUSION

It is therefore the opinion of this office that one holding a lucrative office with the federal government cannot at one and the same time hold the office of trustee of a school district, where remuneration in the nature of a salary is paid him for attendance at meetings of the board of trustees.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

671 Employment Agencies—The fee to be paid an employment agency for the securing of employment is 25 percent of the first month's salary or compensation paid or received.

CARSON CITY, July 2, 1970

MR. STANLEY P. JONES, *Labor Commissioner*, Carson City, Nevada 89701

DEAR MR. JONES:

You have inquired of this office as to the fee to be paid by an applicant to an employment agency, where the employment is for less than a full month.

ANALYSIS

[NRS 611.220](#) reads as follows:

No person licensed pursuant to the terms of [NRS 611.020](#) to [611.320](#), inclusive, shall charge, accept or collect from any applicant for employment as a fee for securing such employment any sum or sums of money in excess of 25

percent of the first month's *salary or compensation received or paid for such employment.* (Italics added.)

[NRS 611.260](#) provides that where the applicant is employed and the employment lasts less than 7 days by reason of the discharge of the applicant, the agency shall refund the fee paid. It will be noted that if the applicant quits or walks off the job, the fee would not have to be repaid.

We feel that the Legislature protected the applicant by designating the first month's salary as *that sum received or paid for such employment.* This could not mean that where a salary is set at \$240 per month, the applicant would have to pay an employment agency 25 percent, or \$60, as a fee if he only worked 10 days and was paid or compensated for only 10 days by his employer. He would, in the instance cited, be required to pay a fee of 25 percent of \$120 based on a 20 working day month, or \$30.

If it were otherwise, the earnings of an applicant working less than a month could be wiped out by the fee based on a full month's salary.

CONCLUSION

It is the opinion of this office that the fee to be paid an employment agency for the securing of employment is 25 percent of the first month's salary or compensation *paid or received.*

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

672 Justices of the Peace—Constitution—Section 11 of Article 6 of the Constitution of Nevada, prohibiting District and Supreme Court judges from holding any office, other than a judicial office, during the term for which they were elected, does not apply to justices of the peace.

CARSON CITY, July 10, 1970

THE HONORABLE JOSEPH S. PAVLIKOWSKI, *Justice of the Peace*, Clark County
Courthouse, Las Vegas, Nevada 89101

DEAR JUDGE PAVLIKOWSKI:

You have requested an opinion of this office as to whether justices of the peace are judicial officers ineligible to any office, other than a judicial office, during the term for which they shall have been elected.

ANALYSIS

Section 11 of Article 6 of the Constitution of Nevada reads as follows:

The justices of the supreme court and the district judges shall be ineligible to any office, other than a judicial office, during the term for which they shall have been elected or appointed; and all elections or appointments of any such judges by the people, legislature, or otherwise, during said period, to any office other than judicial, shall be void.

Thus it can be clearly seen that the prohibition applies only to District and Supreme Court judges.

CONCLUSION

It is the opinion of this office that the prohibition of Section 11 of Article 6 of the Constitution of Nevada does not apply to justices of the peace.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

673 Department of Administration, Central Data Processing—State executive agencies must use Central Data Processing Division for all of their data processing equipment services requirements; said division must provide such services, contracting for outside help where necessary; no reduction in fee authorized for corrective work.

CARSON CITY, July 14, 1970

MR. ROY E. NICKSON, *Secretary, Nevada Tax Commission*, Carson City, Nevada 89701

DEAR MR. NICKSON:

You indicate that the Nevada Tax Commission's understanding of its rights and obligations as to data processing equipment services and the Commission's relationship to the Central Data Processing Division of the Department of Administration have been questioned. Your present belief is that the Tax Commission may not contract for data processing equipment services with anyone other than said Central Data Processing Division (hereinafter referred to as the Division), that if the Division is unable to properly supply the services you require, the Division itself must contract with others to supply such services, and that the Commission must pay all fees charged by the Division even when a portion of such fees may arise by reason of the time spent by the Division in correcting its own previous work which is not usable by the Commission. You ask whether the Commission is correct in its understanding of these matters.

ANALYSIS

The answers to the questions you raise are found in [NRS 242.010](#) to [242.070](#). A purpose of the Division is: "To provide data processing service for state agencies." [NRS 242.020](#)(1). In addition, [NRS 242.030](#)(2) specifies that: "The division shall provide state agencies with all of their required systems, programming and automatic data processing equipment services." Furthermore, subsection 3 of [NRS 242.030](#) reads: "If the demand for services is in excess of the capability of the division to supply such services, the division will contract with other agencies or independent contractors to furnish the required service and will be responsible for the administration of such contracts."

The intent of the Legislature is manifested by the above-quoted statutory provisions. Any data processing equipment services required by a state executive agency, such as the Tax Commission, shall be provided by the Division. If there is need for outside help, the Division is required to contract with others for the furnishing of such help. When the intent of the Legislature is known, statutes must be construed so as to effectuate that intent. *State v. California Mining Company*, [13 Nev. 203](#) (1878); *State ex rel. Nevada Tax Commission v. Boerlin*, [38 Nev. 39](#), 144 Pac. 738 (1914); *Abel v. Eggers*, [36 Nev. 372](#) (1913); *School Trustees v. Bray*, [60 Nev. 345](#), 109 P.2d 274 (1941).

The question of fees is covered by [NRS 242.060](#), which has created a fund out of which "all operating, maintenance, rental, repair and replacement costs of equipment and all salaries of personnel assigned to the division shall be paid * * *." Subsection 3 of said statute states:

Each agency using the services of the division shall pay a fee for such use, which shall be set by the chief of the division in such amount as to reimburse the division for the entire cost of providing such services, including overhead. Each using agency shall budget for such services. All fees, proceeds from the sale of equipment, and other moneys received by the division shall be deposited in such fund.

The repeated use of the word “shall” in the statute indicates that the procedure for determining and paying fees is mandatory, rather than merely directory. Statutory requirements shall be construed as mandatory when it can be ascertained that the Legislature intended such a construction. *Thran v. District Court*, [79 Nev. 176](#), 380 P.2d 297 (1963). In addition, it has been declared by the Nevada Supreme Court that no specific requirement of a statute shall be dispensed with or held to be merely directory unless it is clearly manifest that the Legislature did not deem a compliance with it to be material, or unless the statutory requirement appears to have been prescribed simply as a matter of form. *Seaborn v. District Court*, [55 Nev. 206](#), 29 P.2d 500 (1934). Such is not the case as to [NRS 242.060](#), therefore it is required that the entire fee determined by the Division’s chief pursuant to said statute be paid. There is no provision for a deduction because part of the fee is for the correction of unsatisfactory or unusable work previously performed by the Division. As a matter of fact, experience has shown that such repetitive work virtually always is required when a switch is first made to the use of data processing equipment.

CONCLUSIONS

It is therefore the opinion of this office that the understanding of the Nevada Tax Commission is correct in that:

1. The Commission may not contract with anyone other than the Central Data Processing Division for data processing equipment services;
2. If outside services are needed, the Division is required to contract for such services; and
3. The Commission has no authority to refuse to pay any portion of the Division’s fee that is attributable to a redoing of unsatisfactory or unusable work previously performed by the Division.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By IRWIN AARONS, *Deputy Attorney General*

674 County Surveyor—Elections—A qualified elector may run for the elective office of county surveyor only in the county of his residence. In counties in which no resident files for office, or in which no surveyor resides, the duty devolves on the county commissioners to appoint a county surveyor.

CARSON CITY, July 14, 1970

MRS. EMMA F. GANDOLFO, *County Clerk, Lander County*, Austin, Nevada 89310

DEAR MRS. GANDOLFO:

You have advised that a person, registered as a voter and resident of Elko County, has filed for county surveyor in Lander County, Elko County, and Eureka County.

ANALYSIS

County surveyor is recognized under Section 32, Article IV of the Constitution, as a county officer. This is an elective office. County surveyor is an elective office in Lander, Eureka, and Elko counties, and therefore one who files for the office of county surveyor in three counties has filed for more than one elective office. If he were elected in all three counties, he could under Section 1(b) of [NRS 281.055](#) hold the office in only one county, because by the statute he is prevented from holding more than one elective office.

As an elective office the candidate must file an affidavit of candidacy, wherein he swears that he resides in a certain town or city, and at a certain address, and that he is a registered voter of the election precinct in which he resides.

The purpose of this oath is, in addition to other things, to apprise the county clerk that as a resident of the county he is entitled to run for county office. We believe that where no surveyor resides in a county, the duty falls on the county commissioners to appoint a county surveyor who is a resident of Nevada. The residence requirement for an appointed county surveyor is thus different from the requirements for one seeking the office by election.

CONCLUSION

A qualified elector may run for the elective office of county surveyor only in the county of his residence. In counties in which no resident files for the office, or in which no surveyor resides, the duty devolves on the county commissioners to appoint a county surveyor.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

675 [NRS 334.030](#)—Power of County Commissioners—[NRS 334.030](#) supersedes and overrules [NRS 244.230](#) and [244.320](#) insofar as the power of county commissioners to purchase surplus real property from the federal government by contract extending beyond their term of office is concerned.

CARSON CITY, July 16, 1970

THE HONORABLE WILLIAM MACDONALD, *District Attorney of Humboldt County*,
Winnemucca, Nevada 89445

DEAR MR. MACDONALD:

You have indicated that negotiations are in process for the purchase by Humboldt County and the City of Winnemucca of Winnemucca Air Force Station from the General Services Administration of the federal government.

You submit the following questions:

QUESTIONS

1. May a local subdivision, either county or city, enter into a long term purchase on surplus federal property under the authority of [NRS 334.030](#) without a bond election?
2. May a local subdivision enter into a contract calling for an expenditure or obligation of money extending beyond the current fiscal year but not beyond the terms of the majority of the members of the governing body in the face of [NRS 244.230](#)?

ANALYSIS

With the increasing opportunity for the State of Nevada and its political subdivisions to participate in the acquiring of federal surplus property, the Legislature in 1943 passed the act now cited in our statutes as [NRS 334.030](#), which reads as follows:

1. The purpose of this section is to permit state and local governmental units to take full advantage of available federal surplus properties.
2. The state, or any department, division, bureau, commission, board, authority, agency or political subdivision thereof, may enter into any contract with the United States of America or with any agency thereof for the purchase of any equipment, supplies, materials or other property, real or personal, without regard to provisions of law which require:
 - (a) The posting of notices or public advertising for bids or of expenditures.
 - (b) The inviting or receiving of competitive bids.
 - (c) The delivery of purchases before payment, and without regard to any provision of law which would, if observed, defeat the purpose of this section.
3. In making any such contract or purchase the purchaser is authorized to accept any condition imposed pursuant to federal law as a part of the contract.
4. The governing body or executive authority, as the case may be, of any department, division, bureau, commission, board, authority, agency or political subdivision of the state may designate by appropriate resolution or order any officeholder or employee of its own to enter a bid or bids in its behalf at any sale of any equipment, supplies, material or other property, real or personal, owned by the United States of America or any agency thereof and may authorize that person to make any down payment or payment in full required in connection with such bidding.
5. Any provisions of any law, charter, ordinance, resolution, bylaws, rule or regulation which are inconsistent with the provisions of this section are suspended to the extent such provisions are inconsistent herewith.

It should be noted that [NRS 334.030](#), subsection 2(c), states that the act is effective without regard to provisions of law which would, if observed, defeat the purpose of the section, to-wit, the right of any political subdivision to enter into any contract with the federal government “for the purchase of * * * real property.” This is further accented by subsection 5 which states that any “provision of any law * * * inconsistent with the provisions” of [NRS 334.030](#) is suspended to the extent that such provisions are inconsistent herewith.

[NRS 244.230](#) reads as follows:

The board of county commissioners shall not for any purpose contract debts or liabilities, except those expressly authorized by law. Whenever debts or liabilities have been created, which, added to the salaries of county officers and other estimated liabilities, fixed by law for the remainder of the year, shall equal the money on hand in the treasury at the time applicable to the payment of such salaries and other fixed liabilities, no allowance shall be made of any account, nor shall any expense be incurred other than salaries and fees and fixed liabilities, expressly authorized by law, during the remainder of the year.

This law was enacted by the Legislature in 1865, and amended in 1893. It will be noted that the first sentence of this act provides that the county commissioners shall not for any purpose contract debts or liabilities, *except those expressly authorized by law*.

We believe that [NRS 244.230](#) and [244.320](#) which prohibit a county commissioner from voting on a contract which extends beyond his term of office (also an 1865 law) have been superseded by [NRS 334.030](#). For example, as in [NRS 244.230](#), [NRS](#)

[244.320](#)(1) states that: “Except as authorized by law” the commissioner shall not vote on a contract extending beyond his term of office.

The changing economic picture between 1865 and the present day, insofar as dealing between the State and the federal government is concerned, warrants a liberal interpretation of laws which effect the transfer of moneys or property between the two subdivisions of government.

In this age of land purchases involving large sums of money, it would be impossible for a small political subdivision to take advantage of [NRS 334.030](#) if a debt could not be incurred beyond the term of office of commissioners.

CONCLUSION

It is the opinion of this office that the answers to both questions proposed are in the affirmative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By PETER I. BREEN, *Deputy Attorney General*

676 Public Employees Retirement—Political Subdivisions—Political subdivision does not fall within legislative definition of public employee. Agreement to become public employee with another political subdivision acting as public employer illegal.

CARSON CITY, July 22, 1970

MR. DONALD D. ANDERSON, *Executive Secretary, Public Employees Retirement Board,*
Carson City, Nevada 89701

DEAR MR. ANDERSON:

In seeking clarification of [NRS 286.367](#) you have asked two questions:

QUESTIONS

1. Is it permissible, within the concepts of the retirement act, to consider a political entity as a public employee for the purpose of refunding to the entity retirement contributions submitted and paid on behalf of an individual? ([NRS 286.040](#).)

2. If contributions can be paid with the city regarded as the employee, will refunds be mandatory upon termination of the individual? ([NRS 286.390](#) and [286.430](#).)

ANALYSIS

To begin with it is clear under [NRS 286.040](#) that “employee” is defined only as a public officer or a person employed by a public officer, both references to individuals and not to public entities. Thus any agreement whereby a public entity becomes a designated public employee of another political subdivision is contrary to legislative intent, and contrary to the law.

The Public Employees Retirement Board cannot therefore accept a political subdivision of the state of Nevada as a public employee, and such an agreement being void, the question of refunding retirement contributions becomes moot.

[NRS 286.367](#) clearly indicates that the volunteer members of a regularly organized and recognized fire department may become members of the system. These

firemen then fall into the category of employees. The city, town, county or district which recognizes such firemen becomes the public employer.

In a letter to Diehl, Recanzone and Evans, of Fallon, Nevada, dated February 17, 1970, we advised that if volunteer firemen made no contribution to the system they would not be entitled to a proportionate share of funds contributed to their accounts upon their resignation or withdrawal from the system.

The entire retirement act is directed at individual public employees and a public employer. To attempt any different arrangement would create a legal quagmire from which the board could not be extricated.

The first question having been answered in the negative with the pertinent reasoning, therefore, there is no necessity of answering the second query.

CONCLUSION

It is the opinion of this office that a political subdivision as a single entity does not fall within the legislative definition of a public employee, and is not therefore entitled to join the retirement system in that category.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

677 Bonds; County Bond Commission—The costs for providing information to determine the criteria set forth in [NRS 350.0051](#) should be borne by the unit of government or district seeking approval of a bond issue.

Carson City, August 10, 1970

The Honorable Wayne O. Jeppson, *District Attorney*, Lyon County Courthouse,
Yerington, Nevada 89447

Dear Mr. Jeppson:

The Lyon County School District seeks to issue school bonds, and presented a proposal therefor to the county bond commission. Before deciding the matter, the bond commission sought information pertaining to the effect of the tax levy upon the financial condition of Lyon County. It also sought information concerning the amount of debt outstanding to the school district.

A bill for reports of this information was presented to the county commissioners, who in turn presented it to the school district. The school district and the county commissioners both refuse to pay the bill.

QUESTION

Who is responsible for the payment of this claim, the Lyon County School District, or the County Commissioners of Lyon County?

ANALYSIS

Before a bond can be issued, the appropriate bond commission must approve the issue. This requirement is found in [NRS 350.004](#), which provides:

Before any proposal to issue general obligation bonds may be submitted to the electors of a county, incorporated city or town, unincorporated city or town, school district, or other district or political subdivision (excluding the state) pursuant to this chapter or chapter 387 of NRS or any other law, or before any

other formal action may be taken preliminary to the issuance of any general obligation bonds, their proposed issuance must receive the favorable vote of a majority of the members of the general obligation bond commission of the county in which it is situated. In the case of a joint school district or other district embracing all or part of two or more counties, the proposal must receive such favorable vote in the county or counties in which a majority of its assessed valuation is situated.

In meeting its statutory obligations, the bonding commission must consider certain criteria, established by statute, before approving a bond. [NRS 350.0051](#) provides in part:

* * * The commission shall consider, but is not limited to, the following criteria:

1. The amount of debt outstanding on the part of the political subdivision proposing to issue the bonds.
2. The effect of the tax levy required for debt service on the proposed general obligation bonds upon the ability of the political subdivision proposing to issue the bonds and of other political subdivisions to raise revenue for operating purposes.
3. The anticipated need for other bond issues by the political subdivision proposing to issue the bonds and other political subdivisions whose tax-levying powers overlap, as shown by the county or regional master plan, if any, and by other available information.
4. The public need to be served by the proceeds of the proposed bond issue, as compared to other demands, both operational and capital, to be met from available and anticipated tax and other revenues.

We have found no specific statute which deals with the responsibilities for the pre-election costs of issuing bonds. However, the force of logic and the indications we can gather from the statutes lead us to the conclusion that the costs mentioned in your letter should be borne by the school district.

The bond commission established by [NRS 350.001](#) to [350.006](#), inclusive, is comprised of various representatives of incorporated cities or towns, school districts, and the public at large. It is required by statute to consider certain criteria, the cost of which ultimately resulted in this controversy. There is neither appropriation nor statutory provision which would require or permit the bond commission to assume this burden.

The bond commission coordinates and determines the effect that the various bonds of governmental and political units will have upon each other and upon the public within a county. Its function seems desirable and necessary to meet the diverse interests which must be served. It is only reasonable that a particular government or political unit should pay the cost of determining how its proposed bond and attendant burdens can fit into the existing structure, which must necessarily change if the bond is approved.

Chapter 387 of Nevada Revised Statutes does provide some guidance with respect to election costs. Subsections 3, 4 and 5 of [NRS 387.360](#) provide:

3. The county clerk charged with conducting a special school bond election may, for the purposes of the election, divide the county into special election or consolidated election precincts by consolidating existing precincts, or otherwise, and may change and alter the precincts for such elections, as often as occasion requires.
4. The costs of holding a school bond election consolidation with a general election shall be borne by the county, but the expenses of printing necessary ballots and forms of affidavits shall be paid by the county school district.

5. The costs of holding a special school bond election shall be borne by the county school district.

From these statutes it is arguable that any cost of a school bond election which cannot be associated with the regular costs of a general election in a county should be borne by the school district.

CONCLUSION

We conclude that the costs for providing information to determine the criteria set forth in [NRS 350.0051](#) should be borne by the unit of government or district seeking approval of a bond issue.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By PETER I. BREEN, *Deputy Attorney General*

678 Contractors—Bid Preference—Nevada contractor or subcontractor entitled to preference for instate bidders as set forth in [NRS ch. 334](#).

CARSON CITY, August 17, 1970

THE HONORABLE FLOYD R. LAMB, *State Senator*, 1348 Cashman Drive, Las Vegas,
Nevada 89102

DEAR SENATOR LAMB:

You have asked this office for an interpretation of [NRS ch. 334](#) as it applies to preference in bidding on supplies, material and equipment.

You advise that the County of Clark requested bids for the McCarran International Airport expansion project. Three general contractors bid on the job, and each bid included the bid of a subcontractor for the electrical work.

Contractor A was a low bidder, and as a part of his bid an electrical subcontractor from outside Nevada bid low on the electrical work.

The next lowest subcontractor for the electrical work was a Nevada firm which has paid taxes on electrical merchandise and equipment for 12 years.

ANALYSIS

[NRS 334.007](#) reads as follows:

In awarding contracts for furnishing supplies, materials or equipment, either directly or through a contractor or subcontractor, to the State of Nevada or any political subdivision thereof, the contract shall be awarded to a bidder who furnishes such commodities supplied by a dealer who is a resident of the state and who has for not less than 2 successive years immediately prior to submitting the bid paid state and county taxes within the state on a stock of materials of the kind offered and reasonably sufficient in quantity to meet the requirements of customers from such stock, instead of shipping stock into the state to fill orders previously taken, in preference to a competing bidder who furnishes such commodities not supplied by such a resident dealer whenever the bid of the competing bidder, taking into consideration comparative quality and suitability, is less than:

1. Five percent lower, if the amount of the bid is less than \$50,000.
2. Two and one-half percent lower, if the amount of the bid is \$50,000 or more, but less than \$500,000.
3. One and one-half percent lower, if the amount of the bid is \$500,000 or more.

If the Nevada subcontractor bid \$594,000 in order to secure the bid, the out-of-state subcontractor would have to bid less than \$585,090 in order to meet the 1 1/2 percent preference set forth in [NRS 334.007\(3\)](#). The bid of the out-of-state contractor was \$587,000 and was thus over the amount necessary to meet the referenced statute.

CONCLUSION

It is the opinion of this office that an out-of-state contractor or subcontractor can only meet the bid of a Nevada contractor or subcontractor by a bid lower than 1 1/2 percent beneath the bid of a Nevada contractor or subcontractor where the bid exceeds \$500,000.

Respectfully submitted,

Harvey Dickerson, *Attorney General*

679 Public Employees Retirement—Bailiffs—Bailiffs of courts of participating public entity in State Retirement System are members of system if paid a minimum of \$150 per month, and serving a minimum of 1,200 hours per year. Such employees are not independent contractors.

Carson City, August 17, 1970

Donald D. Anderson, *Assistant Executive Secretary, Public Employees Retirement Board*,
111 West Telegraph, Carson City, Nevada 89701

Dear Mr. Anderson:

You have directed to this office an inquiry as to whether a court bailiff, regularly employed on a year to year basis, with the possibility of an extended term, and paid an established yearly salary, can be employed as an independent contractor by a contributing member of the retirement system.

ANALYSIS

To begin with it is clear that a bailiff does not meet the definition of an independent contractor. An independent contractor according to the Nevada definition ([NRS 284.173\(2\)](#)) is a person “* * * who agrees to perform services for a fixed price according to his * * * own methods and without subjection or control of the other contracting party except as to the results of his work, and not as to the means by which services are accomplished.”

Bailiffs come under the subjection and control of both the sheriff’s office and the court, and do not have that independence of action which takes them out of the category of a regular employee of the employing agency.

One of the legally defined definitions of an independent contractor is found in *Marion Malleable Iron Works v. Baldwin*, 145 N.E. 559, “One who in pursuit of an independent business undertakes to perform a job or piece of work, retaining in himself control of means, method and manner of accomplishing the desired result.”

[NRS 286.030](#)(1)(b) defines an employee as “any person employed by a public employer whose compensation is provided by the public employer and who is under the direction and control of officers of the public employer.” A bailiff of a court meets this definition squarely.

[NRS 286.290](#)(2) provides that “except as otherwise provided in this chapter, all public employers shall participate in the system and their employees shall be members of the system.” The City of Reno and the County of Washoe are public employers and members of the retirement system. Therefore employees of the county are members of the system.

Under [NRS 286.320](#) an employee is eligible for membership in the system if his minimum salary is \$150 per month and his position requires 1,200 or more hours of work per year. The bailiffs of the courts under consideration meet both of these requirements.

Under [NRS 286.410](#) a member of the system is required to contribute 6 percent of the gross compensation earned by him.

CONCLUSION

It is therefore the opinion of this office that bailiffs of courts paid by a participating member of the Public Employees Retirement System are not independent contractors if paid a minimum of \$150 per month and if serving a minimum of 1,200 hours per year in their designated positions. Such employees are not independent contractors and are subject to all the provisions of Chapter 286 of Nevada Revised Statutes.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

680 Insurance Contracts; Bidding—Insurance contracts are not within the competitive bidding requirements of Chapter 332 of Nevada Revised Statutes.

CARSON CITY, August 18, 1970

THE HONORABLE WILLIAM MACDONALD, *District Attorney, Humboldt County*, County Courthouse, Winnemucca, Nevada 89445

DEAR MR. MACDONALD:

Our Opinion No. 633, as amended January 22, 1970, dealt specifically with group health and accident insurance plans. We then concluded that such plans were not within the purview of [NRS 332.040](#), and that they could thus be secured without meeting the requirements of competitive bidding. You now ask us if other types of insurance must be let to bid by governmental units.

QUESTION

Do insurance contracts for types of insurance other than group health and accident insurance have to be advertised for bid in compliance with the Local Government Purchasing Act?

ANALYSIS

The basis for our previous amended opinion was the relationship between an insurance broker and his client. Being one of personal trust and confidence, it calls for the

rendition of personal service. It calls for the adoption of the insurance company's attorneys, and involves prompt, honest and efficient service in the settlement of claims.

The case cited in our amended opinion, *Lynd v. Heffernan*, 146 N.Y.S.2d 113, dealt with fire insurance. There is no real distinction between group health and accident insurance and other forms of insurance. The justification for one would justify the others. There exists essentially the same relationship between broker and client in all forms of insurance coverage.

CONCLUSION

We conclude that insurance contracts are not within the competitive bidding requirements of Chapter 332 of Nevada Revised Statutes.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By PETER I. BREEN, *Deputy Attorney General*

681 Property Taxation—Neither an assessor nor a board of equalization is authorized to prorate personal property tax liability when ownership of such property changes during a tax year.

CARSON CITY, September 1, 1970

THE HONORABLE WILLIAM MACDONALD, *Humboldt County District Attorney*, Humboldt County Courthouse, Winnemucca, Nevada 89445

DEAR MR. MACDONALD:

You have submitted to this office for an opinion the inquiry of the Humboldt County Board of Equalization as to whether Nevada's property tax laws authorize proration or any other relief when the ownership of personal property changes subsequent to assessment. The particular circumstances which gave rise to the inquiry involved the sale at auction of equipment of a contractor, the auction taking place on October 23. The contractor requested that his assessment or tax be prorated so as to give credit to the fact that he was the owner of the equipment for only a portion of the tax year.

ANALYSIS

The tax year coincides with the fiscal year, which extends from July 1 of one year to June 30 of the following year. [NRS 361.020](#). Each county assessor is required by law to ascertain between July 1 and December 31 all real and personal property subject to taxation in his county and the names of the owners of said property; he then must assess the property to the owners. [NRS 361.260](#). A lien for the tax attaches to the property on the first Monday in September. [NRS 361.450](#). The lien, therefore, may precede assessment. The Nevada Supreme Court has held that the owner of personal property which has a situs in Nevada on the date the property tax lien attaches is liable for the entire tax even though the property is removed from the State before actual assessment. *State v. Eastabrook*, [3 Nev. 173](#) (1867). This case seems to cover any of the contractor's equipment that was removed from the State after the October auction; the contractor remains liable for the entire amount of the tax on such equipment.

Some of the contractor's equipment probably was moved to another county in Nevada after the auction. The law in Nevada always has been that any nonexempt property having a situs within the State at any time during the assessment period (now

July 1-December 31) shall be assessed and taxed, with the full cash value of the property being used as the measure for assessment and taxation. [NRS 361.260](#); State of Nevada v. Earl, [1 Nev. 394](#) (1865); State of Nevada v. Carson and Colorado Ry. Co., [29 Nev. 487](#), 91 Pac. 932 (1907). Both cases are specific that the entire tax must be imposed once each year, but only once. It appears quite clear that no item of property may be subjected to multiple property taxation, regardless of change of ownership or change of county of situs. These same cases, however, imply that any apportionment of tax would have to come about through agreement between successive owners, for they call for one-time imposition of the tax only, and at the full amount called for by the full cash value of the property.

Only the Legislature may authorize apportionment or proration of property tax. Attorney General's Opinion No. 269, dated October 29, 1965; Attorney General's Opinion No. 912, dated April 27, 1950. In 1967 the Nevada Legislature enacted legislation requiring proration of property tax on livestock located in more than one county during the tax year. [NRS 361.247](#). Likewise, in 1965 it amended [NRS 361.505](#) to require proration of tax on personal property brought into the State or a county for the first time during the year. This was accomplished by adding the sentence: "The county assessor shall prorate the tax on personal property brought into or entering the state or county for the first time during the fiscal year by reducing the tax one-twelfth for each full month which has elapsed since the beginning of the fiscal year." 1965 Statutes of Nevada, page 1249. This statutory provision applies to property entering a county for the first time; it makes no reference to the possible circumstance that the property came from another county in Nevada. If the Legislature intended that there be proration or apportionment between counties it could easily have said so. It did not. Further, the above-quoted amendment does not make any provision for the situation where the property not only comes into a county for the first time during the tax year, but also is removed from that county before the end of said year.

From the foregoing it appears that the Legislature intended existing law to remain in effect except as specifically changed by the 1965 amendment. The first requirement of existing law is that the property have a "situs" within the county seeking to impose property tax. Insofar as a contractor's equipment is concerned, this is the county in which it is located or used for at least a substantial portion of the tax year. See Barnes v. Woodbury, [17 Nev. 383](#), 30 Pac. 1068 (1883); State v. Shaw, [21 Nev. 222](#), 29 Pac. 321 (1892); Attorney General's Opinion No. 912, dated April 27, 1950. Unless the equipment first entered the county during the tax year, the full amount of tax must be assessed, as measured by the full cash value of the property. State of Nevada v. Earl, supra; State of Nevada v. Carson and Colorado Ry. Co., supra. Payment of such full amount of tax constitutes a defense against any further property taxation of the same property in the same tax year by another county, despite any change of ownership. Id. The burden of proving prior payment lies with the owner who claims that he is not subject to further taxation because of such prior payment. 51 Am.Jur. Taxation § 524. Unless the assessor is satisfied that the personal property tax liability of the owner is covered by the value of the owner's real property in the county, the assessor is required to "proceed immediately to collect the taxes on the personal property." [NRS 361.505](#). This is a further indication that no proration or apportionment of taxes between counties was intended by the Legislature.

Some of the contractor's equipment purchased at the auction may have remained in Humboldt County under its new owner. Subsection 2 of [NRS 361.310](#) states that: "The county assessor may close his roll as to changes in ownership of property on December 1 of each year or on any other date which may be approved by the board of county commissioners." As a practical matter, any change from the December 1 date is usually to an earlier date, for the assessor is required to complete and publish his tax list or assessment roll by January 1. [NRS 361.300](#); [NRS 361.310](#). The Humboldt County Assessor closes his roll on September 15. Since the auction of the contractor's equipment

occurred on October 23, it would have been too late to change the ownership on the assessor's roll. Tax liability does coincide with ownership, but there still would be no statutory or other legal basis for proration or apportionment of tax liability between the old owner and the new, no matter which one is listed on the roll at the time it is closed. Any such apportionment or proration would have to be as a result of agreement between the old owner and the new, and the assessor would not be bound by such an agreement. So long as the property had a situs in the county in July, the assessor has the right to demand the full amount of the tax from the person who is the owner at the time of assessment. [NRS 361.260](#).

CONCLUSION

There is no legal basis for an assessor or board of equalization to prorate or apportion personal property tax liability between successive owners when ownership of the property changes during the tax year.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By IRWIN AARONS, *Deputy Attorney General*

682 Chapter 175 enacted in 1967 has not been superseded and the use of water meters in Carson City is lawful.

CARSON CITY, September 4, 1970

MR. REESE H. TAYLOR, JR., *Chairman, Public Service Commission*, Carson City, Nevada 89701

DEAR MR. TAYLOR:

STATEMENT OF FACTS

The question has been presented as to the legality of the continued use of water meters in Carson City in view of Chapter 213 of the 1969 Statutes of Nevada, commonly referred to as the Carson City-Ormsby County consolidation legislation.

ANALYSIS

By way of background, the Legislature of the State of Nevada enacted in 1919 what is now known as [NRS 704.230](#). Since this statute was authored, a series of amendments have come about so that the statute now reads as follows:

1. Except as otherwise provided in any special law for the incorporation of a city, it is unlawful for any public utility, for any purpose or object whatever, in any city or town, containing more than 7,500 inhabitants, to install, operate or use, within such city or town, any mechanical watermeter, or similar mechanical device, to measure the quantity of water delivered to water users.
2. Nothing in subsection 1 shall apply to cities and towns owning and operating municipal waterworks, or to cities and towns located in counties having a population of 200,000 or more as determined by the last preceding national census of the Bureau of the Census of the United States Department of Commerce.

By subsection 2, it is clear that a city or a town owning and operating a municipal water works or a city or town situated within a county having a population of 200,000 or more, may utilize water metering devices. It is equally as clear that subsection 1 would prohibit the use of such metering devices in Carson City in view of the fact that Carson City contains more than 7,500 inhabitants, and the water system is privately owned, in the absence of “any special law for the incorporation of a city.”

We must then, if we are to determine that the use of water meters by Carson Water Company is legal, look to the legislation which resulted in the incorporation of Carson City, Nevada. That act entitled “An Act to incorporate Carson City,” was approved in its original form on February 25, 1875. In the 95 years of that act’s existence, numerous amendments have been enacted by the Legislature. One of these amendments was Chapter 175, effective March 24, 1967. Accordingly, this 1967 amendment constitutes “a special law for the incorporation of a city” as is called for in [NRS 704.230](#), supra. Chapter 175 reads as follows:

SECTION 1. The above-entitled act, being chapter 43, Statutes of Nevada 1875, at page 87, is hereby amended by adding thereto a new section to be designated as section 31.5, which shall immediately follow section 31 and shall read as follows:

Section 31.5. Any public utility is expressly authorized, for any purpose or object whatever, to install, operate or use within the city mechanical watermeters, or similar mechanical devices, to measure the quantity of water delivered to water users.

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

Reading the above-quoted legislation, it is clear to us that the special law called for in [NRS 704.230](#) is found in Chapter 175, and as of the date of that statute’s effectiveness, the use of water meters in Carson City was lawful.

In 1969, Chapter 213 was passed by the Nevada Legislature. The general purpose of this legislation was “to effect the consolidation of the governments and functions of Carson City and Ormsby County.” Nowhere in this legislation is Chapter 175, supra, mentioned.

It does not necessarily follow, however, that Chapter 175, supra, is repealed. If it is repealed, it must be so by virtue of Section 82 of Chapter 213 which reads:

1. [NRS 19.240](#), [243.320](#) and 251.060 are hereby repealed.
2. Upon the effective dates of section 2 of this act, the provisions of the charter of Carson City, being chapter 243, Statutes of Nevada 1875, as amended, which are respectively superseded shall by virtue of this act be repealed.

This section does not say that all prior existing provisions of Chapter 243, of which Chapter 175 is a part, shall be repealed, but provides only those sections “* * * which are respectively superseded * * *” are repealed. So the question, then, is—Was Chapter 175 actually superseded and thereby repealed? We think not.

The very first sentence of Chapter 213 reads:

1. In order to provide for the orderly government of Carson City and the general welfare of its citizens and to effect the consolidation of the governments and functions of Carson City and Ormsby County, the legislature hereby establishes this charter for the government of Carson City.

This declaration of intent would not be realized if the effect of Chapter 213 is to render illegal the use of water meters and billings by the supplier of water for the past

approximate year and a half. The adverse consequence of this has been publicly recognized by city officials.

If the Legislature intended to repeal each and every section of the existing law relating to Carson City's prior charter, it would have used the conventional and universally accepted language in Section 82, "Chapter 243, Statutes of Nevada 1875, as amended, shall by virtue of this act be repealed." Instead, the repealing language is conditional. Only those provisions which are "superseded" are repealed. In order for Chapter 175 to be superseded, the subject matter of that section must be contained in the superseding statute. Nowhere in Chapter 213 appears language relating to meters. It must be presumed the Legislature was cognizant of Chapter 175 and desired its perpetuation because it did not see fit to expressly repeal it. Repeal by implication is discouraged when there is no irreconcilable conflict between the two acts. In this instance, we have placed considerable emphasis upon the purposes and objects announced in Chapter 213 in the light of surrounding conditions and the former legislation. When this is done, it is clear that Chapter 175 must and should survive so as to accomplish the goal of the Legislature as announced, *supra*.

A contrary conclusion would open the flood gates of the courts. The water company could justifiably contend their property (water meters) was deprived them without due process of law. Water customers could contest billings which were rendered in accordance with meter readings. The Public Service Commission could attack the water company for illegal billings. The chain of litigation is endless. Such a result could not have been the intent of the Legislature and such a result must not come about as long as there is a different way to construe the legislative enactments. That different and preferential construction has been announced above and based thereon, we conclude the use of water meters in Carson City at this time to be sanctioned by the Legislature, and therefore legal.

CONCLUSION

Chapter 175, enacted by the Legislature in 1967, has not been superseded by Chapter 213, enacted in 1969.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By JOHN J. SHEEHAN, *Deputy Attorney General*

683 Counties—Zoning—State—State building projects are exempt from county zoning laws.

CARSON CITY, September 9, 1970

MR. WILLIAM E. HANCOCK, *Manager, State Planning Board*, Legislative Building, Room 306, Carson City, Nevada 89701

DEAR MR. HANCOCK:

The State Highway Department desires to construct maintenance shops on state-owned land in Clark County. The Clark County Planning Commission has indicated that the particular area is zoned for residential estates. Thus the proposed maintenance facilities are not compatible with the present zoning restrictions. The Clark County Planning Director has indicated that he would not recommend a variance to allow the construction of maintenance shops.

QUESTION

Your question is whether the State must comply with local government zoning requirements.

ANALYSIS

There are various theories which the courts have used to effectively bar the operation of local zoning ordinances on the governmental agency in question. Perhaps the common thread running through all of them is that a local government exists at the will of state government. That is, a local government is created by the parent state government and exists for the convenience of attending to governmental affairs. It follows that the local government cannot operate in such a way that it will interfere with the freedom of state governmental functions unless it is expressly empowered to do so.

In some states absolute or limited immunity provides the basis to bar the operation of local zoning ordinances. See 61 A.L.R.2d 971-977. Others have held that zoning ordinances are inapplicable where the governmental agency has the power of eminent domain. *Savannah v. Collins*, 84 S.E.2d 454 (1954), *State ex rel. Helsel v. Board of County Courts*, 78 N.E.2d 694 (1947).

Most cases dealing with this subject have exempted the governmental project because of statutory construction. In essence these cases are based upon the proposition that to subject a governmental unit (particularly the State) to local zoning requires express statutory authorization. See cases collected in 61 A.L.R. 979-992, Kentucky Attorney General's Opinion No. 68-555, 1968-1972.

An examination of our zoning statutes fails to disclose any such express authorization. [NRS 278.020](#) provides:

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

Two other statutes refer to public buildings. [NRS 278.160](#)(f) requires the local master plan to show:

Showing locations and arrangement of civic centers and all other public buildings, including the architecture thereof and the landscape treatment of the grounds thereof.

[NRS 278.180](#) provides:

The county and city planning commission shall, during the formulation of plans for community design and public buildings, notify the governing boards of school districts having jurisdiction of the areas considered of the preparations of such plans to the end that adequate and properly located school sites may be provided for.

Liberally construed, none of these statutes have the force to limit state governmental building projects. They simply do not expressly grant such powers to local governments.

On the other side of the coin is Chapter 341 of Nevada Revised Statutes. In that chapter the State Planning Board has the final authority for the supervision, completion and acceptance of state buildings. It is required by [NRS 341.170](#) to make a comprehensive plan for the economic and social development of the State of Nevada. [NRS 341.180](#) provides for cooperation with local planning agencies. It reads:

The board shall:

1. Cooperate with other departments and agencies of the state in their planning efforts.
2. Advise and cooperate with municipal, county and other local planning commissions within the state for the purpose of promoting coordination between the state and the local plans and developments.

To advise and cooperate with local planning commissions indicates some joint action or common design on the part of both. However, we cannot say that this language amounts to express statutory language requiring compliance with local zoning.

The power of the State to disregard local zoning with impunity may be offensive. However there is solace in the knowledge that there are some obvious practical restraints on the exercise of that power.

One such restraint is that the Planning Board intends to honor local zoning on newly acquired state property.

CONCLUSION

With practical uniformity in precedent from other states and with a lack of express delegation of zoning power to affect state buildings in Nevada, we must conclude that state building projects are exempt from county zoning ordinances.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By PETER I. BREEN, *Deputy Attorney General*

684 Title Risk Insurance Premium Tax—Effect of [NRS 686.010\(3\)](#) on [NRS 695.160](#) construed: Payment of retaliatory tax required when higher in the aggregate because tax base or rate or both are higher. Administrative or legal action to recover unreported and unpaid risk premium taxes not barred by applicable statute of limitations ([NRS 11.190\(3\)\(a\)](#)) recommended.

CARSON CITY, September 10, 1970

MR. LOUIS T. MASTOS, *Insurance Commissioner, Department of Commerce, Carson City, Nevada 89701*

DEAR MR. MASTOS:

You have requested our formal legal opinion and advice supplementing Attorney General's Opinion No. 642, dated January 27, 1970, as to the effect, if any, of the retaliatory provision of [NRS 686.010\(3\)](#) on the incidence of [NRS 695.160](#) Title Risk Insurance Premium Tax.

FACTS

First Title Insurance Company, a Nevada corporation, is licensed under Chapter 695 of Nevada Revised Statutes by the Insurance Division to conduct a title insurance business. First American Title Insurance Company, a California corporation, is licensed under [NRS 695.120](#) to insure title risks located in Nevada. First Title does not actually operate as an insurer. They operate as an underwritten title company (as defined in [NRS 695.470](#)) under an exclusive contract with First American as the title insurer. This

underwriting agreement (dated November 28, 1967, and attached as Exhibit “A” to your December 11, 1969, examination report of First Title) provides in paragraph 2(h) that First Title shall reimburse First American for the [NRS 659.160](#) Title Risk Insurance Premium Tax paid by First American. First Title has been reporting and paying the tax pursuant to the “oral” formula discussed in Attorney General’s Opinion No. 642.

QUESTION

Under Nevada law, which company is liable for the Title Risk insurance Premium Tax, and on what tax base and at what rate?

ANALYSIS

[NRS 695.160](#)(2) imposes an annual tax of 2 percent upon the total title risk insurance premium income (construed in Attorney General’s Opinion No. 642) arising from insuring property titles or risks located in this State. This tax applies to companies in the title insurance business in this State ([NRS 695.200](#)(1)), not to underwritten title companies which do not insure title risks ([NRS 695.200](#)(2)).

The underwriting and underwritten companies are free to contractually divide the economic costs of doing their respective businesses through a division of fees under [NRS 695.560](#) and [695.570](#), but they are not given the authority to contractually shift the statutory incidence of the Title Risk Insurance Premium Tax. Thus, First American, not First Title, has the title risk insurance premium income and the statutory liability for the tax.

The retaliatory provision of [NRS 686.010](#)(3) expressly made applicable to the Title Risk Insurance Premium Tax provides:

* * * When by or pursuant to the laws of any other state * * * any premium * * * taxes * * * or other material obligations, prohibitions or restrictions, are imposed upon Nevada insurers * * * in such other state * * * which are in the aggregate in excess of such taxes * * * or other obligations, prohibitions or restrictions directly imposed upon similar insurers of such other state * * * under the statutes of this state, * * * the same obligations, prohibitions and restrictions of whatever kinds shall be imposed upon similar insurers of such other state * * * doing business in Nevada * * *.

California Constitution, Article XIII, Section 14 4/5 (Taxation of Insurers) provides:

(b) An annual tax is hereby imposed on each insurer doing business in this state on the base, at the rates, and subject to the deductions from the tax hereinafter specified.

(c) * * * In the case of an insurer transacting title insurance in this state, the “basis of the annual tax” is * * * all income upon business done in this state * * *. Income derived directly or indirectly from the use of title plants and title records is included in the basis of the annual tax * * *.

(d) The rate of the tax to be applied to the basis of the annual tax in respect to each year is 2.35 percent.

CONCLUSION

Under Nevada law, First American Title Insurance Company, the California corporation, as the insurer, is liable for the Title Risk Insurance Premium Tax. They are liable at the retaliatory rate of 2.35 percent on the retaliatory basis of all income upon business done as stipulated on the face of their policies of title insurance issued or in force and effect within Nevada. While First Title Insurance Company, the Nevada corporation, may by contract bear the economic cost of that tax, the companies may not

contractually shift the statutory incidence of that tax. These same statutory principles are of course uniformly applicable throughout the title insurance industry in Nevada.

Except as barred by applicable statute of limitations, you are advised that it would be proper to institute immediate administrative or legal action for recovery of all unreported and unpaid title risk premium taxes against First American Title Insurance Company, and any other similar companies that have not been reporting or paying the tax as required by [NRS 695.160](#).

You are further advised [NRS 695.160](#)(3) requires this tax shall be paid before issuing a renewal certificate of authority to any title insurance company to do business in this State.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By ROBERT E. HOLLAND, *Deputy Attorney General*

685 Elections—Death of candidate after primary election and before general election, when both candidates qualifying for the general election were of the same party, leaves vacancy on the general election ballot to be filled by state central committee of that party. No vacancy occurs as far as the other two parties are concerned, because neither nominated a candidate for the primary election.

CARSON CITY, September 29, 1970

THE HONORABLE JOHN KOONTZ, *Secretary of State*, Carson City, Nevada 89701

DEAR MR. KOONTZ:

You have requested an opinion as to whether the untimely death of State Inspector of Mines Mervin Gallagher affords an opportunity to the Republican Party and the Independent American Party to place a candidate on the general election ballot for that office.

You ask the further question as to whether, in view of the fact that the ballots have not been printed, the county clerks should be notified to delete Mr. Gallagher's name from the ballot.

ANALYSIS

This office has reviewed past opinions concerning the situation which now confronts the people of this State in the coming general election as the result of the death of Mervin Gallagher, the incumbent State Mine Inspector.

Mr. Gallagher, a Mr. Springer, and a Mr. Hudgens, all Democrats, were the contestants for the office of State Mine Inspector in the primary election held on September 1, 1970. Mr. Gallagher and Mr. Springer received the highest number of votes and were nominated to oppose each other in the general election. Mr. Gallagher died on September 28, 1970.

In the present case there is no vacancy occurring as far as the Republican party or the Independent American Party are concerned, because neither party nominated a candidate for the primary election.

Back on May 20, 1954, the County Auditor and Recorder of Mineral County died. He was an incumbent, and had filed for reelection as an Independent candidate, without opposition.

The question arose as to whether the Republicans or Democrats could nominate candidates for this office, and this question was answered in the negative. The learned Attorney General held that petitions could be filed to place Independent candidates only on the ballot.

In *District Party Committee of Republican Party v. Ryan*, 106 P.2d 261, it was held that where a candidate for judge filed for the Democratic nomination and the Republican Party did not nominate a candidate against him and the candidate died after the holding of the primary, and thereafter both the Democratic and the Republican parties filed candidates for the office to fill the vacancy on the ticket, the Secretary of State properly refused to certify the name of the Republican Party committee nominee.

Thus it must be determined that insofar as the Republican Party and the Independent American Party are concerned, they cannot place a nominee on the ballot, not having had a candidate at the primary election.

The question now arises as to whether a vacancy exists on the Democratic ticket which may now be filled by the Democratic Party. As stated by a distinguished predecessor, the problem here involved touches upon very substantial rights of the remaining candidate now seeking the office of State Mine Inspector. Because of conflicting opinions, it is hoped that the Supreme Court will eventually face the problem and issue an opinion to guide us in future similar situations.

An election may be broadly defined as the expression of a choice by voters of two candidates for the same office. I am convinced, despite a former opinion, that any election in which the voters are denied the right to make that choice is contrary to the American system of government. There may be a choice between persons of the same party seeking the same office, just as there is a choice between two philosophies of government.

As General Bible pointed out in a former opinion, “* * * The Legislature intended that a choice of persons in the candidates for office should be offered the electors whether or not there was a choice of a political party.”

[NRS 293.165](#), subsection 1(a), provides:

1. A vacancy occurring in a party nomination for office may be filled by a candidate designated by the appropriate political party central committee of the county or state, as the case may be, where:

(a) The nominee dies after the primary election and before the general election.

The question then arises as to whether a vacancy exists which comes within the purview of the statute for filling such vacancies.

CONCLUSION

This office feels that Mr. Gallagher’s death created a vacancy in that the electors of this State are left without a choice in the race for State Mine Inspector, and that the state central committee should nominate a Democrat to fill the vacancy on the general election ballot occasioned by the death of Mervin Gallagher.

The second inquiry is answered by this opinion. Mr. Gallagher’s name should not be placed on the ballot as a candidate for the office of State Mine Inspector.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

686 Teachers—Election to State Board of Education—Teachers are not precluded from being candidates for a position on the State Board of Education.

CARSON CITY, October 5, 1970

THE HONORABLE JOHN KOONTZ, *Secretary of State*, Carson City, Nevada 89701

DEAR MR. KOONTZ:

You have requested an opinion as to whether [NRS 385.020](#) precludes an active school teacher from running for the State Board of Education.

STATEMENT OF FACTS

The Legislative Counsel Bureau, at the request of Republican Senator Carl F. Dodge, has issued a legal opinion purporting to answer the question of whether a public school teacher may be elected by the people of the State of Nevada to serve on the State Board of Education. Teachers have run successful statewide primary campaigns and have been nominated by the people to run in the general election.

The opinion of the Legislative Counsel Bureau was then brought to this office by the Senator and it states that the nominated teachers cannot run in the general election for two reasons. First, because the Legislature has enacted a law which says that the State Board of Education shall consist of nine "lay" members, and teachers would not be lay members; secondly, that their positions as teachers disqualify them from running for the state board under the doctrine of incompatibility. We believe the opinion obtained by Senator Dodge is totally wrong on both issues.

ANALYSIS

There are more substantial and fundamental issues that must be analyzed before a proper legal conclusion can be reached on this question. These include the following:

1. Under what conditions may a citizen of this State be precluded from becoming a candidate for public office?
2. Is the statute in question so vague as to violate the first essential of due process of law?

The right to become a candidate for election to public office is a valuable and fundamental right, and has even been held to be a property right. *Joyner v. Browning*, 30 F.Supp. 512; *Kautenberger v. Jackson*, 333 P.2d 293; *Cottingham v. Vogt*, 160 A.2d 57. The right to become a candidate should be as jealously guarded as the right to vote for a candidate. One desiring to become a candidate must be afforded a reasonable opportunity to qualify as such. The right should not be prohibited or curtailed except by the plainest provisions of law, and any law by which this right of a citizen is diminished or impaired should be strictly construed. *Nunez v. Plaisance*, 200 So. 302.

Intentional and purposeful discrimination barring certain persons from becoming a candidate for state office violates the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. Citing *Anderson v. Martin*, 375 U.S. 399; *Snowden v. Hughes*, 321 U.S. 1. The right to become a candidate for public office should not be in any manner curtailed without good cause. See *Cottingham*, supra. It is our opinion that there is not sufficient cause to constitutionally deprive a teacher in the State of Nevada of his right to run for election to the State Board of Education. The duties that would be performed while serving on that board are not sufficiently incompatible with employment as a teacher so as to deny teachers the right to be candidates.

The State Board of Education prescribes rules and regulations for the issuance and renewal of teachers' certificates and diplomas. [NRS 385.090](#) and [391.020](#). Once the qualifications to be a teacher in the State of Nevada are set by the state board, all who meet the minimum requirements must be certified. The state board merely determines the general qualifications of all teachers. The fact of being a teacher should not disqualify an individual from performing this function. The two other primary functions of the state board can be performed by a teacher as well as any other citizen without an accusation of

incompatibility. By statute the board may accept private gifts and funds from the federal government. [NRS 385.095](#), [385.100](#). It also prescribes the course of study and approves lists of library books. [NRS 385.110](#) to [385.120](#), inclusive.

The second issue involves vagueness of the statute. It is a general principle of statutory law that a statute must be definite to be valid. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. 16 Am.Jur.2d Constitutional Law § 552. In the enactment of statutes, reasonable precision is require; indeed, one of the prime requisites of any statute is certainty, and legislative enactment may be declared inoperative and void for uncertainty in the meaning thereof. 50 Am.Jur. Statutes § 472.

The statute in question seeks to prohibit all but “lay members” without defining what is meant by the word “lay.” The statute does not specify whether the prohibition applies to private school teachers as distinguished from public school teachers, to university professors as distinguished from public school teachers, or to ex-teachers and professors as distinguished from active public school teachers. There could be no justification to preclude ex-public school teachers, private school teachers, or university professors from serving on the State Board of Education because the state board could not substantially affect their well-being.

CONCLUSION

It is therefore our conclusion that even assuming the language of the statute purports to prohibit teachers from running for the State Board of Education, such prohibition would be a deprivation of the constitutional right of every citizen to run for public office unless there is a substantial overriding public interest that would justify such a prohibition. No such justification is apparent on this particular question. The statute in question is so vague that men of common intelligence would have to guess at its meaning. As applied to the issue in question, the statute is inoperable and void for uncertainty.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By DANIEL R. WALSH, *Chief Deputy Attorney General*

687 Public Service Commission—Telephone Directories—The Public Service Commission of Nevada has no jurisdiction to dictate or otherwise control the terms and conditions of commercial advertising in the yellow pages of the directories of telephone companies doing business within the State of Nevada. The revenues received by telephone companies resulting from the sale of commercial advertising in telephone directories are within the jurisdiction of the commission and must be accounted for pursuant to the practices established by the commission.

CARSON CITY, October 19, 1970

REESE H. TAYLOR, JR., *Chairman, Public Service Commission of Nevada*, Carson City, Nevada 89701

DEAR MR. TAYLOR:

STATEMENT OF FACTS

The Public Service Commission of Nevada has been requested by certain subscribers to advertising in the yellow pages of telephone directories to review the rates charged for such advertising. The Public Service Commission has raised, as a threshold question, the matter of the commission's jurisdiction to become involved in the regulation of commercial advertising.

At the present time, the two largest telephone companies in the State contract with nonregulated firms doing business outside the State of Nevada whereby such foreign firms compile, print and sell advertising to individuals.

ANALYSIS

If the Public Service Commission does have jurisdiction in the matter of commercial advertising in telephone directories, it must be predicated upon statutory language because the Public Service Commission is a creature of the Legislature and created solely by statute. There is no language in any of the statutes relating to the Public Service Commission which specifically deals with commercial advertising in telephone directories. Jurisdiction by the commission must therefore be implied if it is to exist at all. The only statutes from which such an implication could be made are [NRS 703.150](#), [704.040](#) and 704.120.

The judiciary of the State of Nevada has not interpreted the above statutes with particular reference to commercial advertising. Such being the case, we must look to decisions that the courts of our sister states have issued. While there appears to be some conflict between the courts, the majority of the decisions stand for the proposition that commercial advertising is not an essential service and therefore is not subject to the jurisdiction of the state regulatory commissions. The rationale of the courts is announced in the following cases:

In *Frank v. New York Telephone Company*, 228 N.Y.S.2d 536 (N.Y. 1962), it was held that when a telephone company engages itself in the publication of paid advertising in the yellow pages of a telephone directory, it is not engaging in a public utility service and the state regulatory commission has no jurisdiction in the matter except to assure the public the privilege of inserting advertisements is available to all subscribers upon the same terms and conditions without discrimination.

In *National Merchandising Corp. v. Public Service Commission*, 158 N.E.2d 714 (N.Y. 1959), it was held that:

A telephone directory is, to some extent, a device used in the business of telephonic communications and is therefore subject to regulatory powers of the Commission. Directories provide a useful and necessary service which facilitates the use of telephones. Accordingly, ordinary alphabetical listings in both the general directory and in the classified directory are subject to the jurisdiction of the commission. While this alphabetical listing in the directory is an essential public service, once a telephone company has discharged this duty, it is under no obligation to solicit advertisements for its directories. Indeed, the sale of advertisements for publication in the directory is not considered an essential public service.

The court having concluded that advertising was not an essential public service, it then concluded that the commission had no jurisdiction to dictate the terms of such advertising.

In *Felix v. Pennsylvania Public Utilities*, 145 A.2d 347 (Pa. 1958), it was held that the Public Service Commission's jurisdiction over a public utility was limited to matters which related to the furnishing of the public service which the utility was designed to provide. The court stated that as far as telephone directories are concerned, the listing of subscribers in the company's directory was properly a matter of interest to the commission, but then went on to state that the commission would not have jurisdiction over the matter of selling advertising to a subscriber in the classified directory. The

court's rationale was that the classified directory constituted an advertising medium and not a public service.

Solomon v. Public Service Commission, 146 N.Y.S.2d 439 (N.Y. 1955). The New York Supreme Court, Appellate Division, held in very clear language that the Public Service Commission of New York had no jurisdiction to become involved with advertisements in classified directories. The rationale of this New York court was that a statute which required every telephone corporation to "print and file with the commission schedules showing all rates, rentals and charges for service of each and every kind by or over its line" would not include classified directories since that was not a service "over the line" of the telephone company.

As was announced above, there are conflicting decisions among the various state courts. One of those decisions is *Videon Corporation v. Burton*, 369 S.W.2d 264 (Mo. 1963). In this case, Television Service Corporation filed a complaint with the Missouri Public Service Commission alleging that a telephone company refused to accept advertisement and thereby committed an unreasonable, discriminatory and unlawful act. The commission dismissed the complaint and Television Service Corporation appealed. The court affirmed the decision of the commission, but in so doing, treated at considerable length the matter of the commission's jurisdiction. Prefatorily, the court said:

The weight of authority seems to treat the publication—including advertising—of a classified telephone directory as being more nearly a private matter than one of public interest so as to make it subject to regulation by a public service commission.

From all of the decisions above referred to, it is clear that the weight of authority dictates the conclusion that commercial advertising in telephone directories is a matter without the jurisdiction of the Public Service Commission in the absence of a clear statutory delegation of such jurisdiction.

The Nevada Legislature has not seen fit to delegate this authority to the Public Service Commission, but has left this matter to the managerial prerogative of the telephone companies. An inference of this authority cannot be gleaned from the statutes.

One additional matter should be discussed and that is the treatment and handling of the revenues received by Nevada telephone companies from the sale of commercial advertising. At the present time, the commission requires, and the telephone companies submit, financial statements which include the revenues received from commercial advertising. Because the commission has been given full and complete authority over the rates of the telephone companies, the matter of revenue from commercial advertising is a matter within the jurisdiction of the commission. The accounting practices and procedures instituted by the commission relating to such revenues are matters properly within the jurisdiction of the commission.

CONCLUSION

The Public Service Commission of Nevada has no jurisdiction to dictate or otherwise control the terms and conditions of commercial advertising in the yellow pages of the directories of telephone companies doing business within the State of Nevada.

The revenues received by telephone companies resulting from the sale of commercial advertising in telephone directories are within the jurisdiction of the commission and must be accounted for pursuant to the practices established by the commission.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By JOHN J. SHEEHAN, *Deputy Attorney General*

688 Funeral Directors—One following the profession of funeral director, whether grandfathered into the field by the act of 1959 or licensed thereafter, may list himself as such director in the classified section of the telephone directory.

CARSON CITY, October 21, 1970

MR. SILAS E. ROSS, *Secretary-Treasurer, Nevada State Board of Funeral Directors and Embalmers*, P.O. Box 2068, Reno, Nevada 89505

DEAR MR. ROSS:

You have directed to this office an inquiry as to the legality of a person engaged in the profession of funeral director prior to July 1, 1959, listing himself as a funeral director in the current telephone directory.

ANALYSIS

The controlling statute is [NRS 642.350](#), which reads as follows:

Any funeral director as defined by [NRS 642.010](#) who, on July 1, 1959, is engaged in or conducting the business of a funeral director, at a fixed place or establishment in this state, shall be issued a license upon application therefor made within 30 days after July 1, 1959, and may continue in business for the remainder of the year. He may have his license renewed annually upon payment of such renewal fees as are required by [NRS 642.420](#).

It is apparent from this statute that those engaged in the profession of funeral director on or before July 1, 1959, were grandfathered into the act of 1959. I can see no objection legally to a listing under funeral directors such as that confined in the telephone directory in the following form:

Joe Doe
Thomas Roe Funeral Home
606 Mary Street

CONCLUSION

One following the profession of funeral director, whether grandfathered into the field by the act of 1959 or licensed thereafter, may list himself as such director in the classified section of the telephone directory.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

689 Public Employees Retirement—A court order decreeing the payment of one-half of a pensioner's retirement allowance to his wife imposes the burden of making such payment on the husband and not on the retirement board.

CARSON CITY, October 22, 1970

MR. DONALD D. ANDERSON, *Executive Secretary, Public Employees Retirement Board,*
Carson City, Nevada 89701

DEAR MR. ANDERSON:

You have advised that a court order entered in a divorce decree reads as follows:

5. That plaintiff shall have as her sole and separate property the following items:

* * * * *

(c) One-half of defendant's pension paid by the State of Nevada Public Employees Retirement Board remaining after payment of one-half the premiums on the policies of life insurance as set forth in the Divorce Complaint.

The attorney for the divorced wife has requested that you pay from the Public Employees Retirement fund one-half of the divorced husband's retirement pension directly to the wife.

ANALYSIS

We do not believe that the administrative burden can be placed on your board to pay from retirement funds the wife's allotment under the court order, nor do we believe the court so intended. We believe the court used the retiree's pension as a gauge to determine what sums the wife should receive.

[NRS 286.670](#) reads as follows:

The right of a person to a pension, an annuity, a retirement allowance, the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or death benefit or any other right accrued or accruing to any person under the provisions of this chapter, and the money in the various funds created by this chapter, shall:

1. Be exempt from all state, county and municipal taxes.
2. Not be subject to execution, garnishment, attachment or any other process.
3. Not be subject to the operation of any bankruptcy or insolvency law.
4. Not be assignable, by power of attorney or otherwise.

It can be ascertained from the foregoing that rights to benefits are not subject to process or assignment. Under [NRS 286.6793](#) the benefits become vested on the date that the employee becomes entitled to begin receiving such benefits.

The Public Employees Retirement Plan is an actuarial plan which allows employees to make allowances to beneficiaries after death. There are five optional plans as to these payments. It can readily be seen that where an optional plan has been adopted to provide for a wife upon death of the recipient of the pension, court awards of set amounts to be diverted from retirement funds during the life of the pensioner would in actuality be a diversion of trust funds which would upset actuarially arrived at figures.

We believe that the burden of making the payment set forth in the court's decree falls on the husband. Under the court order, he could still keep his wife as beneficiary under one of the option plans, thus assuring her an income after his death, and still pay her one-half of any sum paid to him monthly by the retirement board.

CONCLUSION

A court order decreeing the payment of one-half of a pensioner's retirement allowance to his wife imposes the burden of making such payment on the husband and not on the retirement board.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

690 Cosmetology—Wig salons are not subject to licensing as cosmetological establishments even though employees therein may be required to be licensed cosmetologists.

CARSON CITY, October 30, 1970

MRS. RUTH A. DANIELS, *Executive Secretary, Nevada State Board of Cosmetology*,
Carson City, Nevada 89701

DEAR MRS. DANIELS:

You have asked whether a wig salon must be licensed as a cosmetological establishment, under the provisions of [NRS 644.340](#) et seq., if it employs cosmetologists already licensed by the Nevada State Board of Cosmetology.

ANALYSIS

Wig salons are governed, for the purposes of the Nevada State Board of Cosmetology, by [NRS 644.475](#). Sections 1 and 2 of that statute provide:

1. Any establishment in which hairpieces are sold may set or style a new hairpiece on a person in preparation for retail sale. After such sale the hairpiece may only be set or styled by a licensed cosmetologist.
2. A used hairpiece shall be cleaned by a licensed cosmetologist before being sold or tried on a customer.

Cosmetological establishments are defined by [NRS 644.340](#), subsection 1, which reads:

1. Any person, firm or corporation desiring to operate a cosmetological establishment in which any one or a combination of the *occupations of a hairdresser and cosmetician* are practiced shall apply to the board for a certificate of registration and license, through the owner, manager or person in charge, in writing, upon blanks prepared and furnished by the board. Each application shall contain proof of the particular requisites for registration provided for in this chapter, and shall be verified by the oath of the maker. (Italics added.)

A hairdresser and cosmetician is “any person who engages in the practice of cosmetology * * *” ([NRS 644.020](#), subsection 6). “Cosmetology” is defined, inter alia, by [NRS 644.020](#), subsection 3(a):

3. “Cosmetology” shall be construed to include any branch or any combination of branches of the occupation of a hairdresser and cosmetician, and any branch or any combination of branches of the occupation of a cosmetician, or cosmetologist, or beauty culturist, which are now or may hereafter be practiced, and is defined as the following practices:
 - (a) Arranging, dressing, curling, waving, cleansing, singeing, bleaching, tinting, coloring or straightening *the hair of any person* with the hands, mechanical or electrical apparatus or appliances, or by any means; or similar work

incident to or necessary for the proper carrying on of the practice or occupation provided by the terms of this chapter. (*Italics added.*)

In setting or styling a wig prior to its original retail sale, a licensed cosmetologist is not practicing cosmetology or the occupation of hairdresser or cosmetician, since he is not performing work on the hair of a person. If the occupation of hairdresser or cosmetician is not being practiced, the establishment itself is not a cosmetological establishment subject to licensing by the Nevada State Board of Cosmetology. This conclusion is enhanced by the provisions of [NRS 644.475](#), which allow non-licensed establishments to set and style new wigs and hairpieces prior to retail sale.

Once the original retail sale of a wig or hairpiece is made, the hairpiece may only be set and styled by a licensed cosmetologist ([NRS 644.475](#), subsection 2). This, however, does not make the establishment where the work is done a cosmetological establishment as defined by [NRS 644.340](#), since cosmetology, as defined by [NRS 644.020](#), subsection 3(a), is not being practiced. No work is being performed on the hair of a person even though the work is being performed by a licensed cosmetologist.

CONCLUSION

It is therefore our opinion that wig salons need not be licensed as cosmetological establishments, even though the setting and styling of wigs is being performed therein by licensed cosmetologists.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By MICHAEL L. MELNER, *Deputy Attorney General*

691 Taxation; Sales Tax—Any financial institution that makes more than two sales of repossessed property per year is subject to sales tax.

CARSON CITY, November 6, 1970

MR. ROY E. NICKSON, *Secretary, Nevada Tax Commission*, Carson City, Nevada 89701

DEAR MR. NICKSON:

A number of banks, finance companies and loan companies regularly and systematically sell in Nevada motor vehicles, mobile homes, appliances, furniture and other tangible personal property which they have repossessed from defaulting borrowers.

You indicate that an audit of one financial institution, not the largest of its kind in Nevada, revealed that it had sold an average of 522 repossessed automobiles per year during the 3-year period covered by the audit. Of said autos, 414 were sold to dealers and 108 were sold to nondealers each year, on the average.

You request the opinion of this office as to the proper treatment, pursuant to the sales and use tax laws of Nevada, of sales by financial institutions of repossessed tangible personal property.

ANALYSIS

Financial institutions fall within the definition of “person” set forth in the Sales and Use Tax Act of [NRS 372.040](#). Likewise, such institutions are includable in the definitions of “seller” and “retailer.” [NRS 372.070](#) and [372.055](#). In other words, if a financial institution is to receive the benefit of an exception or exemption afforded by the

act, it must be because of the nature of the transaction and not merely because a financial institution is involved.

Where the repossessed property is sold to a dealer in such property and the dealer gives a resale certificate, the transaction is not treated as a sale at retail. [NRS 372.155](#), [372.160](#), 372.225. Therefore, the gross receipts from such a sale should not be includable in the seller's taxable sales. An example of this type of transaction (sale for resale) would be the sale of a repossessed automobile by a bank to an automobile dealer.

On the other hand, where repossessed property is sold to someone other than a dealer in such property, and a resale certificate is not given, the transaction is taxable. Financial institutions in many states have argued that their sales of repossessed property are not a regular part of their business. In some states the local law prohibits the reposessor from making a profit on the sale; any excess obtained over the amount owed by the defaulting borrower must be turned over to the borrower. Therefore, it has been argued that sales by financial institutions of repossessed property should be exempted from the tax as "occasional sales." This argument has been singularly unsuccessful. In the absence of a specific statutory exemption, virtually all states that have considered the matter have ruled such sales to be taxable. Examples of the states that have so ruled, and the numbers of their tax administration agencies' regulations setting forth the rulings, are: Alabama (A28-022), Florida (318-1.65), Georgia (560-12-2.159), Kentucky (SU-58), Louisiana (2-90), Missouri (38), Nebraska (TC-1-38), Tennessee (24), Utah (838), and Virginia (1-59).

Nevada borrowed its Sales and Use Tax Act largely from California. At the time, California held that sales of repossessed property by financial institutions were taxable. California Sales and Use Tax Letter Ruling, dated May 3, 1950. The only exception was in the case of sales by banks, for banks were and are exempted from such taxes by the California Constitution, Article 13, Section 16. Nevada has no such constitutional exemption.

The courts that have considered the issue also have come to the conclusion that sales by financial institutions of repossessed property are not entitled to any "occasional sale" exemption when such sales are constantly recurring. *State v. Zellner*, 13 N.E.2d 235 (Ohio 1938); *S & M Finance Co., Fort Dodge v. Iowa State Tax Comm.*, 162 N.W.2d 505 (Iowa 1969). The Zellner case involved a loan company; the company showed that it could not, by law, profit from the sales, and proved that the sales amounted to only one-one thousandth of its total volume of business. The court, nevertheless, found the sales to be characterized by systematic recurrence and continuity and refused to allow an "occasional sale" exemption.

Nevada statute provides an "occasional sale" exemption from sales taxes. [NRS 372.055](#). This law, as aforementioned, is as applicable to a financial institution selling repossessed property as it is to any other type of seller. The sale now of repossessed cars by lending institutions is no longer sporadic (see Attorney General's Opinion No. 256 of August 18, 1965) and must now be considered other than an occasional sale.

CONCLUSION

Any financial institution that makes more than two sales of repossessed personal property to users or consumers during any 12-month period must obtain a seller's permit and pay sales tax on such sales.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By IRWIN AARONS, *Deputy Attorney General*

692 Interim Finance Committee—The Interim Finance Committee cannot allocate funds to a local agency for which no previous legislative appropriation has been made, regardless of whether the allocation is first made to a state agency.

CARSON CITY, November 10, 1970

MR. HOWARD E. BARRETT, *Clerk, Board of Examiners, Department of Administration,*
Carson City, Nevada 89701

DEAR MR. BARRETT:

The Clark County Health District and the State Health Division of the Department of Health, Welfare and Rehabilitation have made a request to the Board of Examiners for an allocation of funds. They seek to have the Board of Examiners recommend to the Interim Finance Committee that funds be allocated for the benefit of the Clark County Health District. You have asked for our opinion on two questions:

QUESTIONS

1. Is it legally permissible for the Interim Finance Committee to allocate funds to a local government entity such as the Clark County Health District?
2. Can the Interim Finance Committee allocate funds to the Health Division of the Department of Health, Welfare and Rehabilitation which would then be allocated to a local health district such as the Clark County Health District?

ANALYSIS

We do not believe that the Interim Finance Committee can dispense funds to finance the operations of a county health district.

[NRS 353.268](#) assigns the conditions under which allocations can be made from the contingency fund account by the Interim Finance Committee. It reads:

When any state agency or officer, at a time when the legislature is not in session, finds that circumstances for which the legislature has made no other provision require an expenditure during the biennium of money in excess of the amount appropriated by the legislature for the biennium for the support of that agency or officer, or for any program, including the state distributive school fund, the agency or officer shall submit a request to the state board of examiners for an allocation from the contingency fund account. The state board of examiners shall consider the request, may require from the requester such additional information as they deem appropriate, and shall, if they find that an allocation should be made, recommend the amount of such allocation.

The foregoing statute is explicit in its requirement that a state agency or officer be seeking the funds. The statute also requires that the requested expenditure be for the support of an agency or program for which funds have already been appropriated. This characterizes the entire legislative plan as one aimed at supplementary funding, as distinguished from the financing of new programs not already approved by the Legislature.

We have found nothing in the legislative appropriations of the past two sessions wherein the Clark County Health District was made the recipient of funds from the Legislature.

The foregoing leads us to the conclusion that the Interim Finance Committee cannot make allocations to a local government entity such as the Clark County Health District.

In answer to your second question, we must conclude that what cannot be done directly cannot be done indirectly. This is not to say that a violation of the statutes would occur in all cases where a local agency benefits from an allocation to a state agency. In the instant case, it appears to us that the state agency would be acting as a funnel for the sake of appearances. In substance, if not in form, it would amount to a naked appropriation to the local agency. We believe it cannot be done.

CONCLUSION

The Interim Finance Committee cannot allocate funds to a local agency for which no previous legislative appropriation has been made, regardless of whether the allocation is first made to a state agency.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*

By PETER I. BREEN, *Deputy Attorney General*

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