

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1974

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.

158 Private Schools—Public School Buses and Books, Shared Time—(1) A local school board cannot provide transportation on existing school bus routes for nonpublic school pupils, nor may they loan or give books or other instructional material to nonpublic school pupils. (2) A local district may allow nonpublic students to attend classes in public schools on a space-available basis, but it is not mandatory that they do so.

CARSON CITY, January 24, 1974

DR. KENNETH H. HANSEN, *Superintendent of Public Instruction*, Carson City, Nevada
89701

DEAR DR. HANSEN:

In a recent inquiry, you asked an opinion on the following questions:

QUESTIONS

1. Is it constitutionally and statutorily permitted for a local district board (a) to provide transportation on existing school bus routes for nonpublic school pupils, (b) to loan or give books or other instructional materials owned by the district to nonpublic school pupils, and (c) to permit attendance of nonpublic school students on a space-available basis in classes offered by the district schools?

2. If any (or all) of these practices is permitted, does the district have any *obligation* to provide such services?

3. If any (or all) of these practices is permitted, can the district make the decision to offer these services on the basis that no additional direct and identifiable cost will accrue to the district?

ANALYSIS—QUESTION 1(a)

The case of *Everson v. Board of Education*, 330 U.S. 1 (1946), involved the question whether a local school district could authorize reimbursement to parents of moneys expended by them for bus transportation of their children on buses operated by the public transportation system. Part of this money was for the payment of transportation of some children to Catholic parochial schools. The case involved a statute which reads in part:

* * *, the board of education of the district *may* make rules and contracts for the transportation of such children to and from school, including the transportation of such school children to and from school other than a public school, except such school as is operated for profit in whole or in part. (Italics added.)

In upholding the constitutionality of the statute, the United States Supreme Court stated:

* * *, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of Parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.

It is important to note that the New Jersey law stated a local school district “may” reimburse parents for moneys expended by them for bus transportation in sending their children to both public and private schools. The law was therefore permissive. The Legislature *did not mandate* all local school districts to reimburse parents, but rather left the choice with the local boards.

The Everson case, *supra*, was based on *Cochran v. Board of Education*, 281 U.S. 370 (1930). This early case decided the question whether the State of Louisiana could furnish textbooks to all pupils within the state, whether they attended public or nonpublic schools.

Act No. 100 of 1928 provided that the severance tax fund of the State, after allowing funds and appropriations as required by the state constitution, should be devoted “first, to supplying school books to the school children of the State.” The Board of Education was directed to provide school books for school children free of cost to such children.

In upholding the constitutionality of the statute, the United States Supreme Court stated at pp. 374, 375:

It [the appropriation] was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. * * *

The *Cochran* case, *supra*, is the foundation of what is widely known as the “child benefit” theory. It, together with *Everson*, *supra*, has been used extensively as an attempt to utilize public funds to diminish the financial burdens of nonpublic schools.

It would appear clear then, that unless there were a statute preventing the use of publicly financed buses to transport nonpublic school pupils to and from school, it would be constitutionally permissible to allow public school buses to transport nonpublic school pupils on existing bus routes.

Several Nevada statutes are pertinent to this question. [NRS 387.045](#) reads:

1. No portion of the public school funds or of the money specially appropriated for the purpose of public schools shall be devoted to any other object or purpose.
2. No portion of the public school funds shall in any way be segregated, divided or set apart for the use or benefit of any sectarian or secular society or association.

Without doubt, this statute expressly shows a clear intent of the Legislature to limit public funds to public schools only. Under no rule or rules of statutory construction

can this statute be construed to mean that public funds can be used to assist nonpublic schools.

[NRS 392.300](#), subsection 1, reads:

As provided in this title of NRS, the board of trustees of any school district may, in its complete discretion, furnish transportation for all resident children of school age in the school district *attending public school*. (Italics added.)

A board of trustees may either provide buses for public school children, or it may not provide buses at all. But, if the board does provide buses, they are to be used only for resident children of school age in the school district *attending public schools*. This argument is strengthened by [NRS 392.360](#), subsection 1, which reads:

A board of trustees of a school district shall have the power to permit school buses or vehicles belonging to the school district to be used for the transportation of *public school pupils* to and from:

- (a) Interscholastic contests; or
- (b) School festivals; or
- (c) Other activities properly a part of a school program. (Italics added.)

State ex rel. Boardman v. Lake, [8 Nev. 276](#) (1873), holds that the inclusion of one thing is the exclusion of another, i.e., since the above-cited Nevada statutes use the phrase “public school pupils,” the phrases “nonpublic school pupils” or “parochial school pupils” are excluded.

In two places the Legislature referred to school district buses in reference to their use by public school pupils only. If the Legislature had intended to allow school district buses to be used for all pupils within the district, it would have omitted the words “public school” from the two above statutes. Since these words are not omitted, it obviously was the intent of the Legislature to allow a local board of trustees to supply buses only for “public school pupils,” and not simply “pupils.”

CONCLUSION—QUESTION 1(a)

Because of the mandatory prohibitions of [NRS 387.045](#), [392.300](#), subsection 1, and [392.360](#), subsection 1, public school buses cannot be used to provide transportation on existing school bus routes for nonpublic school pupils.

ANALYSIS—QUESTION 1(b)

The case of Board of Education v. Brown, 392 U.S. 236 (1968), again upheld a statute based upon the “child benefit theory.” The statute in question required local school boards to lend textbooks, without charge “* * * to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory school law.”

Clearly then, a state legislature constitutionally could, if it wished, either permit or require a local board of trustees to purchase nonsectarian books for the use of all pupils within the state.

The question, therefore, turns on whether Nevada statutes require, permit, or prohibit a local district from loaning nonsectarian books or other instructional material, to pupils attending nonpublic schools.

[NRS 393.160](#) reads:

The board of trustees of a school district shall have the power:

1. To purchase, rent or otherwise acquire supplies and equipment necessary for the operation of the public schools and other school facilities of the school district.

In clear, concise, and specific language, the Legislature conferred upon local boards of trustees the express power to acquire supplies “for the operation of public schools.” These words mean exactly what they say, and cannot be interpreted to mean *all* schools, but rather are limited to public schools.

[NRS 386.350](#) reads:

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

It is quite apparent that the various boards of trustees have authority only over *public schools* within their district, and only to the extent they do not violate the Nevada Constitution or Nevada statutes. Nowhere in the entire body of Nevada law is there the slightest inference that local school boards have jurisdiction over nonpublic schools.

[NRS 393.170](#), subsection 1, reads:

The board of trustees of a school district shall purchase all new textbooks * * *, and school supplies necessary to carry out the mandate of the school curriculum to be used by pupils of the school district. * * *

As enumerated in [NRS 386.350](#), supra, local boards have authority only over public schools. The “school curriculum to be used by the pupils of the school district” ([NRS 393.170](#), subsection 1) would refer to public schools only, and *not* all schools.

In addition, [NRS 387.045](#), subsections 1 and 2, supra, clearly prohibit the use of public school funds for the benefit of nonpublic schools.

Thus, since local boards of trustees have authority to purchase books and other educational supplies only for the public schools, and they have authority over public schools alone, they are without authority to lend books or other educational supplies to pupils attending nonpublic schools.

CONCLUSION—QUESTION 1(b)

Because of the mandatory prohibitions of [NRS 393.160](#), subsection 1, 386.350, and 393.170, a local school board cannot loan books or other instructional material owned by the school district to pupils attending nonpublic schools.

ANALYSIS—QUESTION 1(c)

The State of Nevada, by enacting [NRS 392.040](#), has a compulsory education law which states that all children between the ages of 7 and 17 shall be sent “* * * to a public school during all the time such public school is in session in the school district in which the child resides.”

There are exceptions to this rule, however, as [NRS 392.070](#) reads:

Attendance required by the provisions of [NRS 392.040](#) shall be excused when satisfactory written evidence is presented to the board of trustees of the school district in which the child resides that the child is receiving at home or in some other school equivalent instruction of the kind and amount approved by the state board of education.

Clearly, those students attending a nonpublic school, whose curriculum is approved by the State Board of Education, are in full compliance with Nevada laws.

Since the case of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), there has been no doubt that parents or guardians can send their children to nonpublic schools. This case

has been cited by various courts time after time where the right to seek nonpublic education, in light of statutory compulsory school attendance, is sought. Each time the nonpublic school meets state requirements concerning course of study, and perhaps safety, the right to attend such nonpublic school has been affirmed.

The question of “shared time,” however, has had little litigation. Shared time is that situation where a student receives part of his education at a public school, and part at a nonpublic school.

A very early case was that of Commonwealth ex rel. Wehrle v. School Dist. of Altoona, et al., 241 Pa. 224, 88 A. 481 (1913), which involved the question of whether a manual training school conducted in the same building with an elementary public school, but independent of and wholly apart therefrom, and under the management of instructors not qualified to teach in the elementary public school, is an “additional school” within the act of May 18, 1911 (P.L. 329), Section 401.

The act reads, in part:

The board of school directors * * * may establish, * * * and maintain the following additional schools or departments for the education and recreation of persons residing in said districts, which said additional schools or departments, when established, shall be an integral part of the public school system. * * * Provided, that no pupil shall be refused admission to the courses in these additional schools or departments, by reason of the fact that his elementary or academic education is being or has been received in a school other than a public school.

The court dismissed the appellant’s argument concerning public funds being used for nonpublic education in violation of the First Amendment by saying:

* * *, the parts of the Constitution relied on have been before this court on several occasions, and our uniform interpretation of their meaning excludes such construction or application as to that contended for by the appellant.

Thus, the court approved the act as being constitutional, and held shared time, absent statutory prohibition, is valid.

A later case was that of Morton v. Board of Education of the City of Chicago, 69 Ill.App.2d 38, 216 N.E.2d 305 (1966), and involved a complaint for injunction to restrain the school board from maintaining an experimental dual enrollment program wherein students took English, social studies, music and art at the St. Paul High School, a nonpublic school, and the remainder of their courses at the John F. Kennedy High School, a public school.

The validity of the statute creating the experimental school was upheld in all respects.

It is important to note, however, that Nevada has no statute creating either shared time or similar programs whereby a student receives part of his education in public schools and part in nonpublic schools.

If a student is attending a nonpublic school, there is neither constitutional authority nor statutory authority requiring him to complete his education at the nonpublic school. The purpose of compulsory education is that all students attend some school, whether it be public or nonpublic.

Since a student need not complete his education at a public or nonpublic school, but can transfer from one to the other, it follows that every student between the ages of 7 and 17 has the *right* to attend regular public school.

However, because the Legislature has enacted no statute either allowing or prohibiting shared time, and shared time is not constitutionally prohibited, the school

districts must each decide whether they will permit attendance of nonpublic school students on a space-available basis.

CONCLUSION—QUESTION 1(c)

A local school board may permit attendance on a space-available basis of nonpublic school students in classes offered by the school district.

ANSWER—QUESTION 2

Since a local school district is prohibited by [NRS 387.045](#), [392.300](#), subsection 1, 392.360, subsection 1, 393.160, subsection 1, 386.350, and 393.170 from busing pupils or lending books or other instructional material to nonpublic school pupils, obviously it is not mandatory that they do so.

A local district may allow pupils attending nonpublic schools to attend classes, on a space-available basis, in classes offered by the local district, but it is not mandatory that they do so.

ANSWER—QUESTION 3

Since busing and lending books or other instructional material are prohibited, a local district cannot make these services available on the basis that no additional costs will accrue to the district.

Allowing nonpublic school students to attend certain classes on a space-available basis offered in public schools is permissible, but not mandatory. Therefore, a local district can refuse to offer such course on the basis of additional costs.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By ROSS DELIPKAU, *Deputy Attorney General*

159 Property Tax Exemption of Pollution Control Devices—Water filtration apparatus or water purification plants designed to provide potable water are not facilities, devices or methods for the control of water pollution, and therefore are not properly exempted from the property tax.

CARSON CITY, January 28, 1974

THE HONORABLE ROBERT E. ROSE, *District Attorney*, Washoe County Courthouse, Reno, Nevada 89501

Attention: LARRY D. STRUVE, ESQ., *Deputy District Attorney*

DEAR MR. ROSE:

You have requested an opinion of this office concerning the newly enacted property tax exemption for property used as a facility, device or method for the control of air or water pollution. 1973 Statutes of Nevada, Chapter 281.

QUESTION

Is a water filtration apparatus or water purification plant designed to provide potable water in conformance with applicable health standards to the residents of a privately-owned trailer park a “facility, device or method for the control of air or water pollution” within the meaning of Chapter 281, 1973 Statutes of Nevada?

ANALYSIS

The statute to which you refer, hereafter referred to as "Act," was adopted by the 1973 Session of the Nevada Legislature, has been published in 1973 Statutes of Nevada, Chapter 281, and reads in part as follows:

Section 1. Chapter 361 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. All property, both real and personal, owned by any individual, group or individuals, partnership, firm, company, corporation, association, trust, estate or other legal entity is exempt from taxation to the extent that such property is used as a facility, device or method for the control of air or water pollution.

2. As used in this section, "facility, device or method for the control of air or water pollution" means any land, structure, building, installation, excavation, machinery, equipment or device or any addition to, reconstruction, replacement, or improvement of land or an existing structure, building, installation, excavation, machinery, equipment or device used, constructed, acquired or installed after January 1, 1965, *if the primary purpose of such use, construction, acquisition or installation if (is?) compliance with law or standards required by any environmental protection agency, authorized by and acting under the authority of the United States or the State of Nevada or any of its political subdivisions, for the prevention, control or reduction of air or water pollution.*

3. As used in this section, "facility, device or method for the control of air or water pollution" *does not include:*

*We are informed by the Legislative Counsel Bureau that this typographical error will be corrected to read "is" upon inclusion in the Nevada Revised Statutes compilation.

(a) *Air conditioners, septic tanks or other facilities for human waste, nor any property installed, constructed or used for the moving of sewage to the collection facilities of a public or quasi-public sewage system.*

(b) Any facility or device having a value of less than \$1,000 at the time of its construction, installation or first use.

(c) Any facility or device which produces a net profit to the owner or operator thereof from the recovery and sale or use of a tangible product or by-product, nor does it include a facility or device which, when installed and operating, results in a net reduction of operating costs.

Section 2. * * * (Italics added.)

A somewhat circular definition of the phrase "facility, device or method for the control of air or water pollution" is included in Section 1, subsection 2 of the Act, supra, as follows: "* * * 'facility, device or method for the control of air or water pollution' means any land, structure, * * * *if the primary purpose of such use, construction, acquisition or installation if (is?) compliance with law or standards required by any environmental protection agency, * * * for the prevention, control or reduction of air or water pollution.*"

There appears to be little dispute that a "water filtration apparatus or water purification plant" is reasonably assumed to be a structure, installation, device, equipment or machinery within the broad language of Section 1 of the Act, supra.

The basic underlying question is the following: Is the primary purpose of a water filtration apparatus or water purification plant "* * * compliance with law or standards required by any environmental protection agency, * * * for the prevention, control or reduction of air or water pollution?"

Pollution has been defined as follows: "By pollution of waters is meant their *impregnation* with refuse or noxious substances." (Italics added.) Restatement of Torts, 1st ed., § 832, Comment (b). A similar definition of "pollution" is found in the Nevada Water Pollution Control Law, Section 16, as adopted by the 1973 Session of the Nevada Legislature. 1973 Statutes of Nevada, Chapter 786. It reads as follows: "'Pollution' means the manmade or man-induced *alteration* of the chemical, physical, biological and radiological integrity of water." (Italics added.) Another general explanation reads: "(p)ollution, from a legal standpoint, is, generally speaking, the wrongful *contamination* of the atmosphere, or of water, or of soil, to the material injury of the right of an individual." 61 Am.Jur.2d, Pollution Control, § 1, p. 811. (Italics added.) It is clear that the above definitions, indeed all definitions which have been discovered, relate "pollution" to an *act*; such as "impregnation," "alteration," or "contamination." Pollution then, simply, is the result of the act of polluting. "Pollute" has been defined as "* * * to make foul or unclean; dirty * * *" Random House Dictionary of the English Language, 1967, p. 1114.

Keeping the above definitional structure in mind, it must next be decided whether the purpose of water filtration or purification facilities is to prevent, control or reduce the "impregnation," "alteration," or "contamination" of the waters of the State. We think not. The stated purpose of the requirement of the applicable health standards which require the addition of the filtration or purification facilities is to insure the drinking water available to members of the public is potable. The waters filtered or purified by such facilities are intended for a prior use before discharge into the waters of the State. Such requirements are not imposed to prevent or control the "impregnation," "alteration," or "contamination" of the waters of the State; rather, they are imposed, in part at least, to remove impurities and waste that may have been previously introduced into the waters of the State.

CONCLUSION

It is therefore our conclusion that a water filtration apparatus or water purification plant is not "* * * a facility, device or method for the control of air or water pollution" within the meaning of the pollution control device property tax exemption adopted by the Legislature at 1973 Statutes of Nevada, Chapter 281.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By JAMES D. SALO, *Deputy Attorney General*

160 Public Employees Retirement Board—PERB is exempt from rules of State Board of Examiners with respect to paying claims or expenses of Retirement System, but must still comply with rules of State Personnel Division and State Purchasing Division on all personnel and purchasing matters.

CARSON CITY, January 30, 1974

MR. VERNON BENNETT, *Executive Officer, Public Employees Retirement Board*, P.O. Box 1569, Carson City, Nevada 89701

DEAR MR. BENNETT:

In your letter of December 7, 1973, you sought the opinion of this office on the following:

QUESTIONS

1. Is the Public Employees Retirement Board subject to the rules and regulations of the State Board of Examiners with respect to the payment of retirement claims and the administrative expenses of the Retirement System?
2. Is the Public Employees Retirement Board required to comply with the laws, rules and regulations of the State Personnel Division and the State Purchasing Division on all questions concerning the board's staffing arrangements and purchases?

ANALYSIS—QUESTION ONE

Article 5, Section 21 of the Nevada Constitution provides, in part, for a State Board of Examiners, composed of the Governor, Secretary of State and Attorney General, with power to examine all claims against the State, except salaries or compensation of officers fixed by law. This constitutional directive has been carried out by the Legislature of our State through enactment of [NRS 353.085](#) and [353.090](#), which set up procedures for approving certain types of claims against the State of Nevada by the Board of Examiners.

Until the 1973 Session of the Legislature, there was no real question about the authority of the Board of Examiners to review certain types of claims against the Public Employees Retirement Fund. In fact, [NRS 286.250](#), subsection 3, specifically directed the Board of Examiners to pass, after payment, upon all claims or demands paid from such fund.

However, the Public Employees Retirement Act, [NRS Chapter 286](#), was substantially amended by Chapter 542 of the 1973 Statutes of Nevada. As a result of these amendments, it is now the opinion of this office that the general laws, rules and regulations pertaining to the powers of the Board of Examiners to review claims of any type against either the Retirement Fund or the administrative fund of the Retirement Board no longer apply to the operations of the Public Employees Retirement System.

For instance, the post-payment review authority of [NRS 286.250](#), subsection 3, was completely repealed by Section 10 of Chapter 542, 1973 Statutes of Nevada. Also repealed was the language of [NRS 286.240](#) which had directed the deposit of all moneys received by the Retirement Board with the State Treasurer as custodian.

Presently under Section 9 of Chapter 542 all employer and employee contributions and all income earned by the system shall, upon receipt, be deposited directly in a bank account established by the Public Employees Retirement Board for its various funds. Related to this significant change in the law is the repeal of the need for the board to seek the approval and consent of the State Treasurer before it selects a bank which will have physical control and custody of its various investments. See Section 12, Chapter 542, 1973 Statutes of Nevada.

Still another significant change in the Retirement Act and the control by the executive branch of state government over the Public Employees Retirement Board operation is found in Section 18, subsection 2 of Chapter 542. This provision specifically exempts the Retirement Board from the requirements of the State Budget Act, i.e., preparing and submitting its biennial budget to the Governor's office, and allows the board instead to file its budget directly with the Legislature.

Still further evidence of the Legislature's desire to make the Public Employees Retirement Board responsible only to itself, its members and the Legislature may be found by examining Sections 2 and 11 of Chapter 542, 1973 Statutes of Nevada. Section 2 directs the Fiscal Analyst to periodically reexamine employee contribution records and report his findings to both the Retirement Board and the Legislative Commission at six (6) month intervals, while Section 11 increases the frequency of audits of the fund from once every two (2) years to annually, with an annual report being made to members and employers contributing to the Retirement System.

A final point worth noting in answer to Question One is the legal status of the Nevada Industrial Commission, vis-à-vis the State Board of Examiners. The Nevada

Industrial Commission is an agency very similar to the Retirement Board in both its funding and basic operations. That agency, as well as your own, receives all of its funds from outside contributions rather than from legislative appropriations. Shortly after enactment of the law establishing the Nevada Industrial Commission, the Nevada Supreme Court was presented with the same question concerning the Nevada Industrial Commission that you now ask with regards to the Retirement Board and its relationship, if any, to the Board of Examiners.

In *State ex rel. Beebe v. McMillan*, [36 Nev. 383](#), 136 P. 108 (1913), Chief Justice Talbot, speaking for a unanimous court, declared that the funds of the Nevada Industrial Commission which are derived entirely from employer contributions were not a part of the state treasury and claims against such funds were not controlled by those provisions of our Constitution and laws which generally require prior presentation of claims against the state treasury to the Board of Examiners for review.

Due to the similarity of funding between the Nevada Industrial Commission and the Public Employees Retirement Board, we believe the rule of *McMillan* may be said to apply equally to the various funds maintained by the Retirement Board.

CONCLUSION—QUESTION ONE

The 1973 amendments to the Public Employees Retirement Act evidence a clear legislative intent to free the Public Employees Retirement Board from any form of outside supervision or restraint by the Board of Examiners with respect to the payment of any claims for retirement or other expenses of the system.

ANALYSIS—QUESTION TWO

Although we have recognized above a legislative intent to remove from the Public Employees Retirement Board many of the controls formerly placed upon it by various agencies of the executive branch of state government, the Legislature has not removed the board from other controls applicable to state agencies generally.

Section 6 of Chapter 542, 1973 Statutes of Nevada, directs a new structure for the administration of the Public Employees Retirement System through four (4) functioning divisions, each headed by a division chief who is declared to be in the state classified service. The board has authority under the law to appoint the various division chiefs and fix their salaries, but this must be done “in accordance with the pay plan of the state adopted pursuant to the provisions of Chapter 284 of NRS.”

The classified service is a part of the State Merit Plan which is under the direct supervision and control of the Personnel Division. [NRS 284.010](#) sets forth as one of the purposes of the State Personnel Law the establishment of uniform job and salary classifications. Such uniformity is believed necessary to provide all citizens a fair and equal opportunity for public service and to establish conditions of service which will attract officers and employees of character and ability to state government.

The chief of personnel is mandated by [NRS 284.160](#) and [284.175](#) to prepare a classification plan for all positions declared by law to be in the classified service and to establish a uniform pay plan for all classified employees. His authority in this area appears so pervasive that only a clear legislative statement to the contrary would justify this office in saying that a particular agency is not included in the personnel scheme envisioned in Chapter 284 of NRS.

We are unable to find any language in either Chapter 284 or Chapter 286 of NRS which we could cite as authority for the proposition that the Public Employees Retirement Board is not subject to the authority of the chief of personnel. On the contrary, [NRS 284.013](#) specifically names those groups exempt from Chapter 284, i.e., the legislative and judicial departments, the Nevada Gaming Commission and the Nevada Gaming Control Board. The Public Employees Retirement Board is not included in this listing; and applying the ancient and basic rule of statutory interpretation, *inclusio unius est*

exclusio alterius (the inclusion of one thing is the exclusion of all others), we must conclude that the Retirement Board is not exempted from Chapter 284 regulation.

We reach the same conclusion with respect to purchases made by the Public Employees Retirement Board. The State Purchasing Act, [NRS Chapter 333](#), requires all state agencies to make their purchases through the purchasing division in conformance with all applicable laws, rules and regulations. This result is achieved in [NRS 333.020](#) by defining the term “using agency,” as used in the chapter, to mean:

* * * any and all officers, departments, institutions, boards, commissions and other agencies in the executive department of the state government which derive their support from public funds in whole or in part, whether the same may be funds provided by the State of Nevada, funds received from the Federal Government or any branch, bureau or agency thereof, or funds derived from private or other sources, excepting counties, municipalities, irrigation districts and school districts. The University of Nevada System and the desert research institute of the University of Nevada System are not “using agencies” except as provided in [NRS 333.461](#).

In addition, [NRS 333.500](#) declares as void all contracts entered into or purchases made contrary to the provisions of [NRS Chapter 333](#) or the rules and regulations of the chief of purchasing. The breadth of this statute is clearly large enough to include the Public Employees Retirement Board as a “using agency.”

This office in Attorney General’s Opinion No. 372, dated April 10, 1958, has previously held that the Nevada Industrial Commission is a “using agency” required to comply with the requirement that purchases be made through the State Purchasing Division. We see no basis upon which a different determination could now be made with respect to the Public Employees Retirement Board, in view of the similarity of the two agencies as mentioned above.

CONCLUSION—QUESTION TWO

The Public Employees Retirement Board, although exempt from regulation by the Board of Examiners with respect to payment of claims, is still required to comply with all pertinent laws, rules and regulations relating to personnel (Chapter 284 of NRS) and purchasing (Chapter 333 of NRS).

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

161 School Trustees—Salaries—It is necessary for a school trustee to request payment to him of salary and for the board of trustees to approve the payment of the salary before the school board member is entitled to salary for attending school board meetings.

CARSON CITY, January 30, 1974

THE HONORABLE ROBERT ROSE, *Washoe County District Attorney*, Courthouse, Reno, Nevada 89505

Attention: ROBERT E. HEANEY, *Deputy District Attorney*

DEAR SIR:

You have asked this office for an interpretation of the statute authorizing payment of salary to school board trustees.

QUESTION

Does [NRS 386.320](#) require authorization for individual trustees to receive salary payment by action of the board as a whole or may an individual trustee elect to receive salary payment without prior authorization by the board as a whole?

ANALYSIS

In 1969, the Legislature amended [NRS 386.320](#) to permit school trustees to receive a nominal salary for attending trustee meetings. The provision pertaining to Washoe County School District is found in [NRS 386.320](#), subsection 2, as follows:

If the average daily attendance of pupils between the ages of 6 years and 17 years attending school in the school district for the immediately preceding school year is 1,000 or more:

(a) The clerk and president of the board of trustees *may* each receive a salary of \$40 for each board of trustees meeting they attend, not to exceed \$80 a month.

(b) The other trustees *may* each receive a salary of \$35 for each board of trustees meeting they attend, not to exceed \$70 a month.

(c) The board of trustees may hire a stenographer to take the minutes of the meetings of the board of trustees; and such stenographer *may* be paid \$20 for each meeting attended. (Italics added.)

By the use of the word “may,” the Legislature has clearly indicated that the payment of salary to a trustee for attending school board meetings and the receipt of such salary by the trustee is totally discretionary. *State v. Sella*, [42 Nev. 467](#), 180 P. 980 (1919); *Fourchier v. McNeil Const. Co.*, [68 Nev. 109](#), 227 P.2d 429 (1951). Additional authority for this conclusion can be found in [NRS 386.290](#) which provides for payment to trustees of travel expenses. That provision reads as follows:

1. In addition to salaries allowed under [NRS 386.320](#) a trustee *shall* be allowed:

(a) His traveling expenses for traveling each way between his home and the place where board meetings are held at the rate authorized by law for state officers.

(b) His living expenses necessarily incurred while in actual attendance at board meetings at the rate authorized by law for state officers.

2. Claims for mileage and per diem allowances *shall* be allowed and paid in the same manner as other claims against the school district fund are paid, but no claim for mileage and per diem allowances for living expenses shall be allowed or paid to a trustee residing not more than 5 miles from the place where board meetings are held. (Italics added.)

Please note that in subsection 1 of the statute, the Legislature has given the trustee an unequivocal right to receive the traveling expenses by the use of the word “shall.” *Owen v. Nye County*, [10 Nev. 338](#) (1875); *Eddy v. State Bd. of Embalmers*, [40 Nev. 329](#), 163 P. 245 (1917). The Legislature, in subsection 2, has gone one step further and required that claims for mileage and per diem shall be allowed and paid from the school district fund. The mandatory language of this statute would clearly create a cause of

action on behalf of the trustee to sue the school district for payment to him of his travel expenses should the school district refuse him payment.

The salary statute ([NRS 386.320](#)) is totally discretionary both as to the trustee's entitlement to the salary and as to the allowance of a claim for the salary by the board of trustees. The statute, because of its discretionary language, would not create a cause of action on behalf of a trustee if the board of trustees were to deny the claim for the salary. Had the Legislature wished to create an unequivocal right to the salary, they could have used mandatory language as found in the travel expense statute ([NRS 386.290](#)).

The board of trustees of the school district, acting as a board, have exclusive authority for approving disbursements from county school district funds pursuant to [NRS 387.300](#) to [387.325](#), inclusive.

CONCLUSION

It is the opinion of this office that in order for a school district trustee to receive compensation for attending school board meetings pursuant to [NRS 386.320](#), it would be necessary for both the individual school trustee to make a request to the board of trustees for payment to him of the statutorily permitted salary and it would also be necessary for the board of trustees by majority vote to approve the claim of a trustee for disbursement to him of the authorized salary.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By JULIAN C. SMITH, JR., *Deputy Attorney General*

162 Traffic Laws—Driver of motor vehicle approaching a stopped school bus displaying flashing red light must stop his vehicle unless he is traveling on a separate roadway of a divided highway, i.e., one separated by a physical barrier which impedes crossover of traffic. Painted lines on road surface do not create a separate roadway or divided highway.

CARSON CITY, March 5, 1974

MR. HOWARD HILL, *Director, Department of Motor Vehicles*, 555 Wright Way, Carson City, Nevada 89701

DEAR MR. HILL:

In your letter of December 31, 1973, you requested the opinion of this office on the following:

QUESTIONS

1. What is the meaning of the term "separate roadways" as that term is used in [NRS 484.357](#), subsection 2?
2. Is the driver of a motor vehicle required to bring his vehicle to a complete stop when he is approaching from the opposite direction or otherwise meeting a stopped school bus, which is displaying a flashing red light and is receiving or discharging children, if the roadway upon which the vehicle and school bus are traveling contains a center left turn lane or other painted median?

FACTS

The Nevada Highway Department recently reconstructed U.S. Highway 395 from the Reno city limits to Steamboat, Nevada, by creating a new center lane in this four-lane highway. This new center lane is restricted in use to the making of left turns onto and off U.S. 395. The new center lane replaced what had been a small concrete median strip over which vehicle traffic was not practical.

From Steamboat to the Winters' Ranch area the highway has some left turn storage lanes, an occasional center lane for left turns and various painted medians of varying widths.

As the result of the recent changes in lane configuration on this stretch of U.S. 395, some question has arisen as to the applicability of the Nevada School Bus Stop Law, [NRS 484.357](#).

ANALYSIS

Paragraph 1 of [NRS 484.357](#) requires the driver of any vehicle upon a highway, street or road, when meeting or overtaking, from either direction, any stopped school bus which is displaying flashing red lights and which is receiving or discharging school children to bring his vehicle to a complete stop until the flashing red lights on the school bus cease operation.

Paragraph 2 of the statute contains two (2) exceptions from the stopping requirement, only the first of which is relevant to this opinion:

The driver of a vehicle upon a highway, street or road *with separate roadways* need not stop upon meeting or passing a school bus which is upon the other roadway. (Italics added.)

Research by this office has failed to uncover any reported decision interpreting the term "separate roadways." However, the term "separate" has been judicially defined to mean "unconnected or divided from" (Halpin v. Collis Company, 243 F.2d 698, 701 (8th Cir. 1957)) or "distinct, apart from, not united or associated" (Kolb v. Prudential Insurance Company of America, 170 F.Supp. 97, 99 (D.Ky. 1959); Snow v. Powell, 189 F.2d 172, 174 (10th Cir. 1951)).

These definitions of "separate" imply that the "separate roadways" mentioned in [NRS 484.357](#), subsection 2, must be physically apart from one another, distinct and not united or joined in any way. Where traffic lanes are divided one from the other by mere painted lines upon the pavement surface, it is the opinion of this office that the form of physical separation contemplated by the term "separate roadways" is not present.

Rather we believe the term "separate roadways" contemplates a situation involving a "divided highway" as that term is defined in [NRS 484.048](#):

* * * a highway divided into two or more roadways by means of a physical barrier or dividing section, constructed so as to impede the conflict of vehicular traffic traveling in opposite directions.

This conclusion is supported by an examination of the policy reasons behind enactment of a school bus stop law. The Virginia Supreme Court of Appeals in the case of Carlton v. Martin, 168 S.E. 348 (Va. 1933), describes the policy behind such a statute as follows:

This section discloses an intent on the part of the General Assembly to provide a safe place for school children in and around standing school buses and to require increased vigilance of automobile drivers while passing a bus discharging or taking on school children. If the statute which expresses that legislative policy is to be given any effect at all, it means that school children,

while being discharged or boarding a standing school bus in the highway, have a priority over drivers of automobiles.

A school bus, while discharging or taking on school children, is a warning of danger to automobile drivers. They are afforded, by its very presence, knowledge that small children may run across the road in front of their approaching automobile. * * *

In addition, [NRS 484.357](#), subsection 2, is in substantial conformity with Section 11-706(d) of the Uniform Vehicle Code. The Uniform Vehicle Code is a product of the National Committee on Uniform Traffic Laws and Ordinances and is regularly compiled by the National Committee's Director, Edward F. Kearney, Esq.

Mr. Kearney, in an undated monograph "Rules of the Road," received by the Nevada State Law Library in September 1973, declares at page 16:

You are not required to stop for a school bus that is on a different roadway of a divided highway.

As Mr. Kearney is draftsman for the code upon which most of our traffic law is based, we believe his interpretation of Section 11-706(d) of the Uniform Vehicle Code is entitled to great weight in attempting to understand the meaning of the term "separate roadways" as it appears in both the Uniform Vehicle Code and our own Nevada law.

Any other interpretation of [NRS 484.357](#), subsection 2, would tend to emasculate the statute and the protection it is intended to offer to our school children who must get on and off school buses on our busy highways, streets and roads.

CONCLUSIONS

1. The term "separate roadways," as that term is used in the Nevada School Bus Stop Law, is synonymous with the term "divided highway" as defined in [NRS 484.048](#), i.e., two roads separated by a physical barrier or dividing section constructed so as to impede the crossover of vehicular traffic from one roadway to the other.

2. Since mere painted lines on a road surface do not create "separate roadways" or a "divided highway," a driver of any vehicle on a roadway such as that represented by U.S. Highway 395 from the Reno city limits to the Winters' Ranch area must obey the command of [NRS 484.357](#), subsection 1, and bring his vehicle to a complete stop, whenever he meets or overtakes, from either direction, any school bus which is stopped for the purpose of receiving or discharging school children and is simultaneously displaying a flashing red light.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

163 Preferential Employment by State and Political Subdivisions; Employment of Aliens—The enforcement of [NRS 281.060](#) would violate the equal protection clause of the Fourteenth Amendment of the United States Constitution. Attorney General's Opinion No. 93, dated August 21, 1972, is rescinded.

CARSON CITY, March 6, 1974

THE HONORABLE ROY WOOFER, *District Attorney*, Clark County Courthouse, 200 East Carson Street, Las Vegas, Nevada 89101

Attention: MELVIN R. WHIPPLE, ESQ., *Deputy District Attorney*

DEAR MR. WOOFER:

You have requested that this office review its Opinion No. 93, dated August 21, 1972, regarding [NRS 281.060](#), in light of the subsequent opinion of the United States Supreme Court in *Sugarman v. Dougall*, 413 U.S. 634 (1973).

FACTS

On June 6, 1972, you requested an opinion as to the constitutionality of [NRS 281.060](#). This statute, in part, provides that:

Only citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States shall be employed by an officer of the State of Nevada, any political subdivision of the state, or by any person acting under or for such officer in any office or department of the State of Nevada, or political subdivision of the state.

Therefore, under this statute, employment of aliens by either the State or any political subdivision is prohibited. The only exceptions are for laborers on highway projects, provided no citizens are available; teachers employed under foreign exchange programs; technical, graduate assistance and student help categories at the University of Nevada and employees of hospitals. See [NRS 281.060](#), subsection 3.

In response to that earlier request, this office issued Attorney General's Opinion No. 93, dated August 21, 1972. In that opinion, we stated that the Office of the Attorney General was extremely reluctant to say that an act of the Legislature is unconstitutional. However, under circumstances where there was clear, convincing and overwhelming evidence that the United States Supreme Court regarded a certain type of law as unconstitutional, this office would be constrained to agree regarding the constitutionality of a similar Nevada statute.

However, at the time Attorney General's Opinion No. 93 was issued, the United States Supreme Court, while it had cast doubt on the validity of laws such as [NRS 281.060](#), had not struck them down. Such statutes in the past had been upheld by that court on the basis that the states had a special public interest in protecting and conserving their public resources for their own citizens. This doctrine had never been overruled. Accordingly, Attorney General's Opinion No. 93 concluded that in the absence of clear, convincing and overwhelming evidence that laws similar to [NRS 281.060](#) were unconstitutional, the Office of the Attorney General would adhere to the principle that legislative enactments were presumed constitutional.

However, on June 25, 1973, the United States Supreme Court rendered its opinion in *Sugarman*, *supra*, which declared an alien employment prohibition law unconstitutional.

QUESTION

Is [NRS 281.060](#) constitutional in light of the United States Supreme Court's recent decision in *Sugarman v. Dougall*, 413 U.S. 634 (1973)?

ANALYSIS

Sugarman, *supra*, considered a New York statute which required a flat prohibition against employment of aliens in the competitive classified service. New York law divided state employment into four (4) classes: certain executive agency positions, the

noncompetitive class, laborers, and, finally, the competitive, classified civil service. Only the last class had an alien employment prohibition.

New York argued that the law met a legitimate state interest, i.e., the state civil service demanded employees who were identifiable with the state and under no obligation to a foreign power. New York also argued that the special public interest doctrine mentioned above applied, i.e., the state had an interest in protecting and conserving its public resources for its own citizens.

Both arguments were rejected by the court. As to the first argument, the court stated that the New York law was much too broad to justify the alleged interest. It applied not just to policymakers but to everyone in the classified service, from the sanitation worker to the typist to the policymaker. The court concluded that: "The citizenship restriction sweeps indiscriminately." Sugarman, *supra*, at 643.

The court rejected the second argument by rejecting the special public interest doctrine altogether. The court held that the doctrine found its roots in the old "privileges versus rights" argument. The court stated that it no longer recognizes that constitutional rights turn on whether a governmental benefit is a privilege or a right. Accordingly, the court held that the special public interest doctrine had no applicability in this case. Sugarman, *supra*, at 644-645.

The court concluded, therefore, that New York's alien employment prohibition law violated the Fourteenth Amendment's equal protection guarantee. Sugarman, *supra*, at 646.

Nevada's law, as one can readily see, is much broader and more prohibitive than New York's law. New York's law applied only to state employment, while Nevada's applies to the State and political subdivisions. New York's applied only to the classified service, while Nevada's applies to all employment. If, in the New York law, the "* * * citizenship restriction sweeps indiscriminately," this is even more apparent in Nevada's law. In short, if Sugarman, *supra*, is to be followed, no legitimate interest in protecting the character of the State's political system or of protecting and conserving its resources for its own citizens is met by this Nevada law. It applies to the laborer, the typist and the policymaker. There can be no doubt, given the rationale of Sugarman, that the United States Supreme Court would regard the Nevada statute unconstitutional.

However, we must take note that the court stated in Sugarman, *supra*, that states may require citizenship as a qualification for office in an appropriately defined class of positions. The State does have a legitimate interest to "preserve the basic conception of a political community" by requiring citizenship of state elective officeholders or in important nonelective executive, legislative or judicial positions for officers who participate directly in the formulation, execution or review of broad public policy. These officers perform functions, said the Court, that go to the heart of representative government. Sugarman, *supra*, at 647.

Therefore, Nevada's laws requiring citizenship of the Governor, the Attorney General, legislators, judges and other elective officers would be recognized as constitutional by the court in Sugarman, *supra*. But a statute, such as [NRS 281.060](#), which applies to all public employment is much too broad and discriminatory to survive constitutional challenge.

CONCLUSION

In light of the United States Supreme Court's ruling in Sugarman v. Dougall, 413 U.S. 634 (1973), this office is of the opinion that the enforcement of [NRS 281.060](#) would violate the equal protection clause of the Fourteenth Amendment of the United States Constitution. Attorney General's Opinion No. 93, dated August 21, 1972, is hereby rescinded.

Respectfully submitted,

164 Education—Private Schools—The State Board of Education has authority to promulgate regulations defining a religious organization. All private schools, including those exempt from state licensure, are subject to the provisions of [NRS 394.130](#) to [394.197](#), inclusive.

CARSON CITY, March 11, 1974

MR. JOHN R. GAMBLE, *Deputy Superintendent of Public Instruction, Department of Education, Carson City, Nevada 89701*

DEAR MR. GAMBLE:

This is in response to your request for an opinion of the following:

QUESTIONS

1. Does the State Board of Education have authority to promulgate regulations defining religious organizations as that term is used in [NRS 394.010](#), subsection 2(b), and [NRS 394.020](#), subsection 1(b)?
2. Are all schools, licensed or exempt from licensure pursuant to [NRS 394.010](#) to [394.120](#), subject to the provisions of [NRS 394.130](#) to [394.197](#), inclusive?

ANALYSIS—QUESTION ONE

The general authority granting the State Board of Education authority to prescribe regulations is found in [NRS 385.080](#), which reads in part:

The board shall have power to adopt rules and regulations not inconsistent with the constitution and laws of the State of Nevada for its own government and which are proper or necessary for the execution of the powers and duties *conferred upon it by law*; * * * (Italics added.)

One of the duties conferred by law upon the State Board of Education is to license private schools. [NRS 394.050](#) expressly confers upon the board regulation-making authority for private schools.

[NRS 394.070](#) reads in part as follows:

The state board of education shall:

1. Formulate standards for licensure in accordance with [NRS 394.050](#).

Thus, by express legislative enactment, the board is granted authority to make the necessary rules and regulations for licensure of private schools.

Not all private schools need be licensed, however, as [NRS 394.010](#), subsection 2(b), and [NRS 394.020](#), subsection 1(b), expressly exempt those private schools operated by a religious organization.

Attorney General's Opinion No. 155, dated December 4, 1973, states the board is charged with determining whether the private school claiming the exemption is in fact operated by a religious organization. It would be impossible for the board to accomplish this task without some standards or regulations. Since it was expressly given this authority by [NRS 385.080](#), [394.050](#) and [394.070](#), it follows that the State Board of Education has the authority to promulgate regulations defining religious organizations.

The board should be guided by Attorney General's Opinion No. 155, dated December 4, 1973, in prescribing these regulations. Any such regulation should not

infringe upon a private school's right to prescribe the content of courses on religious subjects.

CONCLUSION—QUESTION ONE

The State Board of Education has authority to promulgate regulations defining a “religious organization” as that term is used in [NRS 394.010](#), subsection 2(b), and [NRS 394.020](#), subsection 1(b).

ANALYSIS—QUESTION TWO

Under the heading of “Instruction in Private Schools, Colleges and Universities,” [NRS 394.130](#), subsection 1, reads as follows:

In order to secure uniform and standard work for pupils in private schools in this state, instruction in the subjects required by law for pupils in the public schools shall be required of pupils receiving instruction in such private schools, either under the regular state courses of study prescribed by the state board of education or under courses of study prepared by such private schools and approved by the state board of education.

The statute clearly states that private schools shall instruct in subjects under the regular state courses of study approved by the State Board of Education, or under a course of study prepared by the private school and approved by the State Board of Education. Nowhere is there an exemption to private schools operated by a religious organization. In fact, [NRS 394.130](#), subsection 3(a), reads:

Nothing in this section shall be so construed as:

(a) To interfere with the right of the proper authorities having charge of private schools to give religious instruction to the pupils enrolled therein.

Subsection 3(a) recognizes the right of secular and parochial schools to give religious instruction and it follows that a “private school” may be either a secular or nonsecular school. Since [NRS 394.130](#) to [394.197](#), inclusive, refer to “private schools,” without exemptions, except for [NRS 394.130](#), subsection 3(a), the Legislature obviously intended those schools exempt from state licensure to be within the provisions of [NRS 394.130](#) to [394.197](#), inclusive. If the Legislature had intended the opposite result, it could easily have said so.

CONCLUSION—QUESTION TWO

All private schools, whether exempt from state licensure or not, are subject to the provisions of [NRS 394.130](#) to [394.197](#), inclusive.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By ROSS DELIPKAU, *Deputy Attorney General*

165 Board of School Trustees—A vacancy exists if a school board trustee, elected after July 1, 1973, changes his residence from one district to another, but still resides within the county. A vacancy does not exist if he is elected prior to July 1, 1971.

CARSON CITY, March 15, 1974

THE HONORABLE RAY FREE, *Lincoln County District Attorney*, P.O. Box 218, Pioche, Nevada 89043

DEAR MR. FREE:

You have asked for an opinion on the following:

QUESTION

Does a member of a board of school trustees, who is elected at large, create a vacancy on such board pursuant to [NRS 283.040](#), subsection 1(f), if he changes his residence from the trustee area which he represents to another trustee election area within the same county?

ANALYSIS

[NRS 283.040](#), subsection 1(f), provides that an office becomes vacant upon the incumbent ceasing to be a resident of the district for which he was elected. The statute is affected by Chapter 237 of NRS, the Local Government Reapportionment Law.

[NRS 237.025](#), subsection 2, reads as follows:

“Local government unit” means any unit of local government in the State of Nevada, the boundaries of which are coextensive with and which duplicate the county lines of the county in which such unit is located. “Local government unit” shall not include Carson City, or any other incorporated city, but does include *any school district*, hospital district or other district within or conterminous with Carson City. (Italics added.)

[NRS 396.010](#), subsection 1, reads:

County school districts, the boundaries of which are conterminous with the boundaries of the counties of the state, are hereby created. The Carson City school district shall be considered as a county school district.

Reading the latter two above statutes together, it is clear that a board of school trustees is a “local governmental unit.” As such, a board of school trustees is subject to Chapter 237 of NRS.

[NRS 237.055](#), subsection 2, grants authority to the local board of county commissioners to determine whether a single-member district elects its own representatives, or whether each member is elected at large. You have indicated that each of the five members is elected at large.

[NRS 237.035](#), subsection 4, reads as follows:

The members of such bodies [local governmental unit] or boards covered by the provisions of this section, as constituted on July 1, 1971, shall continue to hold office for the terms for which they were elected.

[NRS 237.055](#), subsection 3, reads:

In either case [whether elected at large, or solely by the electors of the district], elected representatives shall be residents of the district which they represent, *throughout their term of office*. (Italics added.)

Interpreting Chapter 237 of NRS as a whole, giving weight to legislative intent, it would appear that those members of a “local governmental unit” elected prior to July 1,

1971, who represent a district and move from such district to another but still reside within the county, are *not* within the provisions of [NRS 237.055](#), subsection 3. They are within the provisions of [NRS 237.035](#), subsection 4, and thus will hold office for the term for which they were elected. This assumes, however, they do not change their residence outside the county.

On the other hand, an elected member of a board of school trustees elected subsequent to July 1, 1971, is subject to [NRS 237.055](#), subsection 3. The phrase “throughout their term of office” can only be interpreted to mean the Legislature intended members of a board of school trustees be residents of their district during all of their term in office. This would be true even if the change in residency is from one district to another, but still within the county.

In your request, you asked whether Attorney General’s Opinion No. 123, dated January 6, 1960, is still valid. Since the instant opinion is based upon legislation enacted subsequent to Attorney General’s Opinion No. 123, that opinion is superseded by this opinion.

CONCLUSION

A vacancy exists pursuant to [NRS 283.040](#), subsection 1(f), if a member of a board of school trustees, who is elected subsequent to July 1, 1971, changes his residence from one district to another, but still resides within the county.

A vacancy is not created if a member of a board of school trustees, elected prior to July 1, 1971, changes his residence from one district to another, but still resides within the county.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By ROSS DELIPKAU, *Deputy Attorney General*

166 The State of Nevada does not have jurisdiction to punish offenses committed by or against Indians within the outer perimeter of Indian Country. The State of Nevada may exercise jurisdiction both civil and criminal over non-Indians whose conduct does not involve Indians or Indian property or does not infringe on the right of Indian self-government. Real property owned by non-Indians within Indian Country is subject to property taxation. All residents of Indian Country may vote in state and county elections if they comply with statutory voting requirements.

CARSON CITY, May 2, 1974

THE HONORABLE CHARLES WATERMAN, *Mineral County District Attorney*, P.O. Box 1217, Hawthorne, Nevada 89415

DEAR MR. WATERMAN:

You have directed a letter to this office in which you pose some interesting but complex Indian law questions.

FACTS

This opinion is addressed to legal questions pertaining to jurisdiction over the Walker River Reservation at Schurz, Nevada.

In 1955 the Nevada Legislature, pursuant to the provisions of Section 7, Chapter 505, Public Law 280 of the 83d Congress, 67 Stat. 588, passed [NRS 41.430](#) which gave the State jurisdiction over public offenses committed by or against Indians or to which Indians are parties, which arise in the Indian Country in Nevada, but giving the county commissioners of each county the right to petition the Governor to exclude the area of Indian Country within their respective counties from the operation of the section. In the same year, the County Commissioners of Mineral County petitioned the Governor to exclude all Indian Country within Mineral County from the operative effects of [NRS 41.430](#). This statute has been upheld in *Davis v. Warden*, [88 Nev. 443](#), 498 P.2d 1346 (1972). As a result, all Indian Country located within Mineral County is subject to federal jurisdiction by proclamation of Governor Charles H. Russell issued on the 12th day of September 1955. The Town of Schurz and essentially all residents of the Walker River Reservation are located in Mineral County.

QUESTION ONE

Does the State of Nevada have jurisdiction to punish offenses committed by or against Indians within the perimeter of the Walker River Reservation on U.S. Highways 95 and 95A?

ANALYSIS—QUESTION ONE

Having already established that the United States exercises federal jurisdiction over all Indian Country within Mineral County it must next be determined whether a U.S. highway running through an Indian reservation is or is not “Indian Country” for purposes of ascertaining the appropriate jurisdiction.

The Criminal Code of the United States (Title 18, U.S.C.A. § 1151) expressly defines “Indian Country” as including:

* * * All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and *including rights-of-way running through the reservation* * * * (Italics added.)

The State of Nevada derived authority to construct Highways 95 and 95A through the Walker River Reservation from Title 25, U.S.C.A. § 311 et seq., and from Part 161, Title 25 C.F.R.

A reading of the above statutes and regulations in conjunction with Title 18, U.S.C.A. § 115, the Criminal Code of the United States, indicates with considerable certainty that the State of Nevada acquired only an easement for right-of-way across the Walker River Reservation for the purpose of constructing Highways 95 and 95A with the result that beneficial title to the land affected by the right-of-way remains in the Indians and is “Indian Country” and as such is subject to federal jurisdiction.

In the case of *In re Fredenberg*, 65 F.Supp. 4 (1946), the Federal District Court for the Eastern District of Wisconsin arrived at the same result by reasoning as follows, at page 6:

I believe it is now firmly established that the Indian title is equivalent to beneficial ownership and I believe that the granting of an easement for the purpose of constructing and maintaining a highway did not extinguish the Indians’ underlying title. By the establishment of the highway the existing relationship of the Indians to the State was not altered. The easement which the State has to construct and maintain the highway is limited in character. The State accepted the easement on that limited basis.

* * * There is no legitimate implication to be drawn that Congress intended any grant of jurisdiction when it permitted the State primarily for its own convenience to establish a State highway across the reservation.

CONCLUSION—QUESTION ONE

The State of Nevada does not have jurisdiction to punish offenses committed by or against Indians within the perimeter of the Walker River Reservation on Highways 95 and 95A.

QUESTION TWO

Does the State of Nevada have criminal and civil jurisdiction over non-Indians within the perimeter of the Walker River Reservation?

ANALYSIS—QUESTION TWO

For purposes of organization and clarity, criminal and civil jurisdiction will be considered under separate headings.

In addition, it will be presumed for purposes of analyzing question two that the conduct or events giving rise to criminal or civil liability occur within the exterior boundaries of a federal jurisdiction reservation.

Criminal Jurisdiction

There is no question that a state has jurisdiction over non-Indians committing criminal acts against the person or property of another *non-Indian* on an Indian reservation. *United States v. McBratney*, 104 U.S. 621 (1881); *New York ex rel. Ray v. Warden*, 326 U.S. 496 (1946).

In addition, the State of Nevada has jurisdiction to punish offenses committed by non-Indians on Indian reservations which offenses are not related to Indians or Indian property. This proposition is based upon the fact that, where Indian wards of the federal government are not involved, an Indian reservation is generally considered to be a portion of the state within which it is located, *Draper v. United States*, 164 U.S. 240 (1896); and the exercise of state jurisdiction in such instances would not affect the authority of the tribal council over reservation affairs and, therefore would not infringe on the right of the Indians to govern themselves. *State of New Mexico v. Warner*, 71 N.M. 418, 379 P.2d 66 (1963).

Further, the Supreme Court of Nevada, at a time when all Indian Country was under federal jurisdiction, in the case of *Ex parte Crosby*, [38 Nev. 389](#), 393, 179 P. 989 (1915), stated:

That the state courts have jurisdiction over offenses committed by parties other than Indians on Indian reservations is, we think, well established; and this general rule is not affected by a provision in the enabling act of a state taking account of Indian lands or Indian reservations within the territory or providing that such Indian lands should remain under the absolute jurisdiction and control of the Congress of the United States (*Draper v. United States*, 164 U.S. 240).

However, when a non-Indian commits a criminal act against an Indian or Indian property within Indian Country, this act is generally within the jurisdiction of the United States. *Williams v. U.S.*, 327 U.S. 711 (1946); *Donnelly v. U.S.*, 228 U.S. 243 (1913).

Section 1152 of the United States Code (Title 18, U.S.C.A.), provides that the federal government shall have jurisdiction over offenses committed by non-Indians against the person or property of Indians within Indian Country if such an act or offense is punishable by the United States if committed anywhere else in an area of federal jurisdiction.

In the absence of further congressional action on the subject, federal law enforcement authorities would have been limited to prosecuting only conduct which was made criminal by federal statutes. However, the Assimilative Crimes Act (18 U.S.C. § 13) provides that any act which would be a crime if committed within the state in question would be a crime punishable in federal courts. The Assimilative Crimes Act applies to Indian Country. *Williams v. United States*, 327 U.S. 711 (1946).

Therefore you have state-federal concurrent jurisdiction where a non-Indian commits an offense against an Indian or Indian property and where exercise of jurisdiction by the State does not infringe on the Indian sovereignty.

Civil Jurisdiction

In the area of civil jurisdiction, the State may assert its jurisdiction over the activities of non-Indians on Indian reservations if those activities are not related to Indians or Indian property. *Thomas v. Gay*, 169 U.S. 264 (1898). In situations where the activities of non-Indians relate to Indians or Indian property, state laws may have application where they do not conflict with or “infringe upon” the rights of the Indians to self-government. *Williams v. Lee*, 358 U.S. 217 (1959).

In *Williams v. Lee*, *supra*, the United States Supreme Court, in reversing a decision of the Arizona Supreme Court, held that state courts of Arizona have no jurisdiction over a civil action brought by a non-Indian licensed as a trader on the Navajo Reservation against an Indian for merchandise sold on the reservation. The court concluded that the exercise of state court jurisdictions in such a case would “infringe on the right of the Indians to govern themselves.”

CONCLUSION—QUESTION TWO

The State of Nevada may exercise its jurisdiction, both criminal and civil, over the activities of non-Indians on the Walker River Reservation for which state jurisdiction was rejected, where it appears that:

1. The conduct giving rise to liability does not involve Indians or Indian property.
2. Where the conduct giving rise to liability and the victim is Indian or involves Indian property, if the application of state law to the non-Indian would not infringe on the right of the Indians to govern themselves.

QUESTION THREE

Does Mineral County have the power to tax private patented land within the perimeter of the Walker River Reservation, whether held by Indians or non-Indians?

ANALYSIS—QUESTION THREE

Regarding the power of Mineral County to impose a real property tax on reservation lands held by Indians, the law is well settled that such power does not exist absent express authority by Act of Congress. *Cohen*, U.S. Department of the Interior, Federal Indian Law, 845, 850 (1958). See also *The Kansas Indians*, 72 U.S. 737 (1866), cited with approval in *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973).

However, where non-Indians hold title to lands located within the exterior boundaries of an Indian reservation, such lands may be taxed by the State. *Cohen*, U.S. Department of the Interior, Federal Indian Law, *supra*, p. 853, citing *Utah and Northern Railway v. Fisher*, 116 U.S. 28 (1885); *Maricopa and Phoenix Railroad Co. v. Arizona Territory*, 156 U.S. 347 (1895). See also *Thomas v. Gay*, 169 U.S. 264 (1898), Cf. *Surplus Trading Co. v. Cook, Sheriff*, 281 U.S. 647 (1930).

CONCLUSION—QUESTION THREE

Mineral County may impose a real property tax upon private patented land within the perimeter of the Walker River Reservation, provided the title to such lands is held by

a non-Indian. Where title to such lands is held by an Indian or by the federal government in trust for the Indians it is exempt from state and local property taxation.

QUESTION FOUR

Any persons living within the perimeter of the Walker River Reservation, whether Indian or non-Indian, entitled to vote in state and county elections?

ANALYSIS—QUESTION FOUR

Since Indians were made citizens of the United States by statute (see Title 6, U.S.C.A. § 1401(a)(2)), they are therefore entitled to all of the rights and privileges of citizens, including the right of suffrage. *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948), *Acosta v. San Diego County*, 126 Cal.App.2d 455, 272 P.2d 92 (1954), *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (1962).

Hence, the issue remaining unresolved is whether the lands encompassed by the Walker River Reservation are to be considered politically and governmentally a part of the State of Nevada, so as to satisfy the constitutional requirement of “residence” for voting purposes.

In this regard, I invite your attention to Attorney General’s Opinion No. 247, dated September 28, 1926, wherein this office took the position that residence on the Pyramid Lake Indian Reservation was residence within the State of Nevada for purposes of qualifying to vote in local elections.

This opinion was based upon the rationale that jurisdiction over the Pyramid Lake Indian Reservation was not exclusively federal.

Similarly, the Walker River Reservation is not subject to exclusive federal authority. As pointed out elsewhere in its opinion the State of Nevada has certain limited but nevertheless significant jurisdictional powers over conduct and events taking place within Indian Country which is otherwise subject to federal jurisdiction by the operative effects of [NRS 41.430](#).

In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), the U.S. Supreme Court, in reviewing past decisions, restated the state jurisdictional test of *Williams v. Lee*, *supra*, and concluded that:

* * * even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law, * * *

In *Montoya v. Bolack*, *supra*, the Supreme Court of New Mexico held that residence on the Pueblo Indian Reservation satisfied the state constitutional requirement of residence for voting purposes. (See also *Harrison v. Laveen*, cited, *supra*.)

CONCLUSION—QUESTION FOUR

Residents of the Walker River Indian Reservation, whether Indian or non-Indian, are entitled to vote in state and county elections provided they comply with statutory requirements which have to be fulfilled by any other voter.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By JULIAN C. SMITH, JR., *Deputy Attorney General*

167 Retirement—Under [NRS 287.023](#), the right to continued coverage under private group insurance plan provided to retired public employee by his previous employer continues until retired employee becomes eligible for medicare, unless the contract with the insurer provides for longer coverage.

CARSON CITY, May 3, 1974

THE HONORABLE THOMAS R. C. WILSON, II, *Nevada State Senator*, P.O. Box 2670, Reno, Nevada 89505

DEAR SENATOR WILSON:

In October of 1973, this office prepared for you, at your request, a letter opinion concerned with the continuation of group insurance for retired public employees. After receiving that letter opinion, you requested this office to issue the opinion as a formal Attorney General's Opinion. The following is our response to that request.

QUESTIONS

1. What right concerning continued group insurance coverage is extended to a retired public employee by [NRS 287.023](#) and how long does that right last?
2. Can a retired public employee remain in the governmental group plan beyond age 65 if the contract of insurance with the public employer provides for continued participation?

ANALYSIS

Questions 1 and 2 will be answered together.

In its 1967 Session, the Nevada Legislature amended [NRS Chapter 287](#), which extends group insurance protection to public employees, to provide a retiring state employee with the option of cancelling or continuing his group insurance or medical and hospital service coverage when the employee retires under the conditions set forth in [NRS 286.510](#) of the Public Employees Retirement Act. This statutory insurance option is now codified as [NRS 287.023](#).

The provisions of [NRS 286.510](#), which are referenced in [NRS 287.023](#), set forth the circumstances which authorize retirement for public employees. Briefly summarized, this provision of the state retirement law authorizes a police officer or a fireman, who is a member of the Public Employees Retirement System, to retire at age 55 if he has completed a minimum of 10 years of service or at age 50 with 20 years of service. All other state employees are authorized to retire at age 60 with a minimum of 10 years of service or at age 55 with 30 years of service. You will note that all authorized retirement ages contained in [NRS 286.510](#) would constitute "early" retirement in the context of usual retirement occurring for most people at age 65.

By studying the provisions of [NRS 286.510](#) and [NRS 287.023](#) it appears that the legislative intent behind the latter statute was to allow an employee who retired "early" to continue his group insurance or medical and hospital service plan coverages for several additional years, even though such person was no longer an active public employee. The second paragraph of [NRS 287.023](#) spells out the length of time a retired state employee may continue these group coverages as a matter of right under state law. The last sentence of the above referenced paragraph reads:

The coverage for any individual receiving benefits will terminate upon that individual's first eligible day for benefits under the Health Insurance for the Aged Act (42 U.S.C. § 1395 et seq.) [Medicare].

It is the opinion of this office that [NRS 287.023](#) provides a minimum legal right to a retired public employee with respect to group insurance and other health care

protection. We find nothing in the language of the law to indicate that a private insurer could not contract with a public employer to provide a longer coverage than the statute provides, so long as the insurer provides the minimum requirements of the statute until the former employee is 65 years of age.

As stated by the Court of Appeals in *Prudential Insurance Co. of America v. Ragan*, 212 S.W. 123, 126 (Ky. 1919):

Where the policy of insurance contains terms more advantageous to the insured than is required by statute, the provisions of the statute will be treated as a minimum of value; the policy and statute will be considered together, and that construction given which is more favorable to the insured, and such as will sustain the contract.

On this same point see *Couch on Insurance* 2d, § 13.8, p. 541, and the cases cited therein.

However, unless the insurer himself has contracted to provide additional coverage beyond age 65, a retired public employee, under [NRS 287.023](#), who desires continued health insurance protection, must shift to medicare at age 65. The ability to make such a shift has been confirmed by the Reno office of the Social Security Administration, which has informed this office that under current federal law any person who possesses the required number of contributing quarters with the Social Security Administration or who is otherwise willing to pay the monthly premium is now eligible for medicare upon reaching age 65. Such an arrangement allows persons who were public employees during their working careers to become part of the medicare program if private insurance no longer covers them.

CONCLUSION

Under state law, a group insurance or medical health care plan provided by a public employer to his public employees must contain a provision which allows a public employee retired under the conditions of [NRS 286.510](#) to continue participation in the group plan until the first day of that retired employee's eligibility for federal medicare benefits. If the terms of the private insurance plan itself allow for additional years of coverage, the retired employee may remain in the plan pursuant to the terms of the contract. If the private group insurance plan does not provide for additional years of coverage beyond age 65, the retired public employee must either join the federal medicare program or seek other private insurance protection elsewhere.

Respectfully submitted,

ROBERT LIST, *Attorney General*

168 Highway Patrolmen as Candidates for Public Office—The Highway Patrol may not prohibit its members from filing for public office. Highway patrolmen may remain on the job while running for public office, but must confine political activities to off-duty hours. Highway patrolmen may retain their jobs if elected to local government positions but must resign their jobs if elected to state legislative or judicial office, including justices of the peace. Finally, the State, by law or regulation, may prohibit its employees from filing for or holding elective office, but such laws or regulations are subject to strict First and Fourteenth Amendment criteria.

CARSON CITY, May 22, 1974

MR. HOWARD HILL, *Director, Department of Motor Vehicles, 555 Wright Way, Carson City, Nevada 89701*

DEAR MR. HILL:

You have requested advice relating to several questions concerning whether members of the Highway Patrol may run for public office.

FACTS

Several members of the Highway Patrol have stated their intentions to become candidates for public office. One patrolman intends to file for county sheriff and another for justice of the peace.

However, Highway Patrol General Order 75.4 states:

No member of the Division shall file for or publicly announce his candidacy for political office. It is mandatory for the good of the service that members shall not become candidates for public service.

QUESTION ONE

Can the Highway Patrol prohibit the sworn members of the patrol from filing for public office?

ANALYSIS—QUESTION ONE

The answer to Question One is no. However, this opinion must be prefaced by the following premises:

1. That the members of the Nevada Highway Patrol do not fall within the provisions of what is commonly referred to as the Hatch Act (Titles 5 and 18 of the United States Code, 80 Stat. 378, 62 Stat. 683). This determination is based on the criteria that the salaries and wages for the patrolmen are paid solely from state funds. While it is recognized that a minimal amount of federal funds go to patrolmen while working special projects, this amount is so insignificant when compared to their total wages that it should not be considered, since 15 U.S.C. § 1501 requires that the employee's "principal employment" be financed by federal funds; and
2. That the political activities in question do not fall within the prohibitions contained in the Nevada State Administrative Manual, Section XI, paragraph C, (1) through (4), which states:

C. Political Activity

Employees shall have the right to vote as they choose and to express their political opinions on all subjects without recourse, except that no employee shall:

1. Directly or indirectly solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, contribution, or political purpose from anyone on any employment list or holding any position in the classified service.
2. Engage in political activity during the hours of his State employment with the purpose of improving the chances of a political party or individual seeking office; or at any time engaging in political activity for the purpose of securing preference for promotion, transfer, or salary advancement.
3. While off duty, engage in political activity to an extent that it impairs his attendance or efficiency as an employee.
4. As an employee in an agency administering federally aided programs, engage in political activities at any time which are forbidden by federal law.

On June 25, 1973, the United States Supreme Court in *United States Civil Service Commission, et al. v. National Association of Letter Carriers, AFL-CIO, et al.*, 413 U.S. 548, held the section of the Hatch Act, 5 U.S.C. § 7324(a)(2), which prohibits active participation by federal employees in political management or in political campaigns, constitutional, against an attack that the provision was overly broad. The opinion of the majority appears to be based on the premises that there are sufficient guidelines and protective devices built into the act to provide sufficient information as to what conduct is prohibited.

In addition, on June 25, 1973, the United States Supreme Court held in *Broadrick, et al. v. Oklahoma, et al.*, 413 U.S. 601, that section 818 of Oklahoma's Merit System of Personnel Administration Act, Okla. Stat. Ann. Title 74, § 801 et seq., was not unconstitutional on its face. This particular statute contains essentially the same provisions as the Hatch Act in prohibiting certain political activity by all of Oklahoma's classified employees. Included was the prohibition against a classified employee becoming a candidate for nomination or election to any paid political office. The court in upholding the statute stated at pp. 616 and 617:

Unlike ordinary breach-of-the-peace statutes or other broad regulatory acts, § 818 is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments. *But at the same time, § 818 is not a censorial statute, directed at particular groups or viewpoints.* Cf. *Keyishian v. Board of Regents*, supra. *The statute, rather, seeks to regulate political activity in an even-handed and neutral manner. As indicated, such statutes have in the past been subject to a less exacting overbreadth scrutiny. Moreover, the fact remains that § 818 regulates a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass.* This much was established in *United Public Workers v. Mitchell*, and has been unhesitatingly reaffirmed today in *Letter Carriers*, supra. Under the decision in *Letter Carriers*, there is no question that § 818 is valid at least insofar as it forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs, or candidates for any paid public office; taking part in the management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters to the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

These proscriptions are taken directly from the contested paragraphs of § 818, the Rules of the State Personnel Board and its interpretive circular, and the authoritative opinions of the State Attorney General. Without question, the conduct appellants have been charged with falls squarely within these proscriptions.

Appellants assert that § 818 goes much farther than these prohibitions. According to appellants, the statute's prohibitions are not tied tightly enough to partisan political conduct and impermissibly relegate employees to expressing their political views "privately." The State Personnel Board, however, has construed § 818's explicit approval of "private" political expression to include virtually any expression not within the context of active partisan political campaigning, and the State's Attorney General, in plain terms, has interpreted § 818 as prohibiting "clearly partisan political activity" only. (Italics added.)

It should be pointed out at this time that both of the above-cited cases were based on *legislative enactment* covering all persons in similar positions, i.e., all federal employees and all state classified employees. The provision of the Highway Patrol's General Orders which restricts the seeking of political candidacy in this situation is neither a statutory pronouncement of the state legislative body nor does it affect all classified state employees. To deny a small group of persons, not only within the classified service of the State of Nevada but also within a particular department of state government, the right to seek political office where other classified employees similarly situated are not so denied, is a violation of the patrolmen's rights under the First and Fourteenth Amendments of the United States Constitution. Not even the above-quoted cases indicate that such a distinction would be allowed, for as emphasized in Broadrick, *supra*, the statute was applied in an "even-handed neutral manner" towards all employees of the State of Oklahoma.

In *Minielly v. State*, 242 Ore. 490, 411 P.2d 69, 28 A.L.R.3d 705, an attack was made upon a provision of Oregon Statute 241.520, prohibiting candidacy of civil service employees, by a deputy sheriff who sought an elective office. The attack was based upon an alleged violation of the deputy sheriff's rights of freedom of expression, equal privileges and immunities, equal protection of the laws and liberty and loss of property without due process. While holding that ORS 241.520 was unconstitutional on First Amendment grounds, the court also recognized that some restrictions may be warranted.

The following language from *Minielly*, *supra*, at page 711, is particularly appropriate to the situation involved here:

The conclusion to be drawn from the above cases would appear to be that while a person does not have a constitutional right to be employed by the public, the government is not free to place unconstitutional prerequisites upon the securing of public employment nor does it have the right to ignore the constitution if it desires to terminate such employment. *The cases would also indicate that the government has the authority, without violating the constitution, to make and enforce regulations for public employment which bear a reasonable relation to the promotion of efficiency, integrity, and discipline of the public service and which are not arbitrary or discriminatory.*

* * *

It is apparent from the cases heretofore discussed in this opinion that a revolution has occurred in the law relative to the state's power to limit federal First Amendment rights. Thirty years ago the statutes now under consideration would have been held to be constitutional, particularly as applied to the factual situation in the present case. This is no longer possible in view of the intervening decisions of the United States Supreme Court. We hold the statutes unconstitutional because of overbreadth. We believe, however, that there would be a compelling state interest warranting the legislature to pass more narrowly drawn legislation. The present statute encompasses too broad a scope and would prevent the plaintiff from becoming a candidate for state, federal or nonpartisan office. It can not [cannot] be demonstrated that the good of the public service requires *all* of the prohibitions of the present statute. (Italics added.)

A case which is indicative of a violation of equal rights of government employees is *Slochower v. Board of Higher Education of New York City*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956). The United States Supreme Court invalidated as a violation of due process the city charter section requiring termination of employment for invocation of the privilege against self-incrimination. The court said:

* * * To state that a person does not have a constitutional right to government employment is only to say that *he must comply with reasonable, lawful, and nondiscriminatory terms* laid down by the proper authorities. 350 U.S. at 555, 76 S.Ct. at 639, 100 L.Ed. at 699. (Italics added.)

A situation close to the one in question was the basis for the case of Mancuso v. Taft, 476 F.2d 187 (1973), wherein the city charter of Cranston prohibiting political conduct of classified civil employees was held unconstitutional upon an equal protection challenge by a city policeman. The unconstitutionality was based upon the court's decision that: (1) it was discriminatory to distinguish city employees from other citizens by forbidding the city employees the right to seek office solely because of their choice of employment; (2) it regulated the citizens' rights as a whole to vote by limiting the candidates; and (3) it stifled the freedoms of expression and association.

Even while recognizing that there may be a compelling public interest in protecting the integrity of its civil service, the court stated in Mancuso, *supra*, at pp. 198 and 199:

We do not, however, consider the exclusionary measure taken by Cranston—a flat prohibition on office-seeking of all kinds by all kinds of public employees—as even reasonably necessary to satisfaction of this state interest. Bullock v. Carter, 405 U.S. at 144, 92 S.Ct. 849. As Justice Marshall pointed out in Dunn v. Blumstein, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972) “[s]tatutes affecting constitutional rights must be drawn with ‘precision.’” NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); United States v. Robel, 389 U.S. 253, 265, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).” For three sets of reasons we conclude that the Cranston charter provision pursues its objective in a far too heavy-handed manner and hence must fall under the equal protection clause. First, we think the nature of the regulation—a broad prophylactic rule—may be unnecessary to fulfillment of the city's objective. Second, even granting some sort of prophylactic rule may be required, *the provision here prohibits candidacies for all types of public office, including many which would pose none of the problems at which the law is aimed.* Third, the provision excludes the candidacies of all types of public employees, without any attempt to limit exclusion to those employees whose positions make them vulnerable to corruption and conflicts of interest. (Italics added.)

Based on the various judicial opinions cited above, it is apparent that Nevada Highway Patrol General Order 75-4 is invalid and unenforceable due to the following reasons:

1. It is a prohibition of political candidacy of all kinds—both partisan and nonpartisan—which goes beyond the prohibitions held as being constitutional by the courts;
2. By prohibiting the seeking of any political office, the General Order violates the freedoms of speech and association;
3. It is a “regulation” established without reference to either a legislative enactment, as in Broadrick, *supra*, or even the state personnel regulations; and further it curtails the rights of the small specific group of persons involved by limiting Nevada Highway Patrolmen the right, as recognized by the State Administrative Manual, to express political opinions;
4. It is violative of equal protection as it restricts the voting rights of both the patrolman and the general public by prohibiting the candidacies of a specific group of people; and
5. It is discriminatory against a specific group of classified employees by imposing conditions not applicable to: (1) the general group of state classified employees;

(2) other state classified employees in similar classifications, i.e., other law enforcement positions; and (3) personnel within the same department but different divisions.

Even the dissent in Mancuso, *supra*, recognized that this last situation would create an untenable and unconstitutional prohibition by stating, at p. 201:

This is not a case of irrational under-inclusiveness—as it would be, for example, had uniformed police been barred from candidacy but detectives allowed to run. See *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Grayned v. City of Rockland*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Being placed in a class drawn so as to exclude others similarly situated would be a denial of equal protection since one is subjected to burdens from which others are irrationally excused. (Italics added.)

CONCLUSION—QUESTION ONE

The Highway Patrol may not prohibit the sworn members of the patrol from filing for public office.

QUESTION TWO

When running for partisan and/or nonpartisan positions, such as sheriff or justice of the peace, can the employee remain on the job while conducting the campaign if all campaigning will be conducted during off-duty time? If the answer is no, can the employee utilize vacation time, compensatory time or leave without pay to campaign?

ANALYSIS—QUESTION TWO

It is not necessary to consider the second part of the question relating to vacation time, etc. as the answer to the question is in the affirmative. As to the first part of the question, there are no provisions or guidelines contained in statutory form, in the State Administrative Manual or in the Nevada Highway Patrol's General Orders to cover this question. The only prohibitions are those contained in the State Administrative Manual, Section XI, Paragraph C, (1) through (4), and there is no prohibition there against remaining on the job during a political campaign. However, the employee may not engage in political activities during his on-duty time, or, while off duty, engage in political activity to such an extent that it impairs his attendance or efficiency as an employee.

CONCLUSION—QUESTION TWO

An employee of the Highway Patrol may remain on the job while conducting a campaign for partisan or nonpartisan office, but must limit political activities to off-duty hours and conduct his or her campaign in compliance with the requirements of the State Administrative Manual, Section XI, Paragraph C, (1) through (4).

QUESTION THREE

Can a member of the Highway Patrol file for an office, such as county commissioner, assemblyman or state senator, and (a) if elected, would there be a conflict of interest, and (b), as in Question No. 2, can he campaign while working full-time for the Highway Patrol?

ANALYSIS—QUESTION THREE

The answer to Question Three (a) cannot be answered with a definite statement as it would depend on the circumstances in each case. There are many different occupations represented by those elected to both houses of the Legislature and county commissions. However, there could possibly arise at a given time or situation a conflict wherein an individual elected to a position would have to abstain from voting due to a direct conflict.

However, a distinction may be safely made between local government elective offices and state elective offices. While an employee of the Highway Patrol could serve in the patrol and simultaneously hold a local government elective office, an employee of the patrol would have to resign his position in the patrol if he were to be elected to a *state* legislative or judicial office. State judicial office in this case includes justices of the peace.

Article 3, Section 1 of the Nevada Constitution states:

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

An employee of the patrol helps perform the administrative functions of the state executive branch of government and, therefore, he is a member of the executive branch. Attorney General's Opinion No. 183, dated July 9, 1952. It would, therefore, be constitutionally invalid for an employee of the patrol to simultaneously serve as a member of the state legislative or judicial departments. Justices of the peace are constitutional officers, created as part of the state judiciary in Article 6 of the Nevada Constitution. Therefore, a highway patrolman elected to the Legislature or to the judiciary, including the office of justice of the peace, would have to resign from the patrol.

However, Article 3, Section 1, applies only to state offices and not to local offices. Therefore, local officials and employees, such as teachers, have been permitted to serve in the Legislature. Attorney General's Opinion No. 4, dated January 26, 1971. By the same token, a member of the patrol should be permitted to simultaneously hold a local government elective post, subject, of course, to the comments made above with regard to abstaining from action in the local government post whenever a conflict of interest was apparent with his state employment.

In answer to Question Three (b), the conclusion stated in Question Two that an employee of the Highway Patrol may remain on the job while conducting a campaign for partisan or nonpartisan office, but must limit political activities to off-duty hours and conduct his or her campaign in compliance with the requirements of the State Administrative Manual, Section XI, Paragraph C, (1) through (4), applies.

CONCLUSION—QUESTION THREE

An employee of the Highway Patrol would have to resign his employment with the patrol if he is elected to the State Legislature or judiciary, including offices of justice of the peace. An employee of the patrol need not resign his position if elected to a local government office, but should be aware of the possibilities of conflict of interest.

QUESTION FOUR

Can the State, by rule or regulation, prohibit employees of the Highway Patrol from filing, actively seeking and holding an office while serving as an employee of the Highway Patrol?

ANALYSIS—QUESTION FOUR

The answer would be a qualified yes. The prohibition would have to be established by statutory enactment or by personnel rule and regulation and would have to be applied uniformly to at least all classified state employees within the same status. In addition, the reasons for the prohibition must be stated and a direct showing made that the conduct sought to be prohibited is necessary to maintain the efficiency, integrity and

discipline of that particular class. It must further meet all the judicially established criteria previously set forth in the analysis to Question One.

CONCLUSION—QUESTION FOUR

The State may prohibit classified employees, including employees of the Highway Patrol, from filing, actively seeking or holding office while serving as state employees, provided First and Fourteenth Amendment criteria are met.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By NEWEL B. KNIGHT, *Deputy Attorney General*

169 Licensing Categories Not Set Forth in Statute May Not Be Established by Administrative Regulations—The regulations of the State Fire Marshal Division establishing a mobile home and travel trailer installer’s and serviceman’s licensing program exceed the authority granted by the Legislature and are invalid. A person may perform work in or about a mobile home or travel trailer without first having obtained such license or licenses.

CARSON CITY, June 11, 1974

MR. DAN J. QUINAN, *State Fire Marshal*, 813 North Plaza Street, Carson City, Nevada 89701

DEAR MR. QUINAN:

In your letter of May 23, 1974, you requested an opinion of this office on the following question:

QUESTION

May a person possessing a valid license issued by the State Contractor’s Board pursuant to Chapter 624 of NRS perform work in and about a mobile home or travel trailer without also having first obtained an installer’s or serviceman’s license issued by the State Fire Marshal Division?

ANALYSIS

There is no question that, absent some other provision of law, the holder of a valid contractor’s license issued by the State Contractor’s Board would be entitled to perform services in or about a mobile home or travel trailer.

Chapter 489 of NRS, adopted by the 1973 Nevada Legislature as Chapter 607, 1973 Statutes of Nevada, sets forth a regulatory scheme for the establishment and maintenance of minimum standards in the construction, assembly and use of mobile homes and travel trailers by providing means for inspection and subsequent issuance of Certificates of Compliance ([NRS 489.051](#)) and Labels of Compliance ([NRS 489.110](#)). Subsequent to hearings held on July 12 and August 22, 1973, by the Nevada Mobile Home and Travel Trailer Advisory Commission, regulations became effective on November 3, 1973, defining installers (Rule 105(9)), servicemen (Rule 105(15)), and requiring licensing (Rule 155(2)) of these two (2) classifications, as follows:

2. Except as to those persons who engage in the retail sale of mobile homes and travel trailers, *no person shall engage in the business of installing or*

servicing of mobile homes or travel trailers in this state, unless he is duly licensed by the division and has posted a bond or a suitable substitute as provided by these regulations. (Italics added.)

Fees were established for licensing and renewal of licenses for the installer and serviceman categories by Rule 135(9).

It is important to note that Chapter 489 of NRS neither makes mention of “installers” or “servicemen” nor provides for any regulatory scheme other than the adoption and maintenance of standards for mobile homes and travel trailers and the inspection machinery to attempt to insure that the consumer acquires a product which meets the standards adopted. Thus, the installer’s and serviceman’s licensing program is entirely a creature of the regulations adopted by the State Fire Marshal Division.

A license is defined in 53 C.J.S., Licenses, § 1, as:

a right or permission granted by some competent authority to carry on a business or do an act which, without such license, would be illegal.

* * *

It has also been defined as the granting of a special privilege. * * *

This office previously ruled that an administrative agency could not, by regulation, establish a new or separate license category that was not provided for in the agency’s enabling statute. Attorney General’s Opinion No. 217, dated October 17, 1956. This ruling was and is in accord with legal authority. In *Blatz Brewing Co., et al. v. Collins, et al.*, 69 Cal.App.2d 639, 160 P.2d 37 (1945), the court held that the California State Board of Equalization under the Alcoholic Beverage Act could not establish a “certificate of compliance” which amounted to a “license,” when the enabling legislation did not provide for it. In so ruling, the court stated, at page 40:

The Legislature in framing the act did not see fit to provide a license for out-of-state manufacturers of beer, although it did provide for licensing in-state manufacturers. The board by rule 55 does attempt to do this, and in the words of defendants’ brief, “Should the board attempt to add additional types of licenses, it would in effect usurp the ‘power of the Legislature.’ ”

The general rule is set forth in 2 Am.Jur.2d, *Administrative Law*, § 300, as follows:

Administrative agencies must strictly adhere to the standards, policies and limitations provided in the statutes vesting power in them.

and in 2 Am.Jur.2d, *Administrative Law*, § 301, it is more specifically stated:

An administrative agency may not declare the existence of an emergency, create a tax exemption, *create a new license requirement*, make illegal an act which the statute does not make illegal, or compel that to be done which lies without the scope of the statute, nor destroy rights which the legislature has conferred. (Italics added.)

The conclusion is inescapable that the regulations establishing the installer’s and serviceman’s licensing program for mobile homes or travel trailers are invalid and unenforceable because such regulations are in excess of statutory authority. Consequently, any person may perform work in or about a mobile home or travel trailer without having obtained an installer’s or serviceman’s license issued by the State Fire Marshal Division.

Necessarily then, a person possessing a valid license from the State Contractor's Board may perform such work without licensure by the State Fire Marshal Division.

CONCLUSION

The regulations of the State Fire Marshal Division establishing a mobile home and travel trailer installer's and serviceman's licensing program exceed the authority granted by the Legislature and are invalid. A person may perform work in or about a mobile home or travel trailer without first having obtained such license or licenses.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By E. WILLIAMS HANMER, *Deputy Attorney General*

170 Aid to Indigent Persons—The residence waiting period of [NRS 428.040](#) may not, in light of the U.S. Supreme Court decision in *Shapiro v. Thompson*, be used by a county to implement the provisions of [NRS 428.060](#). Furthermore, the residence waiting period of [NRS 428.040](#) is not incorporated into the provisions of [NRS 450.400](#). The actual test of residence to be employed by [NRS 428.060](#) and [NRS 450.400](#) is presence, combined with intent to permanently live in a given area.

CARSON CITY, July 19, 1974

THE HONORABLE ROY A. WOOFER, *Clark County District Attorney*, Courthouse, 200 East Carson Street, Las Vegas, Nevada 89101

Attention: D. FRANCIS HORSEY, ESQ., *Deputy District Attorney*

DEAR MR. WOOFER:

You have requested an opinion regarding the residency requirements of [NRS 428.040](#) as it applies to [NRS 428.060](#) and [NRS 450.400](#), both of which apply to county aid to indigents.

FACTS

The provisions of state law relating to county aid to indigent persons are generally found in Chapter 428 of the Nevada Revised Statutes. [NRS 428.040](#) provides:

When an application is made by any pauper to the board of county commissioners of any county for relief, the board of county commissioners shall require of the pauper satisfactory evidence that he has been a resident of the State of Nevada for 3 years and of the county for 6 months immediately preceding the day upon which such application is made, or if such is not the case, satisfactory evidence in regard to where the pauper last resided for 6 months prior to arrival in the county where such application is made.

[NRS 428.060](#) provides that when a pauper has not been a resident of the State and county for the times provided in [NRS 428.040](#), but was previously a resident of another Nevada county, the county in which he applies for aid may render temporary relief. The aiding county must then notify the pauper's previous county of residence of such aid and the previous county of residence is then required by the statute to remove the pauper to

the previous county of residence and repay the aiding county for the temporary aid rendered.

[NRS 450.400](#) applies to extending the privileges and use of a county hospital to a resident of another county. When such privileges are extended by a county to the resident of another county, the aiding county shall notify the county of residence. The county of residence is then required by the statute to remove the person receiving aid to the county of residence and to repay the aiding county for the relief originally rendered by it to the person affected.

The United States Supreme Court, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), had occasion to review the one year residency requirements of Connecticut, Pennsylvania and the District of Columbia. Those jurisdictions required a one (1) year residency requirement as a precondition to indigent aid. The Supreme Court held that such residency requirements were unconstitutional as a denial of the right of freedom of travel between the states, as creating an invidious discrimination between welfare residents of more than a year and welfare residents of less than a year in violation of the Fourteenth Amendment. The court held further that this distinction failed to meet any compelling state interest.

Unlike the case of *Dunn v. Blumstein*, 405 U.S. 330 (1972), in which the Supreme Court recognized a residency waiting period of at least thirty (30) days in order to permit voter officials to prepare registration lists in time for the elections, the court recognized no valid residency waiting period in *Shapiro*. The court noted that before welfare payments are made, the applicant is investigated and this investigation is sufficient to determine if the applicant is a bona fide resident. In effect, the court returned to the basic concept of actual physical presence within a state combined with the intent to reside there permanently as the definition of residency for welfare purposes. 25 Am.Jur.2d, *Domicile*, §§ 1-4.

You have stated that Clark County has accepted the ruling of *Shapiro* and has rendered aid to all indigents regardless of the statutory requirements of [NRS 428.040](#). Indeed, the State Welfare Division has informed this office that most, if not all, Nevada counties have accepted the *Shapiro* ruling. However, you have stated that Clark County does not believe *Shapiro* should be extended to cover inter-county responsibilities. In other words, while the county does not intend to withhold aid to indigents because of their failure to reside in the county for six (6) months as required by [NRS 428.040](#), the county does intend to hold the previous county of their residence responsible for all aid rendered to such indigents as required by [NRS 428.060](#) and [NRS 450.400](#).

QUESTION

In light of the acceptance by most Nevada counties of the ruling in *Shapiro* relating to a residency waiting period for indigent welfare recipients, are the provisions of [NRS 428.060](#) and [NRS 450.400](#), relating to the care of indigents not meeting the residency requirements of [NRS 428.040](#), still applicable?

ANALYSIS

It must be noted that the question posed does not concern itself with indigents arriving in a Nevada county from out-of-state. It is concerned only with the question of an indigent moving from one Nevada county to another.

First, it must become immediately apparent that [NRS 450.400](#) is not in any way affected by the residency waiting period of [NRS 428.040](#). Chapters 428 and 450 are separate and independent chapters. There is no reference in [NRS 450.400](#), or in any part of Chapter 450, to [NRS 428.040](#), or any part of Chapter 428 or vice versa. The residency waiting period of [NRS 428.040](#) is applicable only to the provisions of Chapter 428.

Neither [NRS 450.400](#), nor any other provision of Chapter 450 defines the term “residence” or provides for any residence waiting period. The statute merely states, in its pertinent parts:

When the privileges and use of the hospital are extended to a resident of another county * * * the governing head [of the hospital] shall immediately notify the board of county commissioners of such county.

There being no statutory restrictions or definitions of the term “resident,” as used in [NRS 450.400](#), the term can only be defined in its common legal sense. In Nevada, residence is synonymous with domicile and the Nevada Supreme Court has frequently defined it to mean the fact of presence together with the intention to permanently reside in a given place. *Aldabe v. Aldabe*, [84 Nev. 392](#), 396, 441 P.2d 691 (1968).

Therefore, under [NRS 450.400](#) it is only necessary to determine whether the person given aid by a county hospital is present within that county and has the intention to permanently reside there. If he does fit this definition, then he is a resident of that county and [NRS 450.400](#) does not come into effect. If he does not fit this definition, then he is a nonresident of the county and [NRS 450.400](#) does come into effect.

The residency waiting period of [NRS 428.040](#) is not a factor affecting the operation of [NRS 450.400](#).

We may now turn our attention to [NRS 428.060](#). This statute does incorporate the provisions of [NRS 428.040](#) in its terms. The question, of course, is whether this is valid in light of the Shapiro case.

As stated, Clark County accepts the ruling of Shapiro with regard to giving relief to indigents within the county, but still wishes to rely on the provisions of [NRS 428.040](#) for the purpose of defining the responsibility of the indigent’s previous county of residence for reimbursement for such relief. The apparent effect of this policy is that Clark County accepts the residency of indigents who have been living in Clark County for less than the six (6) month requirement of [NRS 428.040](#) for the purpose of aiding such indigents, but at the same time rejects such residency for the purposes of having the previous county of residence bear the financial responsibility for caring for such indigents. A reading of [NRS 428.060](#) will show, however, the actual effect of such a policy.

[NRS 428.060](#) states that a county providing temporary relief to an indigent who fails to meet the residency waiting period of [NRS 428.040](#) shall notify the county of previous residence of such action. Subparagraph 3 of [NRS 428.060](#) then provides:

The board of county commissioners receiving the notice *shall cause the pauper to be removed immediately to that county*, and shall pay a reasonable compensation for the temporary relief afforded. If the board of county commissioners neglects or refuses to remove the pauper, the county affording relief shall have a legal claim against that county for all relief necessarily furnished, and may recover the same in a suit at law. (Italics added.)

The statute is mandatory on the question of removal and if the county of previous residence refuses to implement it, it would seem that the county granting temporary relief could, in addition to obtaining monetary relief, get a court order implementing the statute.

The effect of this policy would be to completely nullify the ruling of Shapiro, and, in fact, would go much further than that. Shapiro only dealt with restrictions on the right to travel, but the implementation of [NRS 428.060](#) involves the destruction of the right of persons to live where they please by creating a policy of forced emigration. The statute in question not only puts travel restrictions on indigents, but requires indigents who have otherwise legally established a residence in a county to be forcibly removed from that county.

Thus, for example, an indigent from another Nevada county, physically relocates himself in Clark County and forms the intent to permanently reside there. That person has established a legal residence in Clark County and Clark County, in light of Shapiro, will

grant that person aid even if he has not been in the county for at least six (6) months as required by [NRS 428.040](#). But then suppose that Clark County, for the purpose of effecting its policy that the county of previous residence bear the responsibility for reimbursement of such aid, invokes [NRS 428.060](#).

Under subparagraph 3 of [NRS 428.060](#), the county of previous residence has the duty to remove the indigent to that county. Therefore, an indigent who has established legal residence in Clark County may be forced to leave Clark County and live in his county of previous residence. His only opportunity for avoiding this fate is to either live in Clark County for six (6) months without seeking welfare from the county or to remain in his previous county of residence. The statute, therefore, presents the indigent who cannot obtain employment with the alternative of going without aid for a half year or being permanently frozen into living in the county of his previous residence. Such a result is clearly against the Shapiro ruling. It involves restrictions on the right to travel and the creation of an invidious discrimination between classes of long term and short term indigent residents that were declared unconstitutional in Shapiro. It adds the further spectacle of the forced removal of resident indigents from a county.

Accordingly, it is the opinion of this office that a county may not, in light of the Shapiro case, use the residency waiting period of [NRS 428.040](#) as the basis of requiring other counties, previously the counties of residency of indigents, to bear the responsibility of reimbursing a county for aid rendered to indigents who have been present in the aiding county for less than six (6) months. The true test of residency in such situations is the Aldabe test, supra, i.e., presence, with the intention to permanently reside in a given county. If an indigent meets this test, then he is a bona fide resident of that county and that county has the sole responsibility for aiding such an indigent. If an indigent cannot meet this test, then the provisions of [NRS 428.060](#) come into effect and the actual county of residence is responsible for aiding the indigent and reimbursing other counties for temporary aid rendered.

CONCLUSION

In light of the case of Shapiro v. Thompson, 394 U.S. 618 (1969), a county may not rely on the provisions of [NRS 428.040](#), as applied to [NRS 428.060](#), to require the county of an indigent's previous residence to reimburse the county for aid given to the indigent, unless evidence exists that the indigent is not a resident of the new county according to the test set forth in Aldabe v. Aldabe, supra.

[NRS 450.400](#) is a separate and independent statute from [NRS 428.040](#) and, therefore, is not affected by [NRS 428.040](#). The sole test of whether [NRS 450.400](#) is applicable is the Aldabe v. Aldabe test, supra.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

171 Political Activities of Local Government Employees—Local government employees are regulated by the Federal Hatch Act, if their principal employment is in connection with an activity which is financed in whole or in part by the federal government. Local government employees affected by the Hatch Act may not run for a partisan political office unless they are completely terminated from their employment. Running for office while on annual leave, leave without pay, furlough or leave of absence is prohibited. Attorney General's Opinion No. 168, dated May 22, 1974, distinguished.

CARSON CITY, July 19, 1974

THE HONORABLE CARL E. LOVELL, JR., *City Attorney, City of Las Vegas*, 400 Stewart Avenue, Las Vegas, Nevada 89101

DEAR MR. LOVELL:

You have asked for advice regarding the Federal Hatch Act and its effect, if any, on local government employees.

FACTS

You have stated that the City of Las Vegas receives federal revenue sharing moneys in addition to many other federal assistance grants. You have also stated that several Civil Service employees of the Las Vegas Metropolitan Police Department have announced their candidacy for state office, and that there are other county and city employees who have or are about to file for county and state offices as well.

QUESTIONS

1. Does the Federal Hatch Act apply to local government employees?
2. May local government employees run for office without resigning or taking a leave of absence?
3. May a local government employee remain employed if he is elected and so serves in his elective capacity?

ANALYSIS—QUESTION ONE

The Federal Hatch Act is found in two (2) different sections of Title 5 of the United States Code. The regulation of the political activities of federal employees is found in 5 U.S.C. §§ 7312 et seq. The regulation of the political activities of state and local employees is found in 5 U.S.C. §§ 1501 et seq.

The Federal Hatch Act does apply to state and local employees. The pertinent parts of 5 U.S.C. § 1501 read as follows:

* * *

(2) "State or local agency" means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof;

* * *

(4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—

(A) an individual who exercises no functions in connection with that activity; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization. * * *

In addition, 5 U.S.C. § 1502 provides, in pertinent part:

(a) A State or local officer or employee may not—
* * *

(3) take an active part in political management or in political campaigns.

Finally, 5 U.S.C. § 1503 provides as follows:

Section 1502(a)(3) of this title does not prohibit political activity in connection with—

(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party.

The Federal Hatch Act, therefore, does apply to local government employees if their principal employment is in connection with an activity which is financed in whole or in part by the federal government. It is possible, of course, for a local government employee to be employed by an agency which receives federal funds but whose principal employment within that agency is not funded with federal funds. In that case, such a local government employee is not regulated by the Federal Hatch Act.

CONCLUSION—QUESTION ONE

It is the opinion of this office that local government employees, whose principal employment is in connection with an activity which is financed in whole or in part by the federal government, are regulated by the Federal Hatch Act and are prohibited from taking an active part in any partisan political campaign. Only those local government employees who receive no federal funds, or who exercise no functions in connection with an activity which is financed by the federal government, or who are employed by an educational or research institution which is supported in whole or in part by a state or political subdivision thereof, or who take part in nonpartisan political campaigns are exempt from the Federal Hatch Act.

ANALYSIS—QUESTION TWO

Under 5 U.S.C. § 1501(5), the Civil Service Commission was given the authority to administer the Federal Hatch Act regarding state and local government employees. The question of whether state and local government employees may run for partisan political offices while on annual leave, etc. has been considered by the Civil Service Commission. In a recent letter to the Attorney General of the State of Maryland, on October 19, 1973, the General Counsel of the United States Civil Service Commission stated as follows:

The provisions of the Hatch Act apply to covered employees on leave status, whether annual leave, leave without pay, furlough, or leave of absence. An employee ceases to be covered by the Hatch Act only upon termination of the employment which has brought him or her within its jurisdiction. In other words, the employee may no longer be carried on the rolls of the State or local agency. Of course, the employee might also be reassigned to a position wherein the duties and responsibilities are not in connection with an activity which receives Federal loans or grants. Such an action might warrant close scrutiny by the Commission, particularly if it appeared to be effected for the purpose of subverting the statute. Thus, any action which has the effect of a leave of absence, as opposed to a total termination from employment, would not be sufficient to relieve the employee from the political activity restrictions.

We would note, in passing, that federal regulations regarding prohibited and permitted political activities of state and local employees are found in 5 C.F.R., Part 151 et seq.

CONCLUSION—QUESTION TWO

A local government employee, who is regulated by the Federal Hatch Act, may not run for a partisan political office while on annual leave, leave without pay, furlough or leave of absence. The employee must completely terminate his employment with the local government agency prior to his running in a partisan political campaign.

ANALYSIS—QUESTION THREE

This question has already been answered by our analysis to Question One. If a local government employee who is subject to the Hatch Act may not remain in his employment status with his local government while running for a partisan political campaign, it is obvious that he cannot remain employed with the local government upon his election to the office.

CONCLUSION

A local government employee who is subject to the Hatch Act may not remain employed with his local government if elected to a partisan political office.

The foregoing conclusions are readily distinguishable from Attorney General's Opinion No. 168, dated May 22, 1974, ruling that a State Highway Patrol Regulation prohibiting patrol members from being candidates for public office violated the First and Fourteenth Amendments. The opinion noted that the Highway Patrol was funded principally with state appropriated moneys and, therefore, its members were not subject to the Hatch Act.

The opinion further stated that state employees who are candidates for public office are expressly authorized by State Personnel Regulations to retain their jobs while running for office so long as they do not engage in political activities during on-duty time, or while off duty, engage in political activities which impair work attendance or job efficiency.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

172 Nevada State Prison—Inmates who work in and around the State Prison are not able to enter into “contracts of hire” and are therefore not covered by Chapter 616 of NRS, the Nevada Industrial Insurance Act.

CARSON CITY, September 30, 1974

MR. EDWIN T. POGUE, *Warden, Nevada State Prison*, P.O. Box 607, Carson City, Nevada 89701

DEAR MR. POGUE:

In your recent letter, you posed the following question:

QUESTION

Are inmates who work in and around the prison at rates from \$1.00 per month to \$1.25 per day entitled to coverage under the Nevada Industrial Insurance Act?

ANALYSIS

There is no specific statutory provision covering inmates in Chapter 616 of NRS, the Nevada Industrial Insurance Act. Any coverage of inmates would derive from [NRS 616.055](#), which reads as follows:

“Employee” and “workman” are used interchangeably in this chapter and shall be construed to mean every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed. * * *

The critical language is “contract of hire.” The question of whether convicts are able to engage in contracts of hire depends on whether they have a choice in the matter of working. Inmates at the Nevada State Prison are required by law to perform labor. [NRS 209.340](#) provides:

The board shall require of every able-bodied convict confined in the state prison as many hours of faithful labor in each day during his term of imprisonment as shall be prescribed by the rules and regulations of the prison.

It can therefore be seen that inmates are not free to choose whether or not they labor. The reward received by the inmates is not sufficient to create a contract of hire, it being in the nature of an inducement to good behavior, and an aid to rehabilitation.

Larsen, Workmen’s Compensation Law, § 47.31, states the distinction as follows:

Convicts and prisoners have usually been denied compensation for injuries sustained in connection with work done within the prison, even when some kind of reward attended their exertions. The reason given is that such a convict cannot and does not make a true contract of hire with the authorities by whom he is confined. The inducements which might be held out to him, in the form of extra food, or even money, are in no sense consideration for an enforceable contract of hire.

The Supreme Courts of Arizona, Idaho and Oklahoma have considered this question and have held unanimously that inmates laboring in the state prison, or outside the prison under the supervision of the prison staff, i.e., on a prison farm, are not entitled to workmen’s compensation benefits for injuries sustained in the course of their work. The absence of choice on the part of the inmate prevents the creation of a contract of hire. *Watson v. Industrial Commission*, 414 P.2d 144, 100 Ariz. 327 (1966); *Shain v. Idaho State Penitentiary*, 291 P.2d 870, 77 Ida. 292 (1955); and *In re Kroth*, 408 P.2d 335 (1965).

CONCLUSION

It is the opinion of this office that because inmates at the Nevada State Prison are not free agents, and are compelled to perform labor by statute, the reward they receive in the form of money is not sufficient to create a “contract of hire.” Therefore, such inmates are not entitled to coverage under the provisions of the Nevada Industrial Insurance Act.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By PATRICK B. WALSH, *Deputy Attorney General*

173 Insufficient Funds Check—A person who cashes a check in a gambling casino and uses the proceeds for gambling is chargeable under [NRS 205.130](#) if the check is an insufficient funds check and the other elements of [NRS 205.130](#) are met.

CARSON CITY, October 22, 1974

THE HONORABLE ROBERT C. MANLEY, *Elko County District Attorney*, Courthouse, Elko, Nevada 89801

DEAR MR. MANLEY:

You have posed the following question for opinion by this office:

QUESTION

Is a person who cashes a check in a gambling casino and uses the proceeds for gambling chargeable under [NRS 205.130](#) if the check in question is an insufficient funds check?

ANALYSIS

[NRS 205.130](#) clearly states that “every person who * * * with intent to defraud, shall make, pass, utter or publish any bill, note, check * * * for the payment of money * * * or delivery of other valuable property * * * when in fact such person shall have no money * * * or shall have insufficient money * * * to meet and make payment of the same in full upon its presentation, shall be guilty of a misdemeanor. * * *” If the amount in question exceeds \$100, the offense is a felony.

There is no statutory exception to the criminal liability of [NRS 205.130](#) for situations where the proceeds are used for gambling. The offense is completed when the intent to defraud and the act of cashing the check are in union. [NRS 193.190](#). It is, therefore, irrelevant that the proceeds are immediately used for gambling purposes in the gaming establishment where the check is cashed. The cases of *Corbin v. O’Keefe*, [87 Nev. 189](#), 484 P.2d 565 (1971); *Weisbrod v. Fremont Hotel*, [74 Nev. 227](#), 326 P.2d 1104 (1958); *West Indies v. First National Bank of Nevada*, [67 Nev. 13](#), 214 P.2d 114 (1950); and *Scott v. Courtney*, [7 Nev. 419](#) (1872), are distinguishable in that all are civil cases involving enforcement of gambling debts in Nevada courts. Unlike those cases, the issue here is not whether a civil action will lie for collection of money or for money had and received. Rather it is a question of the enforcement of our criminal statutes and the prosecution of criminal fraud.

CONCLUSION

A person who cashes a check in a gambling casino, and uses the proceeds for gambling purposes, can and should be charged pursuant to [NRS 205.130](#) if the check in question is an insufficient funds check and the elements of the statute are met.

Respectfully submitted,

ROBERT LIST, *Attorney General*

174 CATV (Cable Television) Franchises—State and federal regulation has completely pre-empted the jurisdiction of political subdivisions of the State and municipalities over CATV service areas and operations. Political subdivisions and municipalities may, however, lease to a CATV company the use of the streets, ways, alleys and places under jurisdiction of such local governing body.

CARSON CITY, October 23, 1974

THE HONORABLE ROBERT L. VAN WAGONER, *Reno City Attorney*, South Center and East Liberty Streets, Reno, Nevada 89501

Attention: JOHN AARON WHITE, JR., ESQ., *Chief Deputy City Attorney*

DEAR MR. VAN WAGONER:

You have requested a clarification of Attorney General's Opinion No. 128, dated April 22, 1964.

FACTS

On June 5, 1953, the Reno City Council passed Resolution No. 1453, which recognized the public need for a cable TV (hereinafter CATV) franchise in the City of Reno and provided the manner of making application for such a franchise. On June 22, 1953, Resolution 1453 was codified as Bill No. 1210, City Ordinance No. 996, and on September 1, 1953, the city entered into a franchise agreement with Community Antenna Company, Inc. On July 13, 1959, the city extended this franchise agreement for a period of 15 years. CATV had not been subjected to federal or state regulation at that time.

In 1963, the Nevada Legislature adopted Chapter 373, Statutes of Nevada, which added the following language to the definition of "public utility" set forth in [NRS 704.020](#):

Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce.

On April 22, 1964, in response to an inquiry of the City Attorney of Las Vegas, the then Attorney General issued Attorney General's Opinion No. 128, based on Chapter 373, stating that "if the transmission of television by community antenna is intrastate in character that the Public Service Commission of Nevada, and not a political subdivision of the State, has the power to grant a franchise."

In 1965, the Federal Communications Commission issued its Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, wherein the commission asserted its jurisdiction over CATV systems. In 1966, the FCC issued its Second Report and Order, 2 F.C.C.2d 725, assuming jurisdiction over the CATV industry as interstate commerce. This assumption of jurisdiction by the FCC was upheld in *United States et al. v. Southwestern Cable Co., et al.*, 392 U.S. 157, 88 S.Ct. 1944, 20 L.Ed.2d 1001 (1968).

In 1967, the 54th Session of the Nevada Legislature adopted the Model State Community Antenna Television System Code. This code was incorporated into the Nevada Revised Statutes as [NRS Chapter 711](#). This entire chapter was tested and sustained as merely complimentary to federal regulations in the case of *TV Pix, Inc., et al. v. Taylor, et al.*, 304 F.Supp. 459 (D. Nev. 1968), *aff'd mem.*, 396 U.S. 556 (1970).

Finally, on February 3, 1972, the FCC issued its Fourth Report and Order, 37 Fed.Reg. 3251 (1972). The CATV franchise granted by the City of Reno on July 13, 1959, expired on August 13, 1974, The city now wishes to renew that franchise, but seeks a clarification of Attorney General's Opinion No. 128.

ANALYSIS

To the extent federal regulation has invaded the CATV field such regulation has pre-empted state and local jurisdiction. The FCC's Fourth Report and Order, *supra*, regulates the following CATV operations: program origination, carriage and exclusivity, franchise standards, diversification of control, and technical standards.

When the State Legislature enacts a comprehensive regulatory scheme applicable to a particular industry and to be administered by a particular state agency, the Legislature *ipso facto* withdraws jurisdiction to so regulate from the political subdivisions of the State. *Chicago Motor Coach Co., et al. v. City of Chicago, et al.*, 337 Ill. 200, 169 N.E. 22, 66 A.L.R. 834 (1929). Accordingly, to the extent Chapter 711 of NRS has further invaded the field of CATV regulation, local jurisdiction to so regulate has been withdrawn. Chapter 711 of NRS gives the Public Service Commission jurisdiction to regulate: service areas and extensions thereof, rates, fitness and ability of operator, safety and adequacy of service, and to promulgate and enforce rules and regulations. Accordingly, jurisdiction to regulate the rates, service areas and *operations* of CATV companies has been wholly pre-empted and withdrawn from political subdivisions of the State of Nevada.

The Reno City Charter specifically grants the city council power to lease any municipal property for the purpose of providing service to the public (Sec. 2.150). The power to lease such property to a CATV company has not been pre-empted or withdrawn by federal or state regulation.

At the time of Attorney General's Opinion No. 128, the Nevada Legislature had declared CATV to be a public utility subject to regulation pursuant to [NRS Chapter 704](#). [NRS 704.330](#) requires each public utility to obtain a certificate of public convenience and necessity prior to operation. Such a certificate designates a service area within which the utility has an exclusive right to render the service authorized. This exclusive right is commonly characterized as a "franchise"; nevertheless, the term "franchise" is a generic term referring to a special privilege conferred by a sovereignty which does not belong to citizens generally. *Elliott, et al. v. City of Eugene, et al.*, 135 Ore. 108, 294 P. 358 (1930). It is apparent that the term "franchise," as used in Attorney General's Opinion No. 128, refers to a certificate of public convenience and necessity.

CONCLUSION

Attorney General's Opinion No. 128 is clarified as follows: federal and Nevada state regulations have completely pre-empted the jurisdiction of the City of Reno to regulate the rates, service areas and operations of CATV companies providing services within the city. The City of Reno may, however, lease to that CATV company the use of the city streets, ways, alleys and places.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By GLADE L. HALL, *Deputy Attorney General*

175 [NRS 293.404](#), Recounts—A recount of general election results is merely a retabulation of the ballots in the same fashion as in the original election with each candidate or his representative present as an observer. A candidate's observers may not challenge ballots, but must save challenges for any later election contest.

CARSON CITY, November 25, 1974

THE HONORABLE WM. D. SWACKHAMER, *Secretary of State*, The Capitol, Carson City,
Nevada 89701

DEAR MR. SWACKHAMER:

One of the candidates for the Office of United States Senator from Nevada in the recent general election has indicated to you that he will demand a recount after the Supreme Court canvass on November 27, 1974. You have requested the advice of this office on the nature of the recount.

FACTS

The general election was held on November 5, 1974. There was an election for the Office of United States Senator on the ballot and one of the candidates received, in the unofficial tally, 620 votes more than his opponent. His opponent indicated he would seek a recount after the Supreme Court, pursuant to [NRS 293.395](#), canvassed the vote.

QUESTIONS

Is a recount merely another count of the vote, or is it a procedure whereby the candidates may challenge the legality of the ballots? In this connection, must ballots, which are counted by electronic computer, be counted by hand or once again be counted by the computer?

ANALYSIS

There appears to be some question in the cases researched as to whether a recount is but a mathematical count of ballots previously canvassed and recorded on the tally sheet, or whether it is a recanvass of the votes involving determination as to whether ballots were properly allowed for the original counting. It is certain that a recount is not an election contest. See Words and Phrases, "Recount." Election recounts and election contests are separate proceedings. State ex rel. Booth v. Board of Ballot Commissioners, 196 S.E.2d 299 (W.Va., 1973); 29 C.J.S., Elections § 291. A contest is an adversary proceeding, or suit, between a candidate certified as elected and one not certified for the purpose of determining the validity of an election. McClendon v. McKeown, 323 S.W.2d 542 (Ark. 1959); see also Words and Phrases, "Contest." The differentiation between recount and contest is found in the statutory scheme of [NRS 293.400](#) et seq. There are different procedures stated for each.

It is also certain that recounts and contests did not exist at common law. Therefore, they are subject solely to statutory interpretation. They are special proceedings regulated by statute only. In re Parson, [76 Nev. 442](#), 357 P.2d 120 (1960); 26 Am.Jur.2d, Elections, § 295. The applicable statute for the conduct of a recount is [NRS 293.404](#). Section 1 sets up the recount board, while section 2 describes the basic procedure for recounts. Section 2 provides that:

The recount shall include a count of all ballots, including rejected ballots, and shall determine whether such ballots are marked as required by law. The county clerk shall have authority to unseal and give to the recount board all ballots to be counted. (Italics added.)

The statute specifically orders the recount board to inspect each ballot and to determine if each is marked as required by [NRS 293.293](#) and [293.367](#). By this provision, the recount board conducts the recount in the same manner as was done by the election board in the original count of the ballots after the general election. In other words, in Nevada, a recount is but a replay of the procedures for inspecting and counting the ballots as was done immediately after the general election.

These inspections and determinations are to be the sole responsibility, as provided by [NRS 293.404](#), of the recount board. The position of the candidates or their representatives is to function merely as observers with no power to challenge ballots or interfere in any way with the determination of the recount board in which ballots are to be counted or in how the ballots are to be counted. Such observers are in the same position as observers of the political parties or candidates on election night. See Rules 35 and 39 of the “Rules and Regulations for the Conduct of Primary and General Elections Promulgated by the Secretary of State.” In both instances they are to merely observe and are subject to removal if they interfere in the counting procedures. If such observers believe that illegal ballots are being counted in the recount, they may record such information for their own use in bringing a contest action. Such observers, however, may not challenge ballots. The recount board alone determines which ballots are to be counted and how they are to be counted.

As additional reasoning for this view, we would note [NRS 293.391](#), subsection 3, which states that ballots deposited with the county clerk shall not be subject to the inspection of anyone, except in cases of contested elections. The purpose of this statute, originally enacted in 1879, was to prevent tampering with the ballots by prohibiting anyone but the county clerks from handling, receiving or inspecting the ballots. *State v. Baker and Josephs*, [35 Nev. 1](#) (1912). This statute has been modified by [NRS 293.404](#) by permitting an official recount board to inspect such ballots. However, the original intent remains. No one but the county clerk or his designated recount board, of which the county clerk serves as chairman, may handle, receive or inspect ballots. A candidate or his representative may, however, observe the entire process.

What this means in terms of counting ballots for the recount is as follows. In the case of noncomputer ballots, a recount board hand counts the ballots, determining which ballots are to be counted. In the case of computer ballots, a recount board first inspects the ballots to determine which ballots are to be counted and then proceeds to count such ballots by means of an electronic computer. In both instances, the decision on which ballots to count and how they are to be counted lies with the recount board. In both instances, the candidates or their representatives are merely limited to roles as observers and may not interfere in the recount process. They may merely observe for the purpose of detecting irregularities which may later serve as the basis of a contest.

CONCLUSION

A recount, according to Nevada law, involves a determination by a recount board in each county as to which ballots may be counted and then the recount board proceeds to count such ballots. The process is the same as the process followed by the election boards on election night. In the case of noncomputer ballots, such ballots are hand counted by the recount boards, whereas in the case of computer ballots, such ballots are first inspected to see if they are in accordance with Nevada law on marking ballots and are then counted, as on election night, by electronic computer.

The candidates or their representatives may act as observers, but only as observers. They may not challenge ballots or interfere in any way with the counting of ballots. If observers note any irregularities in the counting of ballots, they may contest such irregularities only through an election contest.

Respectfully submitted,

ROBERT LIST, *Attorney General*

176 Retirement—Police officer or fireman must serve in such capacity for number of years set forth in [NRS 286.510](#) to qualify for early retirement benefits.

May not receive credit towards early retirement for any time spent in nonpolice or nonfire related public employment.

CARSON CITY, December 3, 1974

MR. VERNON BENNETT, *Executive Officer, Public Employees Retirement Board*, P.O. Box 1569, Carson City, Nevada 89701

DEAR MR. BENNETT:

In your letter of October 23, 1974, you requested the opinion of this office on three (3) questions relating to the length of service required of a police officer or fireman to qualify for early retirement under the Public Employees Retirement Act, [NRS Chapter 268](#).

QUESTIONS

1. Must the years of service for a police officer or fireman, to qualify for early retirement, be continuous?
2. May a police officer or fireman receive credit towards early retirement for time spent in a covered position other than as a police officer or fireman?
3. After the minimum years of service are rendered, may a police officer or fireman change jobs, but still subsequently retire under the early retirement provisions when minimum retirement age is reached?

ANALYSIS

Since the three (3) questions put forth in your letter are so interrelated, the analysis of each of them will be done as a single unit.

[NRS 286.510](#) sets forth the minimum statutory requirements for retirement of members of the Public Employees Retirement System. Subsection 1 authorizes a police officer or fireman who is a member of the system and who has attained the age of 55 years with a minimum of ten (10) years of accredited service to be retired from that service. Subsection 3 authorizes a police officer or fireman to retire at age 50 if he has completed twenty (20) years of continuous service.

All other public employees are authorized by subsection 2 to retire at age 60 with ten (10) years of service or at age 55 with thirty (30) years of service.

From reading the above-cited statute, it is immediately clear that a very significant retirement advantage is being given by the Legislature to police officers and firemen as compared to other public employees in the State of Nevada. However, the circumstances connected with the performance of the duties related to these two (2) positions easily justify the advantage extended by law.

A person acting as a police officer or fireman is almost daily placed in a situation involving great potential danger to life and limb. In addition, the physical exertions and activities of these jobs far exceed the usual demands of the more traditional civil service position.

Courts have for a long time recognized that statutes similar to [NRS 286.510](#), subsections 1 and 3, are enacted by a Legislature with the objective of rewarding in a meaningful way both the efficiency and faithful service of police officers and firemen who labor at their dangerous tasks for many continuous years. See *Klench v. Board of Pension Fund Commissioners*, 249 P. 46 (Cal. 1926); *Kirschwing v. O'Donnell*, 207 P.2d 819 (Colo. 1949); *State v. City of Oshkosh*, 166 N.W. 37 (Wisc. 1917); *Commonwealth v. Walton*, 38 A. 790 (Pa. 1897); *In re Roche*, 126 N.Y.S. 766 (N.Y. 1910); and *State ex rel. Sena v. Trujillo*, 129 P.2d 329 (N.M. 1942).

Taking all these factors into consideration, it is our opinion that [NRS 286.510](#) requires a police officer or fireman to serve a full ten (10) years of continuous service in

that capacity in order to qualify for early retirement benefits at age 55 or a full twenty (20) years of continuous service to qualify for retirement at age 50.

There is nothing in the statute to indicate that a police officer or fireman can use any service years established at some other job to qualify for the special retirement advantage given by law to persons who occupy the position of police officer or fireman. On the contrary, the phrase “who has completed twenty years of *continuous service*” (italics added) in [NRS 286.510](#), subsection 3, clearly states that the service must be as a police officer or fireman for the full minimum period.

Any other interpretation of this statute so as to allow a policeman or fireman credit for years of service in jobs not related to law enforcement or fire protection would be contrary to the specific objectives behind an early retirement statute for persons who accept the risk and dangers inherent in the position of police officer or fireman as set forth above and as declared by the courts previously cited.

However, once a police officer or fireman has satisfied the requirements of [NRS 286.510](#), he is, in our opinion, free to remain in that job or he may change jobs. He will always be entitled to retire pursuant to the provisions of law relating to police officers and firemen, whether or not he occupies such a position on the date he enters into retirement. The statute does not require him to be in that position at the time of actual retirement from public service, but only that he have devoted himself to one of these two important positions for the required minimum number of continuous years.

In addition, we note that [NRS 286.570](#), as amended in 1973, guarantees a retirement allowance to any covered member of the Public Employees Retirement System after he has served a minimum of ten (10) years of continuous service and upon reaching the minimum retirement age set by law for his job or position. We conclude that once a police officer or fireman satisfies the minimum service requirements for early retirement he cannot be divested of his early retirement benefit even though he changes to a public job that is not entitled under law to a similar benefit or he leaves government service entirely.

CONCLUSIONS

1. A police officer or fireman, in order to qualify for early retirement benefits under [NRS 286.510](#), must serve in such capacity for a continuous number of years as set forth in the statute.
2. A police officer or fireman may not receive credit towards early retirement for any service time spent in a public service position other than as a police officer or fireman.
3. A police officer or fireman who has satisfied the minimum service requirements for early retirement cannot be divested of his early retirement benefits regardless of any further change in his employment status.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

Addendum to 176. January 2, 1975. Addendum to Attorney General’s Opinion No. 176, dated December 3, 1974—Definition of continuous service.

CARSON CITY, January 2, 1975

MR. VERNON BENNETT, *Executive Officer, Public Employees Retirement Board*, P.O. Box 1569, Carson City, Nevada 89701

Re: Addendum to Attorney General's Opinion No. 176, dated December 3, 1974.

DEAR MR. BENNETT:

Since the issuance on December 3, 1974, of Attorney General's Opinion No. 176 concerning the legal requirements for retirement of police officers and firemen under the provisions of [NRS 286.510](#), this office has received several inquiries concerning the definition of the term "continuous service" as that term was used in Attorney General's Opinion No. 176 and as it appears in the statute. In order to avoid any misunderstanding by police officers or firemen who are members of the Public Employees Retirement System, we are pleased to provide you with this addendum to Attorney General's Opinion No. 176.

Ordinarily, the term "continuous" is defined to mean connected, without break, cessation or interruption. *State ex rel. Mulrine v. Dorsey*, 264 A.2d 515 (Del.Super. 1970); *Fowler v. United Equitable Ins. Co.*, 438 P.2d 46 (Kan. 1968); *Talbot v. Atchison*, 110 F.Supp. 182 (D.C.D.C. 1951); *Hode v. Sanford*, 101 F.2d 290 (5th Cir. 1939).

This would be the meaning ascribed to the term "continuous" as used in our retirement law were it not for the fact that [NRS 286.030](#) provides a special legislative definition for the term "continuous service." Subsection 1 of this portion of our retirement law defines "continuous service" to mean "service in public employment of the state, and for public employers participating in the system, in positions subject to the provisions of this chapter or in positions which would have been subject to this chapter, not interrupted for 5 years or more." As you can see, this rather unique definition of the term "continuous service" allows an employee to actually interrupt his service with a public employer up to four years and 364 days and still be classed as being in the "continuous service" of a public employer. An interruption of five years or more, however, destroys the continuous service of such an employee although under subsections 2 and 3 of [NRS 286.030](#) it may be possible to restore such credit after resuming service with a public employer for 10 or more years.

In conclusion, the term "continuous service" as used in the Public Employees Retirement Act, [NRS Chapter 286](#), means service with a public employer not interrupted for 5 years or more. The term as used in our law is *not* synonymous with consecutive years of service.

We trust that the above will allow you and the Retirement Board to answer any future questions concerning the meaning of the term "continuous service" as used in our retirement law. If we may be of any further assistance, however, please advise.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*