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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.

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**196 Open Meeting Law—Governing body need not exclude clerk from executive sessions on personnel matter; minutes of meeting should be kept separately from minutes of regular meeting.**

CARSON CITY, January 27, 1976

THE HONORABLE MARIO G. RECANZONE, *City Attorney of Yerington,* 38 South Main Street, Yerington, Nevada 89447

DEAR MR. RECANZONE:

Your predecessor requested an opinion from this office on the following:

QUESTIONS

1. Must the city council exclude the city clerk—ex officio clerk of the council and keeper of council records—from a bona fide session of the council which is permitted, under the Nevada Open Meeting Law, to be conducted in private?
2. What record of such meeting should be prepared and kept?
3. How should records of such meeting be maintained in order to preserve the confidentiality specifically permitted under the Open Meeting Law?

ANALYSIS

Since your questions appear to all be interrelated, they may best be answered together as a whole.

Case law in Nevada, stretching back more than 100 years, has established the principle that a board of county commissioners exercises limited and special powers only. When the power of such a board to do a certain thing or take a particular action is questioned, the record must show affirmatively all the facts necessary to give authority to the board to act. Hanson v. Board of County Commissioners, 75 Nev. 27, 333 P.2d 994 (1959); State ex rel. Kearns v. Streshley, 46 Nev. 199, 209 P. 712 (1922); State ex rel. Fall v. Kelso, 46 Nev. 128, 208 P. 424 (1922); State v. Board of County Commissioners, 5 Nev. 317 (1869).

On this point, our Supreme Court, in the case of Johnson v. Eureka County, 12 Nev. 28 (1877), has observed that:

> Whenever the jurisdiction of the board depends upon certain facts to be ascertained and determined by it, its records should show that it acted upon the evidence presented and adjudged the facts to be sufficient.

The rules cited above relating to a board of county commissioners generally apply also to a city council. 56 Am.Jur.2d Municipal Corporations, § 177.

In addition, NRS 244.075 requires a county clerk to "keep a full and complete record of all the proceedings of the board * * * and all such proceedings shall be entered upon the record.

The Yerington City Charter, at Section 3.030, contains similar language and even commands attendance at council meetings for the city clerk. For general incorporation cities, NRS 266.480 requires the same.

Having a legal duty to make a record of its actions, it is our opinion that a board of county commissioners or city council meeting in executive or personnel session pursuant to the Nevada Open Meeting Law, NRS 241.030, may allow any person to remain in the room whose services are reasonably necessary for the board or council to adequately discharge its duties under law, including the county or city clerk, or one of the deputies of the same, if that individual has the responsibility for taking the minutes of all meetings of that group and keeping its records. Case law from other jurisdictions supports our view. See Thomas v. Bd. of Trustees of Liberty Twp., 215 N.E.2d 434 (Ohio 1966), and Blum v. Bd. of Zoning and Appeals, 149 N.Y.S.2d 5 (N.Y. 1956).

The need for such person or persons to be present for the purpose of making an accurate record is even more essential today in view of the fact that many public employees are now seeking court review of adverse decisions reached at closed personnel sessions.

Under NRS 239.010, 244.075, and 268.305, the minutes of a board of county commissioners or city council would normally be classified as a "public record" which could be examined by any interested person.

However, the minutes and other records made at a legally closed executive personnel session cannot be so viewed, since to do so would destroy the confidentiality of the meeting and defeat the very purpose of the statutes which allow such meetings to be held in private for the benefit of the employee affected. NRS 241.030, 244.080, subsection 3, and 268.305, subsection 3.

We therefore recommend that the clerk maintain a separate minute book of any such meetings, with access thereto restricted to the parties involved, their respective attorneys, or any person possessing a valid court order commanding access to that record.

This minute book and other related records should furthermore be kept in a place apart from those records in the clerk's office otherwise open to the public for inspection. We believe it is best to leave the actual details of any security system to the county or city clerk to decide.

CONCLUSION

It is therefore our conclusion that a board of county commissioners or city council need not exclude its clerk from any executive or personnel session, but should instruct the clerk to be present and discharge his legal duties in keeping the minutes of the board or council. These minutes of a legally confidential meeting are likewise to be kept confidential.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

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**197 Primary Elections—(1) Candidates in a party primary election must be registered voters of the party for which they seek nomination. (2) Candidates**

**in a nonpartisan primary election must be qualified electors, but need not be registered voters. (3) NRS 293.176 is constitutional. (4) A candidate may not circumvent NRS 293.176 by cancelling his voter registration in one party and reregistering as a voter in another party.**

CARSON CITY, January 27, 1976

MR. STANTON B. COLTON, *Registrar of Voters,* 400 Las Vegas Boulevard South, Las Vegas, Nevada 89101

DEAR MR. COLTON:

You have asked several questions relating to primary elections.

QUESTION ONE

In view of the provisions of Article 15, Section 3 of the Nevada Constitution, is it a valid law to require that a qualified elector should also be a *registered voter* in order to be a candidate in any *party primary* election? If not, what proof should be required of a nonregistered elector who wishes to be a candidate in a party primary election that he is affiliated with that party?

ANALYSIS—QUESTION ONE

NRS 293.177 provides in its pertinent parts:

> 1. * * * [N]o name may be printed on a ballot or ballot label to be used at a primary election unless the person named has filed a declaration of candidacy, or an acceptance of candidacy. * * *
>
> 2. A declaration of candidacy or an acceptance of candidacy required to be filed by this section shall be in substantially the following form:
>
> * * *
>
> For the purpose of having my name placed on the official primary ballot as a candidate for the …….. Party nomination for the office of ……., I, the undersigned ……., do swear (or affirm) * * * that I am a *registered voter* of the election precinct in which I reside * * *; that I am registered as a member of the …….. Party; * * * (Italics added.)

Since NRS 293.177 provides that no one may be a candidate in a party primary unless he files the above affidavit, and since the affidavit requires a candidate to acknowledge he is a registered voter, it is clear that NRS 293.177 requires a party primary candidate to be a *registered voter* of the party for which he seeks nomination in order to be eligible for the primary election.

However, Article 15, Section 3 of the Nevada Constitution provides that:

> No person shall be eligible to any *office* who is not a *qualified elector* under this constitution. * * * (Italics added.)

Article 2, Section 1 of the Nevada Constitution defines qualified electors as:

> All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of eighteen years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election. * * *[1]

The Nevada Supreme Court has pointed out that a "qualified elector" is not necessarily the same as a "qualified" or "registered voter." To be a registered voter, one

must be a qualified elector,[2] but the reverse is not true. State ex rel. Schur v. Payne, 57 Nev. 286, 62 P.2d 921 (1937); Caton et al. v. Frank, 56 Nev. 56, 44 P.2d 521 (1935); State ex rel. Boyle v. Board of Examiners, 21 Nev. 67, 24 P. 614 (1890).

In the Schur case, supra, a candidate attempted to file for the election for the nonpartisan office of justice of the peace. The county clerk refused to accept the candidate's declaration of candidacy because the candidate was not a registered voter of the township. The Nevada Supreme Court held that the candidate's filing should have been accepted because, as a qualified elector, he was eligible for the office. The court quoted from Bergevin v. Curtz, 127 Cal. 86, 59 P. 312 (1899), to the effect that:

> He could not have voted at the election, and thus would have been deprived of voting for himself, if he so desired; but, having the constitutional qualifications, he was eligible to the *office.* (Italics added.) State ex rel. Schur, supra, at 292.

The key word is "office." This candidate was not filing for a party nomination, but for the right to run for an office. The Nevada Supreme Court recognizes a distinction:

> * * * There is a substantial distinction in the law between the nominating of a candidate and the election of a public officer. * * * Riter v. Douglass, 32 Nev. 400, 425 (1910).

The Ritter case, supra, concerned itself with the constitutionality of

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[1]The six month residency requirement was advised to be unconstitutional due to the U.S. Supreme Court's ruling in Dunn v. Blumstein, 405 U.S. 330 (1972), in Attorney General's Opinion No. 85, dated June 19, 1972. It was removed from NRS 293.485 by the 1973 Legislature and the voters will have a chance to officially remove it from the Nevada Constitution in the 1976 general election.

[2]Article 2, Section 6 of the Nevada Constitution states that "Provision shall be made by law for the registration of the names of Electors. * * *"

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Nevada's primary election law. The court quoted from State v. Nichols, 50 Wash. 508, 97 P. 728 (1908), to the effect that:

> * * * [W]e do not think the sections of the constitution providing the qualifications of electors applicable to the primary election provided for by this statute. It is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office, to be voted for at the general election. Being so, the qualifications of electors provided by the constitution for the general election can have no application thereto. * * * Riter, supra, at 426.

In Riter, supra, the court noted that the purpose of the primary law was to preserve the integrity of political parties. Riter, supra, at 418. That being the case, the court later noted that:

> Any reasonable test of party affiliation may be required by the legislature of those who desire to participate in primary elections of the various parties. Riter, supra, at 428.

In this case, the test required by the Legislature is found in NRS 293.177. A candidate for a party primary must be a registered voter of that party. A state may impose reasonable requirements designed to insure that persons listed as party candidates on primary ballots are members of that political party. Ray v. Blair, 343 U.S. 214 (1952). This, then, is the purpose of NRS 293.177—to furnish proof to party voters in a party primary that candidates in the party primary actually belong to the party. The Legislature deemed this to be a reasonable test of party integrity in such primary elections.

CONCLUSION—QUESTION ONE

It is the advice of this office that NRS 293.177 is a valid law and, therefore, it is necessary that a candidate in a party primary must be a registered voter of that party. Having answered Question One in this manner, it is unnecessary to answer the second part of the question.

QUESTION TWO

In view of the provisions of Article 15, Section 3 of the Nevada Constitution, is it permissible to require that a qualified elector should also be a *registered voter* in order to be a candidate in a *nonpartisan primary* election? If not, what proof should be required of a nonregistered elector who wishes to be a candidate that he is eligible?

ANALYSIS—QUESTION TWO

NRS 293.177 provides that for any candidate's name to appear in any primary election, he must file a declaration or acceptance of candidacy. NRS 293.177 also provides that the declaration or acceptance of candidacy to be used should be *substantially* the same as the declaration printed in the statute. The Nonpartisan Declaration of Candidacy adopted by the Secretary of State provides, in its pertinent parts:

> For the purpose of having my name placed on the official primary election ballot as a nonpartisan candidate for nomination for the office of ……., I, the undersigned ……., do solemnly swear (or affirm) * * * *that I am a registered voter of the election precinct in which I reside.* * * * (Italics added.)

As indicated earlier, Article 15, Section 3 of the Nevada Constitution merely states that a person should be a qualified elector in order to be eligible to an office in Nevada.

There is a difference between a party primary and a nonpartisan primary. The purpose of a party primary is to nominate the candidates of a political party. Riter v. Douglass, supra. The term "nonpartisan," however, means no partisanship; no regard to political affiliations. Reed v. State ex rel. Stewart, 76 Nev. 361, 354 P.2d 858 (1960); Bonner v. District Court, 122 Mont. 464, 206 P.2d 166 (1949). The purpose of nonpartisan primaries is not to nominate party candidates, but merely to limit the size of the ballot for the nonpartisan office at the general election. It has always been considered reasonable for a state to attempt to limit the size of a ballot at the general election so as to insure that the candidate elected at the general election represents a majority of the voters participating in the election. 26 Am.Jur.2d Elections, § 215.

Since the purpose of a nonpartisan primary is to limit the size of the nonpartisan ballot at the general election, the nonpartisan primary must be considered an integral part of the general election for the office itself. The nonpartisan primary, therefore, cannot be divorced from the general election as the Riter case, supra, does for party primaries. It is, instead, a part of the election for the office. Its is clearly shown by the Schur case, supra, in which a candidate attempted to file for the nonpartisan *primary* election.

The Nevada Supreme Court held, quoting Bergevin, supra:

> It is settled by the great weight of authority that the legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors, and who desire to vote, to show that they have the necessary qualifications; as by requiring registration. * * * Such provisions do not add to the qualifications required of electors. * * * In this case the appellant would have been eligible to the *office* of supervisor of the district for which he was elected if his name had not been on the great register. He could not have voted at the election, and thus would have been deprived of voting for himself, if he so desired; but, having the constitutional qualifications, he was eligible to the *office*. (Italics added.) Schur, supra, at 292.

The Nevada Supreme Court then ruled that the candidate, despite not being a registered voter in the township in which he was running for office, was eligible for the office. Schur, supra, at 298, 300.

As such, it is this office's opinion that a candidate in a nonpartisan primary, although he must be a qualified elector, need not be a registered voter.

Proof of a nonpartisan's eligibility for the primary election under these circumstances is the same as for proof of his eligibility for the general election—the declaration of candidacy. Compliance with the provisions of this document will establish prima facie proof that a candidate is a qualified elector. However, in the case of candidates for a nonpartisan primary election who are not registered voters, the sentence in the Declaration of Candidacy which reads: "* * * and that I am a registered voter of the Election Precinct in which I reside * * *," may be struck, in accordance with the Nevada Supreme Court's ruling in the Schur case.

## CONCLUSION—QUESTION TWO

It is the advice of this office that a candidate in a nonpartisan primary election need not be a registered voter, although he must be a qualified elector. Proof of his eligibility as a qualified elector may be established on a prima facie basis by the Declaration of Candidacy, except that statements in the declaration that the candidate is a registered voter may be struck, when the candidate, in fact, is not a registered voter.

## QUESTION THREE

Is NRS 293.176 constitutional?

## ANALYSIS—QUESTION THREE

NRS 293.176 provides that:

> No person may be a candidate for a party nomination in any primary election if he has changed the designation of his political party affiliation on an official affidavit of registration in the State of Nevada or in any other state since September 1 prior to the closing filing date for such election.

The closing filing date for elections is the third Wednesday in July of the year in which the election is to be held. NRS 293.177. In effect, then, NRS 293.176 prohibits a change of party registration for approximately 10½ months prior to the closing filing date for a party primary election. Similar statutes have been enacted in other states and have been upheld in state courts as legitimate requirements to insure party loyalty and to prevent party raiding. Such laws prohibiting party candidates from changing party registration for periods of time from 6 months, 12 months, and even 2 years prior to a primary election have been upheld on the right of legislatures to enact reasonable tests of the sincerity of party candidates. Roberts v. Cleveland, 48 N.M. 226, 149 P.2d 120

(1944); Crowells v. Peterson, 118 So.2d 539 (Fla. 1960); Mairs v. Peters, 52 So.2d 793 (Fla. 1951); Bradley v. Myers, 46 P.2d 931 (Ore. 1970).

The federal courts have taken a similar stand. In Ohio, the legislature provided that a person could not become a party candidate if he voted in any other party's primary during the previous *4 years.* A federal court upheld the law, saying:

> The compelling State interest the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent "raiding" of one party by members of another party and to preclude candidates from "* * * altering their political party affiliations for opportunistic reasons." [Cite omitted.] Protection of party membership uniformly applied to all parties cannot be characterized as "invidious discrimination." Lippitt v. Cipollone, 337 F.Supp. 1405, 1406 (1971).

This case was affirmed by the United States Supreme Court without an opinion. Lippitt v. Cipollone, 404 U.S. 1032 (1972).

In Storer v. Brown, 415 U.S. 724 (1974), the United States Supreme Court upheld a California law which prohibited a person from running as an independent candidate in the general election if he had been a registered voter with a political party at any time within 1 year prior to the immediately preceding primary election. The court held that the state had a compelling interest to prevent opportunists from destroying the vitality of a political party by drawing party voters away from the party by an independent candidacy.

The court also made reference to the fact that California law prohibited a person from being a party candidate if he were registered with another political party at any time within 1 year prior to the party primary. Although this law was not at issue in the case, the court noted the state's interest in such a law was the same as was upheld by the court in Rosario v. Rockefeller, 410 U.S. 752 (1973). Storer, supra, at 734.

In Rosario, the U.S. Supreme Court upheld a New York law that prohibited voters from voting in a party primary unless they were registered to vote for that party at least 11 months before the primary. The court stated that the law met a legitimate state interest—a prohibition of party raiding. Since "long range planning in politics is quite difficult," an 11 month prohibition against a change in party affiliation was regarded as a proper test of party sincerity. Rosario, supra, at 760.

The only reported Nevada case regarding NRS 293.176 is Long v. Swackhamer, 91 Nev. Advance Opinion 169, dated July 31, 1975. In that case, petitioner, a Republican, changed his party registration after the September 1, 1973, cutoff date to the Independent American Party. However, the Independent American Party did not become a qualified party for the purposes of the ballot until June 25, 1974. Accordingly, the Nevada Supreme Court held:

> We believe, and so hold, that NRS 293.176 has no application at all to a new political party coming into existence after September 1 of the preceding year.

On this narrow ground, petitioner Long was permitted to file for the ballot. The court, however, did not consider the validity of NRS 293.176 with regard to established parties.

It would appear, therefore, in view of the United States Supreme Court's affirmance of the Lippett case, supra, and its opinions in Storer, supra, and Rosario, supra, coupled with the presumption that statutes are valid, Viale v. Foley, 76 Nev. 149, 350 P.2d 721 (1960), that NRS 293.176 is constitutional.

It is true that this statute denies certain potential candidates from contending for a party nomination. A statutory scheme that absolutely denies a candidate a place on the ballot is unconstitutional. Williams v. Rhodes, 393 U.S. 23 (1968). Where a candidate is not absolutely precluded from the ballot, statutes which restrict him in other ways are not

unconstitutional if they serve a compelling state interest. Jenness v. Fortson, 403 U.S. 431 (1971); Lubin v. Panish, 415 U.S. 709 (1974).

In Nevada, a candidate denied the opportunity of appearing on a party primary ballot may, pursuant to NRS 293.200, appear on the general election ballot as an independent candidate.[3]

> The law is not mandatory in compelling candidates who may desire to get on the official ballot to submit themselves to the primary election. They have the privilege * * * of running independently if they desire. In the event they desire to submit themselves to the primary election, it is not unreasonable or unrighteous to make them comply with any reasonable test made by the legislature for the purpose of preserving the integrity of the party with which they desire to affiliate. * * * Riter, supra, at 433.

CONCLUSION—QUESTION THREE

It is the advice of this office that NRS 293.176 is constitutional, except it is not applicable to new political parties coming into existence after the September 1 date prior to the closing filing date for the next election.

QUESTION FOUR

Could a qualified elector, officially registered as a voter in a political party, and who wishes to run as a candidate under another party label, circumvent NRS 293.176 by simply requesting that his current affidavit of voter registration be *cancelled* and then, after a period of time, reregister as a member of the desired party in order to run in its primary?

ANALYSIS—QUESTION FOUR

NRS 293.176 applies to candidates who have "changed" their party registrations subsequent to the September 1 cutoff date. You have stated to this office that, ordinarily, a person "changes" his registration all at one time by filing an affidavit of registration with the county clerk or voter registrar indicating he has "changed" registration from one party to another. Your question, however, contemplates a person cancelling his previous registration, remaining unregistered with any party for a period of time, then registering with another party.

This question assumes that a candidate has a party affiliation subsequent to the September 1 cutoff date before he cancels that registration. By the terms of NRS 293.176, therefore, when he cancels his previous registration and, after a time, reregisters into a new party, he "has changed the designation of his political party affiliation" subsequent to the September 1 cutoff date. Whether he does this all at once by filing an affidavit of registration "changing" his registration or whether he first cancels his previous registration and then, after a period of time, registers with another party makes no difference in the result. By the terms of the law, he would be prohibited from running in his new party's primary election.

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[3]Prior to July 1, 1975, a person wishing to be an independent candidate was prohibited by NRS 293.200 from running as an independent if he was registered with a political party at any time subsequent to the primary election preceding the closing filing date for the next election. This provision was repealed by the 1975 Legislature. There is now no prohibition against a candidate changing his voter registration to independent at any time prior to the closing filing date for the next election and running as an independent candidate pursuant to NRS 293.200.

The intent of NRS 293.176 is to preserve party integrity by preventing political opportunism or interparty raiding. To permit so transparent an attempt as cancelling a previous registration after the September 1 cutoff date and reregistering into another party at a later date as the basis for allowing a candidate to run in the other party's primary, would be to patently frustrate the legislative intent of NRS 293.176. Statutes and words therein should be construed so as to avoid absurd results. Western Pacific R.R. v. State, 69 Nev. 66, 241 P.2d 846 (1952). Every statute must be construed in light of its purpose. Berney v. Alexander, 42 Nev. 423, 178 P. 978 (1919).

CONCLUSION—QUESTION FOUR

It is the advice of this office that a candidate may not, after the September 1 date prior to the closing filing date for the next election, circumvent NRS 293.176 by cancelling his voter registration in one party and, after a period of time, reregistering as a voter in another party.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

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**198 NRS 294A.010 and 294A.020—The term "district," as used in NRS 294A.010 and 294A.020, means not only multicounty districts, but also intracounty districts such as general improvement districts, school trustee districts, hospital trustee districts, etc.**

CARSON CITY, January 28, 1976

THE HONORABLE WM. D. SWACKHAMER, *Secretary of State*, The Capitol, Carson City, Nevada 89710

DEAR MR. SWACKHAMER:

You have requested advice regarding the campaign contribution and expenditure reporting requirements of Chapter 294A of Nevada Revised Statutes.

QUESTION

Does the term "district," as used in NRS 294A.010 and 294A.020, refer only to multicounty district offices, such as legislators or district judges, or does it also refer to intracounty district offices, such as general improvement districts, school trustee districts, hospital trustee districts, etc.?

ANALYSIS

NRS 294A.010 states that:

> Every candidate for state, district, county, city or township office at a primary or general election shall, within 15 days after the primary election and 30 days after the general election, report the total amount of all of his campaign contributions to the secretary of state on affidavit forms to be designed and provided by the secretary of state.

NRS 294A.020 provides that:

> Every candidate for state, district, county, city or township office at a primary or general election shall, within 15 days after the primary election and 30 days after the general election, report his campaign expenses to the secretary of state on affidavit forms to be designed and provided by the secretary of state.

The ultimate determination of the meaning of a term used in a statute must rest, as always is the case, upon a finding of legislative intention. In construing a statute, the prime concern of any court is to determine legislative intent. Board of School Trustees v. Bray, 60 Nev. 345, 109 P.2d 274 (1941).

If the language of a statute does not clearly express the intent of the Legislature, it is permissible to look to the title of the statute for the purposes of construction. A Minor Girl v. Clark County Juvenile Court Servs., 87 Nev. 544, 490 P.2d 1248 (1971); Torreyson v. Board of Examiners, 7 Nev. 19 (1871). For the purposes of construction, two statutes relating to the same subject may be considered *in pari materia.* State v. Esser, 35 Nev. 429 (1913).

Applying these principles of statutory construction of Chapter 294A of Nevada Revised Statutes, it should be noted that the NRS Chapter is an amalgamation of Chapters 406 and 719 of the 1975 Statutes of Nevada. The purpose of Chapter 719 is to place campaign expenditure *limits* on political candidates. The title to Chapter 719 reads:

> An Act relating to elections; setting limits on campaign expenses of candidates for *specified* state, county and city offices; and providing other matters properly relating thereto. (Italics added.)

The title makes no reference to "district" offices. Indeed, it is designed to apply only to specified offices. The act, now codified as NRS 294A.030, applies to candidates for Governor, Lieutenant Governor, Secretary of State, State Treasurer, State Controller, Attorney General, Justices of the Supreme Court, district judges, justices of the peace, and all elective city, county and township officers. No reference whatever is made in the statute to university regents, school district trustees, water district trustees, hospital district trustees, general improvement district trustees, etc.[1] Therefore, there are no campaign expenditure limits for those offices.

Chapter 406, now codified as NRS 294A.010 and 294A.020, requires candidates to file campaign contribution and expenditure *reports.* The title for this statute reads:

> An Act relating to elections; requiring the reporting of campaign contributions and expenditures by candidates for *all* elective offices; establishing powers and duties of the secretary of state in connection therewith; providing penalties; and providing other matters properly relating thereto. (Italics added.)

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[1]Campaign expenditure limits for legislators are found in NRS 218.032.

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Thus, NRS 294A.010 and 294A.020 apply to "Every candidate for state, district, county, city or township office. * * *"

By reading the title to Chapter 406 and by comparing this title to the more limited title and provisions of Chapter 719, this office concludes that the intent of the Legislature was to apply NRS 294A.010 and 294A.020 to all elective officers in the State, with no exceptions. Township, city, special district, county, multicounty district and state elected

officers must all file campaign contribution and expenditure reports with the Secretary of State.

CONCLUSION

It is the advice of this office that the term "district," as used in NRS 294A.010 and 294A.020, means not only multicounty district officers, such as legislators or district judges, but also means intracounty districts, such as general improvement districts, school trustee districts, hospital trustee districts and etc. In short, all elected officers in Nevada are covered by the two statutes and all elected officers must file the required campaign contribution and expenditure reports with the Secretary of State.

On the other hand, only those officers specified in NRS 294A.030 are subject to the campaign expenditure limits imposed upon them. All other officers not named have no such limits.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

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**199 Recording Fee for Notices of Location and Location Certificates Pertaining to Mining Claims—No specific statutory fee is provided for the recording of Notices of Location and Location Certificates; the general fee provisions of NRS 247.305, subsection 1, apply to these documents and a fee of $3 for the first page and $1 for each additional page is to be charged by county recorders.**

CARSON CITY, February 9, 1976

THE HONORABLE PETER L. KNIGHT, *Nye County District Attorney,* P.O. Box 593, Tonopah, Nevada 89049

DEAR MR. KNIGHT:

This is in response to your letter of January 14, 1976, wherein you requested the formal opinion of this office in regard to the question of what recording fees are to be charged by county recorders for the recording of Location Certificates and Notices of Location pertaining to mining claims.

QUESTION

What recording fee is to be charged for recording of Location Certificates and Notices of Location pertaining to mining claims?

ANALYSIS

The repeal of NRS 517.330 by the 1975 Nevada State Legislature removed from the Nevada Revised Statutes any reference to a specific statutory fee to be charged for the recording of Notices of Location of mining claims. NRS 517.330 was apparently repealed because it was no longer consistent with existing statutory law which had done away with separate mining district recorders by consolidating this function in the county recorders in the State of Nevada making them ex officio mining district recorders. See NRS 517.320. By this consolidation of functions, the requirement to file duplicate Notices of Location with the county recorders as provided in NRS 517.330, subsection 4, became redundant. NRS 517.330, subsection 4, had provided for a recording fee of $1 to be paid to the

county recorder for the filing of the duplicate Notice of Location. As a result of the repeal of NRS 517.330, the recording of Notices of Location of mining claims falls under the general fee provisions of NRS 247.305, subsection 1, because there no longer exists any fee specifically provided for by law.

As to Location Certificates, no specific statutory fee for their recording is provided for in the Nevada Revised Statutes resulting in the recording thereof falling under the general fee provisions of NRS 247.305, subsection 1.

NRS 247.305, subsection 1, provides in part:

> Except as otherwise specifically provided by law, county recorders shall charge and collect the following fees:
>
> For recording any document, for the first page.....$3.00
>
> For each additional page .....$1.00
>
> * * *

Thus, with the repeal of the specific statutory fee provided in NRS 517.330, NRS 247.305, subsection 1, controls as to what recording fee is to be charged for the recording of Notices of Location and Location Certificates pertaining to mining claims, and said fee is $3 for the first page and $1 for each additional page that is filed.

CONCLUSION

The recording of Notices of Location and Location Certificates pertaining to mining claims comes within the provisions of NRS 247.305, subsection 1, and a fee of $3 for the first page and $1 for each additional page that is filed is to be charged by the county recorders.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By TODD RUSSELL, *Deputy Attorney General*

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**200 General Improvement District Elections—Candidates for general improvement district trustee do not have to pay a filing fee when filing their declarations of candidacy, regardless of whether trustees receive compensation or not. The names of candidates for general improvement district trustees are not placed on the general election ballot of the county, but on ballots used only by the general improvement district.**

CARSON CITY, February 24, 1976

THE HONORABLE WM. D. SWACKHAMER, *Secretary of State*, The Capitol, Carson City, Nevada 89710

DEAR MR. SWACKHAMER:

You have requested advice on two questions relating to the election of trustees of general improvement districts.

QUESTION ONE

If members of the board of trustees of a general improvement district receive pay for their services, do candidates for the office of trustee of such a general improvement district have to pay a filing fee when they file their declarations of candidacy?

ANALYSIS—QUESTION ONE

NRS 318.095 provides for the election of boards of trustees for general improvement districts. NRS 293.193, subsection 1, lists various elective public offices, including "district" offices, for which filing fees are required when candidates for those offices file declarations of candidacy. The fees required are also listed therein. NRS 293.193, subsection 2, provides:

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

Many general improvement districts do not provide compensation to their trustees. It is clear that, under NRS 293.193, subsection 2, candidates for the office of general improvement district trustee, for which no compensation is received, do not have to pay filing fees when filing their affidavits of candidacy.

However, a few general improvement districts, and you have cited the Minden-Gardnerville Sanitation District as an example, do pay their trustees compensation for their services. In order to determine whether candidates for these compensated offices must pay filing fees, it is necessary to review the pertinent parts of NRS 293.193, subsection 1. This statute provides, in part, for the following candidate filing fees:

* * *

| | |
|---|---|
| Any state office, other than governor or justice of the supreme court | [$]100 |
| Any district office | 75 |
| Any county office | 40 |
| State senator | 30 |
| Assemblyman | 15 |
| Justice of the peace, constable or other town or township office | 10 |

Under NRS 318.015, a general improvement district is considered, as a matter of legislative declaration, a body corporate and politic and a quasi-municipal corporation. It is not, therefore, part of a county, town or township, which are political subdivisions in their own right. 56 Am.Jur.2d Municipal Corporations, etc., §§ 5, 7. The question, then, is whether the category, "district office," used in NRS 293.193, subsection 1, is applicable to general improvement districts.

The order in which NRS 293.193, subsection 1, lists the offices for which filing fees are applicable is particularly important. First, state offices are listed, then district offices, followed by county, legislative, justice, constable, town and township offices. The term "district office" is listed ahead of the term "county office," yet, under NRS 318.050, the boundaries of a general improvement district must be no larger than the boundaries of the county in which it serves. In most instances, as in the case of the Minden-Gardnerville Sanitation District, the boundaries of a general improvement district are smaller than the boundaries of the county. As the case below illustrates, the placement of the term "district office" after state offices and before county offices, would thus appear to have some significance and would be indicative of legislative intent that multicounty districts were intended by the statute.

The Nevada Supreme Court has stated, in construing the term "district," as used in Article 2, Section 1 of the Nevada Constitution:

> * * * The order in which the words "state," "district," and "county" are placed, while by no means conclusive, is some indication that "district" was not

intended to include any subdivision of less extent than a county. State ex rel. Schur v. Payne, 57 Nev. 286, 297, 62 P.2d 921 (1937).

In addition, in this instance, to require a candidate for general improvement district trustee to pay the filing fee required of district officers in NRS 293.193, subsection 1, would be to require them to pay a larger fee than is charged county officers. Yet, as already stated, most general improvement districts are smaller than the counties in which they are located. Statutes should be construed so as to avoid absurd results. Western Pacific R.R. v. State, 69 Nev. 66, 241 P.2d 846 (1952).

These factors, therefore, lead this office to conclude that the term "district," as used in NRS 293.193, subsection 1, refers to multicounty districts and does not refer to general improvement districts. This conclusion is to be differentiated from the conclusion of Attorney General's Opinion No. 198, dated January 28, 1976, which held that the term "district," as used in NRS 294A.010 and 294A.020, meant not only multicounty districts, but general improvement districts as well. The conclusion to Attorney General's Opinion No. 198 was reached because the title of the legislature enacting NRS 294A.010 and 294A.020 indicated the legislative intent that *all* elective offices in the State were regulated by the statutes. That is not the case with NRS 293.193, subsection 1.

NRS 293.193, subsection 1, therefore, makes no provision for filing fees for candidates for the position of general improvement district trustee.

CONCLUSION—QUESTION ONE

It is the opinion of this office that candidates for the position of general improvement district trustee do not have to pay a filing fee when filing their declarations of candidacy, regardless of whether the trustees receive compensation for their services or not.

QUESTION TWO

Are the names of candidates for the position of general improvement district trustee placed on the general election ballot of the county, or are they placed upon ballots used only by the general improvement district?

ANALYSIS—QUESTION TWO

NRS 318.095 provides that general improvement district trustee elections are to be held, "in conjunction with the first general election in the county after the creation of the district and in conjunction with every general election thereafter. * * *" The term "conjunction" means occurrence together. Diamond T Utah, Inc. v. Canal Ins. Co., 12 Utah 2d 37, 361 P.2d 665 (1961). Use of the term "conjunction" is to be compared with Chapters 244, 246-250, 252-253, and 269 of Nevada Revised Statutes in which various county and town officers are to be elected, "at the next general election." The use of these differing terms would indicate that general improvement district trustee elections, while they would be held at the same time as the general election, would not be placed on the county's general election ballot, as in the case of county and town officers.

This conclusion is strengthened by the fact that, under NRS 318.020, subsection 7, a qualified elector for general improvement district elections is one who, *except for registration*, is legally entitled to vote in Nevada and is either a resident of the district or an owner of personal property in the district. Thus, general improvement district electors need not be residents of the district or even registered voters. However, in order for a person to be able to vote on a county election ballot, he must have his name on the election board register. NRS 293.277. This means he must be a registered voter and a resident of the precinct in which he is voting. To place general improvement district trustee candidates on the general election ballot of the county would be to open the county ballot to non-registered, nonresident voters.

It is, therefore, apparent from these facts that general improvement districts must maintain their own ballots for the election of their officers.

CONCLUSION

It is the opinion of this office that the names of candidates for the position of general improvement district trustee are not placed on the general election ballot of the county, but on ballots used only by the general improvement district.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

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**201 Physician's Assistant—Controlled Substances; Poisons; Dangerous Drugs—A physician's assistant may not carry, possess, administer or dispense controlled substances, poisons or dangerous drugs outside the physical presence of the supervising physician.**

CARSON CITY, March 10, 1976

MR. VERN CALHOUN, *Chief, Division of Investigations and Narcotics, Department of Law Enforcement Assistance,* 430 Jeanell, Carson City, Nevada 89701

DEAR MR. CALHOUN:

In your letter of December 29, 1975, you requested an opinion of this office on the following matter:

QUESTION

Does the Physicians, Physicians' Assistants and Paramedics Act (NRS Chapter 630) allow physicians' assistants to carry, possess, administer or dispense controlled substances, poisons or dangerous drugs outside the physical presence of the supervising physician?

ANALYSIS

To answer your question, it is necessary to examine the provisions of NRS Chapter 453, Controlled Substances; NRS Chapter 454, Poisons, Dangerous Drugs, Devices; as well as NRS Chapter 630, Physicians, Physicians' Assistants, Technicians.

NRS 453.381 which defines the authority to prescribe, administer and dispense controlled substances, provides:

> 1. A *physician, dentist* or *podiatrist,* in good faith and in the course of his professional practice * ** may prescribe, administer and dispense controlled substances, or he may cause the same to be administered by a *nurse or interne* under his direction and supervision. (Italics added.)
>
> (Section 2 of that statue provides similar authority for veterinarians.)

Concerning controlled substances, NRS 453.021 defines "administer" to mean:

> [T]he direct application of a controlled substance, whether by injection, inhalation, ingestion or any other means, to the body of a patient or research subject by:

1. A practitioner or, *in his presence, by his authorized agent;*
2. A licensed nurse, at the direction of a physician; or
3. The patient or research subject at the direction and *in the presence* of the practitioner. (Italics added.)

It is further noted that "dispense," as defined in NRS 453.056, "includes * * * prescribing, administering, packaging. * * *" Thus, the only person specifically authorized to administer controlled substances outside the presence of a "practitioner" is a licensed nurse or intern.

The concern of NRS Chapter 454 is restriction of traffic in certain poisons, dangerous drugs and devices. NRS 454.301 provides, however:

1. The provisions of NRS 454.181 to 454.381, inclusive, do not apply to a *physician, dentist, podiatrist* or *veterinarian* who dispenses drugs and who *personally* furnishes his own patients with such drugs as are necessary in the treatment of the condition for which he attends such patient, if:

* * *

(c) Such drugs are *not* dispensed or furnished by a nurse or attendant. (Italics added.)

Included in the definition of "administer" and "dispense" in Chapter 454 is a list of specific professional titles to whom the terms apply.

NRS 454.191 defines "administer" as:

* * * the furnishing:

1. By a *physician, surgeon, dentist, podiatrist* or *veterinarian* to his patient of such amount of drugs or medicines * * * as are necessary for the immediate needs of the patient; or
2. By a *nurse* pursuant to a chart order. * * * (Italics added.)

NRS 454.211 defines "dispense" to mean:

* * * the furnishing of:

* * *

2. Drugs or medicines to a patient *personally* by a physician, dentist, podiatrist or veterinarian. * * * (Italics added.)

Based on the wording of the above statutes, it appears that the only classification under which the physician's assistant might possibly possess, carry, administer or dispense controlled substances, poisons or dangerous drugs, would be that of a "practitioner." (See NRS 453.021.)

However, "practitioner" is defined by NRS 453.126 as:

1. A physician, dentist, veterinarian, scientific investigator, podiatrist or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state.

Since "physician," "dentist," "podiatrist," "veterinarian" and "pharmacist" are specifically defined within NRS 454.0095 and a physician's assistant is obviously not a scientific investigator, then the only remaining category of "practitioner" within which the physician's assistant might fit is "* * * other person licensed * * * or otherwise permitted to distribute, dispense, * * * or to administer a controlled substance. * * *" (NRS 453.126.)

No specific statutory authority has been found that may be construed to place a physician's assistant in the category of a "practitioner."

An examination of NRS 630.271, "Physician's assistant: Authorized services," reveals that:

> A physician's assistant may perform such medical services as he is authorized to perform under the terms of a certificate * * * *if such services are rendered under the supervision and control of a supervising physician.* (Italics added.)

NRS 630.273 states that:

> * * * The application for a certificate as a physician's assistant shall be cosigned by the supervising physician, and the certificate is valid only so long as that supervising physician employs and supervises the physician's assistant.

Such a licensing procedure is in the nature of an "agency" relationship, in that the physician's assistant's certificate is valid only so long as that supervising physician employs and supervises the physician's assistant.

Therefore, the physician's assistant fits directly within the limitation of NRS 453.021, subsection 1, which states that a controlled substance may be administered by:

> * * * A practitioner or, *in his presence, by his authorized agent;* * * * (Italics added.)

To allow the physician's assistant authority to dispense and administer such drugs outside of such presence would require one to "bootstrap" the physician's assistant into the category of a practitioner, which is clearly excluded by the statutory definition of practitioner.

The terms "administer" and "dispense" imply that the physician's assistant would have to "carry" and/or "possess" such controlled substances in order to "administer" or "dispense" them. Since a physician's assistant may not "administer" or "dispense" controlled substances outside the physical presence of the supervising physician, neither may the physician's assistant "carry" or "possess" controlled substances outside the physical presence of the supervising physician.

It is the prerogative of the Legislature to grant or withhold specific authorization for the administering and dispensing of drugs. They saw fit to grant such authority for "Advanced Emergency Medical Technician-Ambulance" (commonly known as paramedics). See NRS 630.450, subsection 4. Although the conduct of physicians' assistants and paramedics are governed by the same Chapter (NRS Chapter 630), the Legislature has failed to provide the former with any such specific authority. That omission must be construed as purposeful.

Under NRS 630.271, a physician's assistant is given the powers as noted supra. However, an administrative agency may not provide authority in excess of that allowed by statute. Therefore, the physician's assistant may not be licensed by the Board of Medical Examiners to do more than that allowed by statute. Jones v. Berman, 371 N.Y.S.2d 422, 332 N.E.2d 303 (1975).

In considering those statutes which specifically list those persons who are allowed to "dispense, administer, distribute" etc., the maxim "inclusio unius est exclusio alterius" applies. In this context, it means that the failure to include a person when others are specifically enumerated or included (as in NRS 453.381 and 454.191) acts to exclude those persons not included. (See Cannon v. Taylor, 87 Nev. 285, 486 P.2d 493 (1971).)

## CONCLUSION

It is the opinion of this office that a physician's assistant may not carry, possess, administer or dispense controlled substances, poisons or dangerous drugs outside the physical presence of the supervising physician.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By D. G. MENCHETTI, *Chief Deputy Attorney General*
*Criminal Division*

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**202 Durational Residency Requirements for Municipal Political Candidates—City charter provisions requiring municipal political candidates to reside within the boundaries of the city for a specified length of time prior to holding office are constitutional.**

CARSON CITY, March 23, 1976

THE HONORABLE DANIEL J. DEMERS, *Chairman, Assembly Committee on Elections*, 231 Edelweiss Place, Mt. Charleston, Las Vegas, Nevada 89101

DEAR MR. DEMERS:

You have requested an opinion regarding the constitutionality of durational residency requirements of the various city charters in Nevada.

FACTS

There are 13 special charter cities in the State of Nevada. Each of these has a provision in its city charter requiring candidates for city office to be residents within the boundary of the city for a certain period of time prior to the election in order to be eligible for city office. One city[1] requires a 3-year residency period prior to election; seven cities[2] require a 2-year residency period prior to election; and three cities[3] require a 6-month residency period prior to election. Two cities[4] require a 30-day residency period prior to the last day for filing an affidavit or candidacy, which, since this date for both cities falls in April with the general election being held in June, means an effective residency period of at least 3 months.

QUESTION

Are the durational residency requirements of the various city charters in Nevada, which are applicable to municipal political candidates, constitutional?

ANALYSIS

The United States Supreme Court has ruled that durational residency

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[1]Henderson.

[2]North Las Vegas, Gabbs, Boulder City, Carlin, Wells, Elko, and Caliente.

[3]Carson City, Reno, and Yerington.

[4]Sparks and Las Vegas.

requirements for *voters* are unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment and the constitutional right to unrestricted travel among the states. Dunn v. Blumstein, 405 U.S. 330 (1972). In that case, the court held that, while a 30-day residency period prior to the election would be permissible to enable county clerks to establish registration lists, a 6-month durational residency law applying to voters was invalid. Dunn, supra, at 348.

However, with regard to durational residency requirements for *candidates,* the United States Supreme Court has affirmed, without opinion, three lower court decisions upholding the validity of lengthy candidate durational residency requirements. In Chimento v. Stark, 414 U.S. 802 (1973), and Sununu v. Stark, 420 U.S. 958 (1975), the court upheld a New Hampshire 7-year durational residency requirement for governor. In Kanapaux v. Ellisor, 419 U.S. 891 (1974), the court upheld a South Carolina 5-year durational residency requirement for governor.

The decision of the three-judge panel in Chimento, which was affirmed in the Supreme Court, held that the state had two compelling reasons for the establishment of a 7-year durational residency requirement for the office of governor. First, the requirement insured that candidates for the office had sufficient exposure to the state to be aware of the problems of the state and the needs of constituents. This also enabled the voters to be better able to judge the qualifications of potential officeholders. The court felt that this reason was particularly important in a state which was sparsely populated and consisted mostly of rural communities, because the expensive means of modern communications readily available to candidates in highly populated states were not readily available in sparsely populated states. Candidates, therefore, had to depend on personal contact to be acquainted with a particular locale and this takes time. Chimento v. Stark, 353 F.Supp. 1211, 1215 (D. N.H. 1973).

Second, such durational residency requirements prevent frivolous candidacies from persons having little exposure to the problems of the voters. Chimento, 353 F.Supp., supra, at 1215.

The lower court also concluded that such durational residency requirements had a minimal impact on the ability of a potential candidate to participate in the electoral process, as other offices were available without such a durational limit. Nor did such a requirement limit the voter's choice of candidates to any significant degree since few people who have moved into a new locale immediately present themselves as potential candidates and since factors such as age and the cost of campaigning already have a deterring effect upon potential candidates. Chimento, 353 F.Supp., supra, at 1217-1218.

Finally, the lower court refused to apply the Dunn v. Blumstein holding regarding the constitutional right to travel. The court held that the right to public office cannot be equated to the right to vote in relationship to the right to travel. Chimento, 353 F.Supp., supra, at 1218.

The lower court in Chimento did note, at 353 F.Supp., page 1216, that the 7-year residency requirement, while appropriate for the statewide office of governor, might not be appropriate for local political office. In deciding the reasonableness of a particular period of residency, it must be determined whether the duration of the residency is "too attenuated" to justify the law's ends. Wellford v. Battaglia, 343 F.Supp. 143 (D. Del. 1972). In other words, can a political candidate be reasonably expected to properly acquaint himself with the problems of a locale and, in turn, become properly acquainted to the voters in less than 3 years or 2 years or 6 months?

> The question, accordingly, is one of degree—one of line drawing in an area where reasonable men may differ. Wellford, supra, at 149.

A factor to be considered would certainly be the locale involved. A sparsely populated area may need more time for this mutual acquaintance than a highly populated area. Chimento, 353 F.Supp., supra; Hadnott v. Amos, 320 F.Supp. 107 (D. Ala. 1970), aff'd 401 U.S. 968 (1971); Draper v. Phelps, 351 F.Supp. 677 (D. Okla. 1972).

Thus, durational residency requirements of up to 3 years have been held to be reasonable. DeHond v. Nyquist, 65 Misc.2d 526, 318 N.Y.S.2d 650 (1971), local school board; Walker v. Yucht, 352 F.Supp. 85 (D. Del. 1972), legislative district; Hayes v. Gill, 473 P.2d 872 (Hawaii 1970), legislative district; Gilbert v. State, 526 P.2d 1131 (Alaska 1974), legislative district.

CONCLUSION

In light of the United States Supreme Court's affirmance of the Chimento case, and the fact that Nevada, as a sparsely settled state, may have particular need of lengthy durational residence requirements for candidates, and the fact that statutes are presumed constitutional unless clearly shown to be otherwise, King v. Board of Regents, 65 Nev. 533, 200 P.2d 221 (1948), it is the opinion of this office that the durational residency provisions of city charters of Nevada requiring municipal political candidates to reside within the boundaries of the various cities for specified lengths of time are constitutional.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

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**203 Real Property Ownership Requirements for Municipal Political Candidates—The requirements of city charters and of state law that candidates for city council must be taxpayers on real property located within the boundaries of the city constitute a denial of equal protection of the laws under the Fourteenth Amendment of the United States Constitution.**

CARSON CITY, April 20, 1976

THE HONORABLE MICHAEL E. FONDI, *District Attorney*, 208 North Carson Street, Carson City, Nevada 89701

DEAR MR. FONDI:

You have requested advice as to whether Section 2.010 of the Carson City Charter, requiring a candidate for the Board of Supervisors to be a taxpayer on real property located within Carson City, is constitutional.

FACTS

The city charters of eight cities in Nevada require candidates for city council to be taxpayers upon real property located within the boundaries of the respective cities.[1] In addition, NRS 266.215, which is a part of the general city incorporation law of the State of Nevada, requires city councilmen to be taxpayers on real property within their respective wards. A similar provision exists for members of the town board of an unincorporated town organized under NRS 269.017. Also under Chapter 269 of Nevada Revised Statutes, town boards may be advised by citizens' advisory councils. NRS 269.0242 provides that the members of such citizens' advisory councils shall be real property owners in the town.[2]

ANALYSIS

In the case of Turner v. Fouche, 396 U.S. 346 (1970), the United States Supreme Court considered a Georgia statute which required persons serving on a school board to be owners of real estate located within the school district. The United States Supreme Court declared this law to be unconstitutional as a denial of equal protection of the laws under the Fourteenth Amendment of the United States Constitution. The court reasoned that citizens have a constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The court stated that it was impossible to discern any state interest for the requirement that members of a school board be real property owners. The court went on to say:

> * * * It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions. * * *
>
> * * *
>
> Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold. Turner, supra, at 363-364.

In the case of Stapleton v. Clerk for the City of Inkster, 311 F.Supp. 1187 (E.D. Mich. 1970), a three-judge federal court ruled that a city charter provision requiring city council candidates to own real property within the city was a denial of equal protection of the laws. The court made three points in that decision.

First, the court noted that the United States Supreme Court has overthrown city and state laws requiring voters to be real property owners in

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[1]Carson City, North Las Vegas, Boulder City, Carlin, Elko, Henderson, Reno, and Caliente.

[2]The Unincorporated Town Government Law, NRS 269.500 et seq., is an alternative means for creating town boards. The provisions of the Unincorporated Town Government Law do not contain any taxpayer or real property requirements for membership on the town board or any advisory council.

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order to participate in city municipal or bond elections. The court in particular cited Kramer v. Union Free School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); and Phoenix v. Kolodziejski, 399 U.S. 204 (1970). The Cipriano and Phoenix cases dealt with an attempt by cities to prohibit nonproperty owners from participating in city bond elections. The Supreme Court specifically invalidated these statutes. The court in Stapleton noted that if a city or state cannot "protect" municipal property holders by limiting the franchise in bond elections to such property holders, then the state cannot limit membership on the city council for the same purpose. Stapleton, supra, at 1191.

Secondly, the court in Stapleton noted that the city has police powers over all of its citizens, regardless of whether they own property or not. Therefore, it would not be proper to restrict membership on the city council only to property owners. Stapleton, supra, at 1190.

Finally, the Stapleton court noted that the city urged that real property ownership requirements were necessary to insure an attachment of persons to the city and to prevent mere transients from invading the city and affecting its affairs. However, the Stapleton court, in addition to quoting the language of Turner, supra, which rejected such an argument, also pointed out that the city eliminated the problem of "invading" transients by having a requirement that city council members reside within the city for at least 2 years prior to their election. Stapleton, supra, at 1190. Durational residency requirements have already been considered by this office and have been found by this office to be constitutional. All of Nevada's special charter cities have such durational residency requirements. Attorney General's Opinion No. 202, dated March 23, 1976.

Two other federal district courts have also considered municipal property ownership requirements for city council membership to be a denial of equal protection of the law, with both of them basing their reasoning on the Turner, supra, case. Anderson v. City of Belle Glade, 337 F.Supp. 1353 (S.D. Fla. 1971); Green v. McKeon, 335 F.Supp. 630 (E.D. Mich. 1971).

In addition, a New York state court has also considered this problem and has also declared a city charter provision requiring city councilmen to be property owners to be a denial of equal protection of the laws. In that case, the court stated:

> Ownership of real property does not render one more interested in, or devoted to, the concerns of the town. In a society such as ours, characterized by its "mobility" and "anonymity" (Cox, The Secular City [rev. ed., 1966], p. 33) a land owner is no more likely to be permanently established in a town—and by that token, better qualified to govern—than one who is not a property owner. Examples come readily to mind which demonstrate the unrealistic character of the property qualification: an elected town councilman, suddenly compelled by financial reverses to sell his home and move into an apartment, would be required to resign from office; an apartment dweller who owned a taxpayer [sic] in town but who commuted to his place of business in, for instance, New York City and took no interest or part in civic affairs would be fully eligible for town office; and an apartment dweller not owning real property but with a place of business in town and deeply involved in community affairs, would be ineligible. All and all, we suggest that it is impossible today to find any rational connection between qualifications for administering town affairs and ownership of real property. Landes v. Town of North Hempstead, 20 N.Y.2d 417, 284 N.Y.S.2d 441 (1967).

Since the Office of the Attorney General is an administrative, not a judicial, office and since there is a usual presumption that statutes are presumed constitutional unless clearly shown to be otherwise, King v. Board of Regents, 65 Nev. 533, 200 P.2d 221 (1948), this office has repeatedly stated in the past that it is reluctant to declare, by administrative opinion, that a statute of the State of Nevada is unconstitutional. However, this office has also stated that where it is clear that a court of competent jurisdiction would declare a state statute unconstitutional, this office would render an opinion to that effect. Attorney General's Opinion No. 85, dated June 19, 1972; Attorney General's Opinion No. 93, dated August 21, 1972; Attorney General's Opinion No. 131, dated May 9, 1973.

In this instance, it is clear that the United States Supreme Court, in the Turner case, supra, has declared real property ownership as a qualification for political office to be unconstitutional. As was stated in Stapleton, supra:

> It appears to this court that the reasons given for requiring the compelling interest standard in voting cases are equally applicable to cases challenging qualifications for public office; in both situations the challenge is directed to the assumption that the institutions of state government are structured so as to fairly

represent all the people. Thus, the City must demonstrate a compelling interest to justify the ownership of real property in the City as a qualification to hold office and the City does not have the advantage of the usual presumption that the Charter is constitutional. Stapleton, supra, at 1190.

As was stated in the case of Harper v. Virginia State Board of Elections, 383 U.S. 663, 668 (1966), "Wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the political process."

CONCLUSION

It is the opinion of this office that Section 2.010 of the Carson City Charter, and similar provisions in other city charters and in state law, which require candidates for city council to be taxpayers on real property located within the city, contravene the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

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**204 Lands Beneath Navigable Waters—The State of Nevada owns the land below the present ordinary and permanent high-water mark of the portion of Lake Tahoe within Nevada and beneath the ordinary and permanent high-water marks of other navigable bodies of water within the boundaries of the State.**

CARSON CITY, April 20, 1976

MR. GLEN K. GRIFFITH, *Director, Nevada Department of Fish and Game*, 1100 Valley Road, Reno, Nevada 89510

DEAR MR. GRIFFITH:

You have requested an Attorney General's opinion concerning the following question:

QUESTION

Who owns the land below the high-water mark at Lake Tahoe?

ANALYSIS

In 1864 the State of Nevada was "admitted into the Union on an equal footing with the original states." See President Abraham Lincoln's Proclamation of October 31, 1864. The "equal-footing doctrine" was explained by the U.S. Supreme Court in Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 317-318 (1973), as follows:

> When the Original Colonies ratified the Constitution, they succeeded to the Crown's title and interest in the beds of navigable waters within their respective borders. As new States were forged out of the federal territories after the formation of the Union, they were "admitted [with] the same rights, sovereignty and jurisdiction * * * as the original States possess within their respective borders." Mumford v. Wardwell, 6 Wall. 423, 436 (1867). Accordingly, title to lands beneath navigable waters passed from the Federal Government to the new States, upon their admission to the Union, under the

equal-footing doctrine. See, e.g., Pollard's Lessee v. Hagan, 3 How. 212 (1845); Shively v. Bowlby, 152 U.S. 1 (1894); Weber v. Board of Harbor Comm'rs, 18 Wall. 57, 65-66 (1873).

Lake Tahoe was held to be navigable in Davis v. United States, 185 F.2d 938, 942-943 (9th Cir. 1950). Thus, when Nevada achieved statehood in 1864, it assumed title to the land beneath Lake Tahoe and its shores by virtue of the equal-footing doctrine, and such title was later confirmed by the Submerged Lands Act of 1953. Considering the effect of the act, the Supreme Court in Bonelli, supra, explained, at 318, that:

> The Act merely confirmed the States' pre-existing rights in the beds of the navigable waterways within their boundaries by, in effect, quitclaiming all federal claims thereto. * * * 43 U.S.C. § 1301(a)(1).

According to principles early [earlier] announced in Barney v. Keokuk, 94 U.S. 324, at 336 (1877), the extent of Nevada's ownership on October 31, 1864, was to the then ordinary high-water mark, and conversely, the

> [T]itle of the riparian proprietors * * * extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed * * * belongs to the State. This is * * * the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so. * * *

This office is of the opinion that under federal law, the State of Nevada was vested with the title to the bed and shores of Lake Tahoe below the ordinary high-water mark as it existed October 31, 1864. Accord, Utah v. United States, 420 U.S. 304 (1975); Bonelli Cattle Co. v. Arizona, supra, at 318; Brewer-Elliott Oil & Gas Company et al. v. United States, et al., 260 U.S. 77, 84 (1922); Arkansas v. Tennessee, 246 U.S. 158, 176 (1918); Shively v. Bowlby, 152 U.S. 1, 40, 49-50 (1894); Hardin v. Jordan, 140 U.S. 371, 381, 383 (1891); Packer v. Bird, 137 U.S. 661, 666-667 (1891). The State holds its title as a public trust for navigation, fishery, and related public purposes. See Bonelli, supra, and the cases discussed therein at 321.

A determination of the extent of the present day ownership of the land below the high-water mark at Lake Tahoe necessarily entails an inquiry into whether the State has divested itself of any interest since the time of statehood and whether there has been a permanent change in the high-water mark.

The question of whether the State has granted interests in the beds of navigable waters or otherwise divested itself of such interests is governed by state law. See Bonelli Cattle Co. v. Arizona, supra, at 319-320; Arkansas v. Tennessee, supra, at 175-176; Scott v. Lattig, 227 U.S. 229, 242 (1913); Shively v. Bowlby, supra, at 40; Hardin v. Jordan, supra, at 382; Barney v. Keokuk, supra, at 338. As Mr. Justice Brewer, in beginning his dissenting opinion in Hardin v. Jordan, supra, at 402, said:

> Beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State and the decisions of its highest court furnished the best and final authority.

As a general proposition, the Nevada Legislature has not divested the State by statute of any interest in the beds of its navigable waters. On the contrary, in 1921, the Legislature declared that the Colorado River and Virgin River were navigable and the title to the lands below the high-water mark thereof is held by the State. See NRS 537.010

and NRS 537.020. Although the Nevada Supreme Court in State Engineer v. Cowles Brothers, Inc., 86 Nev. 872, 876, 478 P.2d 159 (1970), held that the issue of navigability is a judicial question, and that the "statement in the statutes therefore served no purpose," it is the opinion of this office that the statutes at least have expressed the legislative intent to claim complete sovereignty and ownership to the high-water mark of waters declared navigable by the courts.

The Supreme Court of Nevada in State Engineer v. Cowles Brothers, Inc., supra, at 877, recognized the applicability of the common law to questions of the ownership of beds of navigable lakes as a consequence of the Legislature's declaration "that the common law shall be the rule of decision in the courts of this state unless repugnant to the constitution and laws of this state. NRS 1.030." A decision consonant with the common law would recognize the ordinary high-water mark as the proper boundary as was done in Barney v. Keokuk, supra.

In the case of Nevada v. Julius Bunkowski, et al., 88 Nev. 623, 503 P.2d 1231 (1972), the Supreme Court of Nevada apparently recognized the high-water mark as the extent of the State's ownership of the beds of navigable waters. In Bunkowski the court quoted, at 629, the following excerpt from People of the State of California v. Mack, et al., 19 Cal.App.3d 1040, 1050, 97 Cal.Rptr. 448, 454 (1971):

> [M]embers of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point *below high water mark* on waters of this state which are capable of being navigated by oar or motor propelled small craft. (Italics added.)

Although the court cited People of the State of California v. Mack, et al., supra, and the cases discussed therein for the proposition that state courts have not striven for uniformity as to the test for navigability, the inference is that once the uniform federal test of navigability for title is answered in the affirmative, then the State's title extends to the high-water mark.

The case of Nevada v. Bunkowski, supra, appears to have overruled dicta contained in the early Nevada case of John A. Shoemaker, et al. v. A. J. Hatch, et al., 13 Nev. 261, 265, 267 (1878), that the "low water mark, and not the middle thread of the stream, was the proper boundary." The Court in Shoemaker, supra, cited Railroad Company v. Schurmeir, 74 U.S. (7 Wall.) 272, 286-287 (1868), for its holding. A close reading of the cited portions of Railroad Company v. Schurmeir, supra, discloses that only the river, the watercourse of the stream is a boundary of navigable streams but the fine distinction between the high- and low-water marks simply was not made. It is important to note that in Shoemaker, supra, the State of Nevada was not a party and did not have an opportunity to litigate the extent of its ownership on behalf of the public. For these reasons, this office is of the opinion that Shoemaker v. Hatch, supra, is not a controlling precedent with respect to the extent of the State's ownership of the beds of navigable waters.

Attorney General's Opinions No. 632, dated January 6, 1970, and No. 59, dated May 17, 1951, indicate that the low-water mark is the boundary of the State's ownership of the Carson and Truckee rivers. Both opinions cited Shoemaker v. Hatch, supra, as the sole support for the proposition. For the reasons mentioned above, that Shoemaker, supra, is not controlling with respect to the issue, and because of the clear and contrary legislative intent, this office is compelled to disapprove statements in the prior opinions issued by this office which delineate the low-water mark as the boundary of state lands under navigable waters.

It is the present opinion of this office that the title to lands beneath navigable waters in Nevada is bounded by the ordinary and permanent high-water mark and prior opinions to the contrary are hereby superseded.

Having established the extent of the State's ownership to the beds and shores of navigable waters which include Lake Tahoe, the final consideration is the effect that changes in the elevation of the lake have on the extent of the State's ownership.

As the United States Supreme Court explained in Bonelli, supra, at 318:

> In order for the States to guarantee full public enjoyment of their navigable watercourses, it has been held that their title to the bed of a navigable river mechanically follows the river's gradual changes in course. See Oklahoma v. Texas, 268 U.S. 252 (1925). Thus, where portions of a riparian owner's land are encroached upon by a navigable stream, under federal law, the State succeeds to title in the bed of the river to its *new high-water mark.* (Italics added and footnotes omitted.)[1]

The foregoing principle announced in Bonelli, supra, is the result of the policies subserving the common law doctrines of erosion, accretion and reliction and is equally applicable to navigable lakes as to navigable streams. See United States v. Utah, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 14 (1935).

We know that because of certain artificial controls at the mouth of Lake Tahoe the elevation has been controlled since 1870, first by private parties and thereafter by the United States. In Bonelli, supra, at 327, the court considered the effect of artificial changes:

> The doctrine of accretion applies to changes * * * due to artificial as well as natural causes. [Citations omitted.] Where accretions to riparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof.

By giving the upland owner the benefit of relictions and accretions, riparianness is maintained, but he is subject to losing land as well by erosion or submergence due to the same policy of maintaining riparianness. See Bonelli, supra, at 326; see also State Engineer v. Cowles Brothers, Inc., supra, at 876.

At the present time Lake Tahoe is controlled between the elevations of 6223.0 and 6229.1 feet (Lake Tahoe datum). Stabilization of the Lake's surface elevation between these levels has resulted in a relatively permanent high water level somewhat less than 6229.1 feet. Seasonal or temporary effects such as cresting during periods of rapid runoff or the necessity of pumping water out of the lake during periods of drouth are transient effects and are not significant with respect to a permanent high-water mark. The common law has always seemed to contemplate a result

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[1]Although the federal question jurisdiction suggested by Bonelli, supra, in purely intrastate title disputes has now been challenged in the case of Oregon v. Corvallis Sand and Gravel Company, Nos. 75-567 and 75-577 before the United States Supreme Court, the federal common law principles announced in Bonelli, supra, are for the most part well settled common law doctrines applied by the State of Nevada. See State Engineer v. Cowles Brothers, Inc., supra, at 874-877.

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substantially permanent; thus the land "hath been formed, and hath been settled, grown and accrued upon." The King v. Lord Yarborough, 107 Eng.Rep. 668 (K.B. 1824).

This office expresses no opinion as to the precise location of the present ordinary high-water mark which may be considered permanent for title purposes. The United

States Department of the Interior, Geological Survey, has kept records of the elevation of the lake since 1900 and such records, especially those of recent years, are good evidence of the elevations of the permanent high-water mark below which title to that portion of the shore and bed of Lake Tahoe within the State of Nevada inures to the State.

CONCLUSION

The State of Nevada owns the bed and shores of Lake Tahoe and other navigable bodies of water within Nevada to the present ordinary and permanent high-water mark. The State of Nevada has not divested itself of any interest in the subject lands by state law or usage. Rather, it holds them in trust for full public enjoyment of navigation, fishery and related purposes.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By HARRY W. SWAINSTON, *Deputy Attorney General*

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**205 Physicians—Citizenship requirement for license to practice medicine unenforceable as being in contravention of Fourteenth Amendment; medical board may nonetheless require alien applicant to provide evidence of legal presence in the United States and legal right to work while in United States. NRS 630.160, subsection 2(a); NRS 630.195, subsection 1(a).**

CARSON CITY, April 23, 1976

DR. KENNETH F. MACLEAN, *Secretary-Treasurer, Nevada State Board of Medical Examiners*, 1281 Terminal Way, Suite 211, Reno, Nevada 89502

DEAR DR. MACLEAN:

In a letter to this office dated March 15, 1976, you inquired as to the constitutionality of those provisions of Chapter 630 of the Nevada Revised Statutes which require applicants for a license to practice medicine in the State of Nevada to show that they are United States citizens; or that they have filed a petition for naturalization which is then pending; or, not having fulfilled the residence requirements for naturalization, have filed a declaration of intention to become a citizen of the United States. These requirements of law are found in NRS 630.160, subsection 2(a) and 630.195, subsection 1(a).

FACTS

Certain otherwise qualified and licensed Canadian physicians wish to become professionally affiliated with a Nevada professional corporation providing medical services in one of our major metropolitan areas. These Canadian doctors apparently fulfill all requirements of the Nevada Medical Practices Act except that they are not United States citizens, are not in the process of naturalization, and have not filed declarations of intent to become U.S. citizens. On the contrary, they fully intend to retain their Canadian citizenship and desire only to enter the United States on temporary work visas.

QUESTION

Do the limitations on licensing contained in NRS 630.160 and 630.195 contravene the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution?

ANALYSIS

In recent years, federal and state courts have taken the position that statutory classifications based on alienage must be subjected to close judicial scrutiny. In re Griffiths, 413 U.S. 717 (1973); Raffaelli v. Committee of Bar Examiners, 101 Cal.Rptr. 896 (1972); Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948). Consequently, the courts have given approval to such statutory classifications only when they serve a compelling governmental interest, i.e., where the purpose of the classification is a substantial one and the classification as drawn is necessary to the accomplishment of that purpose. In re Griffiths, supra, at 721-722.

A number of cases have been decided by the courts involving aliens and the right to work or be part of a profession. In Purdy and Fitzpatrick v. State, 79 Cal.Rptr. 77 (1969), the California Supreme Court held unconstitutional a statute which prohibited employment of aliens on public works projects. The reason cited in Purdy and Fitzpatrick, supra, was violation of the Equal Protection Clause of the Fourteenth Amendment. The court was unable to discern any compelling governmental interest which would justify the blatant discrimination embodied in the statute against persons who were lawful resident aliens.

In Sugarman v. Dougall, 413 U.S. 634 (1973), the U.S. Supreme Court held invalid a New York civil service law provision that only citizens could hold permanent positions in the competitive class of the state civil service on the grounds that the statute was too broad and indiscriminate in its application and could not withstand scrutiny under the Fourteenth Amendment. A similar ban in a rule adopted by the United States Civil Service Commission was held to constitute such unjustifiable discrimination against all aliens as to be violative of due process under the Fifth Amendment in Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1974).

Although this office has not discovered a case on this subject directly involving an applicant for licensure as a medical doctor, there are several cases concerning the rights of aliens to apply for special licensing by states involving other occupations and professions. For instance, in the case of In re Griffiths, supra, a resident alien successfully challenged a Connecticut court rule restricting admission to the bar in that state to persons who were citizens of the United States. The U.S. Supreme Court, speaking through Mr. Justice Powell, after concluding that classifications based on alienage are inherently suspect and therefore subject to close judicial scrutiny, could find no relationship between the citizenship requirement and a person's qualifications to practice law in a particular state, such that it could be said that a compelling governmental interest was served by the Connecticut court rule. Being unable to meet the compelling governmental interest test, the statute was held to be violative of the Fourteenth Amendment's guarantee of equal protection under law.

On the state level, the same result was reached a year earlier in the case of Raffaelli v. Committee of Bar Examiners, supra. The Supreme Court of California acknowledged that a state may maintain high standards of qualification for admission to its bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Such a connection was not shown to exist between the citizenship requirement and an applicant's fitness or capacity to practice law in California.

In the same year as the decision in Raffaelli, supra, the federal District Court in Puerto Rico in Arias v. Examining Board of Refrigeration and Air Conditioning Technicians, 353 F.Supp. 857 (D.P.R. 1972), held invalid a commonwealth statute restricting licensing for refrigeration and air conditioning technicians to persons with United States citizenship. The reasons cited for this conclusion are the same as those set forth in Griffiths, supra, and Raffaelli, supra.

And finally, permanent resident aliens received a favorable determination in the case of Sundram v. City of Niagara Falls, 357 N.Y.S.2d 943 (1973), concerning the unconstitutionality of the city ordinance which prohibited issuance of taxicab drivers'

licenses to all but United States citizens, on the grounds that said ordinance denied equal protection to permanent resident aliens who were otherwise qualified for such licensure.

In view of the rulings in the above-cited cases, it is the opinion of this office that the citizenship requirement set forth in NRS 630.160, subsection 2(a) and 630.195, subsection 1(a) in relation to applicants for licenses to practice medicine in Nevada would not be legally enforceable by the State Board of Medical Examiners, for the reason that such a requirement has been held by numerous courts, including the U.S. Supreme Court, to be violative of the Equal Protection Clause of the Fourteenth Amendment. We also note that Section 3 of the rules and regulations of the Board of Medical Examiners requires each applicant for licensure to indicate that he is a citizen of the United States or has filed a petition for naturalization or, not having fulfilled the residence requirements for naturalization, has filed a declaration of intention to become a citizen. In our opinion, this rule is similarly unenforceable.

In your inquiry to this office, you requested, in the event our opinion concerning the citizenship requirement was unfavorable, that we comment on whether it would be nonetheless proper for the board to require an applicant for licensure to submit to the board satisfactory evidence that the applicant is legally in the United States and that he or she is permitted by the federal immigration laws to work while in the United States.

It is the opinion of this office that it would be both lawful and reasonable for the board to make an applicant for licensure, who is an alien, supply satisfactory evidence that he is legally in this country and that he is legally entitled to work while in the United States. We base our opinion on the fact that the cases cited hereinabove appear to recognize that the rights involved in those cases attached only to persons who were lawful, permanent residents of the United States or otherwise lawfully admitted to the United States pursuant to the federal Immigration and Nationality Act. Our opinion on this subject is further supported by a recent decision of the United States Supreme Court in DeCanas v. Bica, 44 L.W. 4235 (Feb. 25, 1976). In that case, the court upheld as constitutional a California statute that barred knowing employment of aliens not entitled to lawful residence in the United States where such employment would adversely affect lawful resident workers.

In DeCanas, supra, the Supreme Court recognized that the states possess broad authority under their police powers to regulate the employment relationship to protect workers within their states. The court, at page 4237, concluded that:

> California's attempt in Section 2805(A) to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the main stream [mainstream] of such police power regulation.

A newly adopted board rule requiring proof of lawful presence in the United States and a legal right to work while in the United States appears to be well within the mainstream of the police power regulation conferred upon the State Board of Medical Examiners by the Nevada Legislature.

## CONCLUSION

The citizenship requirement for a license to practice medicine in the State of Nevada as set forth in NRS 630.160, subsection 2(a) and 630.195, subsection 1(a), is legally unenforceable, since such a requirement has been judicially determined to be in violation of the Equal Protection Clause of the Fourteenth Amendment. However, the board, by rule and regulation, may nonetheless require an applicant for licensure, who is an alien, to provide satisfactory evidence that he or she is legally present in the United States and lawfully entitled to work while living in the United States under the provisions of the federal Immigration and Nationality Act.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

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**206 Autopsies/Coroner's Inquests—A justice of the peace acting as ex officio coroner may not authorize a physician to conduct a dissection of a dead body when it is not suspected that death was occasioned by unnatural means and no inquest is contemplated. However, the county board of commissioners may enact an ordinance pursuant to NRS 244.163 empowering the coroner to do so.**

CARSON CITY, June 10, 1976

JOHN J. KADLIC, ESQ., *Assistant District Attorney,* Elko County Courthouse, P.O. Box 1132, Elko, Nevada 89801

DEAR MR. KADLIC:

In response to your inquires of April 6, 1976, the following opinion is offered:

QUESTION ONE

May a justice of the peace, acting as coroner, authorize a physician to conduct a dissection of a dead body pursuant to NRS 259.050, when the coroner does not suspect the death has been occasioned by unnatural means, and does not plan to hold an inquest?

ANALYSIS—QUESTION ONE

Chapter 451 of Nevada Revised Statutes governs the dissection of dead human bodies. NRS 451.010 states in part:

> The right to dissect the dead body of a human being shall be limited to cases:
>
> * * *
>
> Where a coroner is authorized under NRS 259.050 or an ordinance enacted pursuant to NRS 244.163 to hold an inquest upon the body, and then only as he may authorize dissection.

NRS 259.050 states in part:

> 1. When a justice of the peace, acting as coroner, or his deputy, has been informed that a person has been killed, or committed suicide, or has suddenly died under such circumstances as to afford reasonable ground to suspect that the death has been occasioned by unnatural means, he shall:
>
> * * *
>
> (b) Proceed to hold an inquest to inquire into the cause of the death.

It appears that NRS 451.010, subsection 1(b), limits the authority of the coroner to authorize the dissection of a dead body only to those situations when the coroner is specifically authorized to hold an inquest.

A coroner is specifically authorized to hold an inquest only under those conditions set forth in NRS 259.050, subsection 1.

Therefore, a coroner may not authorize a physician to dissect a dead body when he does not suspect the death has been occasioned by unnatural means and does not plan to hold an inquest.

QUESTION TWO

May the board of commissioners enact an ordinance pursuant to NRS 244.163 empowering the coroner to authorize the dissection of a dead body where no unnatural circumstances causing death are present and the coroner does not plan to hold an inquest?

ANALYSIS—QUESTION TWO

NRS 244.163 provides:

> 1. The boards of county commissioners shall have the power and jurisdiction in their respective counties to create by ordinance the office of county coroner, to prescribe his qualifications and duties and to make appointments to such office.
>
> 2. Any coroner so appointed shall be governed by the ordinances pertaining to such office which may be enacted by the board of county commissioners, and *the provisions of NRS 259.020 to 259.140, inclusive, and 259.190 to 259.240, inclusive, shall not be applicable.* (Italics added.)

* * *

Further, NRS 259.010, subsection 2, states:

> The provisions of this chapter, except NRS 259.150 to 259.180, inclusive, do not apply to any county where a coroner is appointed pursuant to the provisions of NRS 244.163.

Therefore, should the board of commissioners create, by ordinance, the office of county coroner, as authorized above, then they may also prescribe is qualifications and duties (Attorney General's Opinion No. 113, dated February 18, 1964). Thus, in answer to your second question, it would appear that a provision may be made to allow the dissection of a dead body where there are no unnatural circumstances apparently causing the death.

CONCLUSION

It is the opinion of this office that while NRS 259.050 and 451.010 limit the authority of a justice of the peace as ex officio coroner to authorize the dissection of a human body, the board of commissioners may, pursuant to NRS 244.163, enact an ordinance which would prescribe the coroner's duties and responsibilities as they see fit. Caveat, however, that such an ordinance should not stray too far from the guidelines set forth under Chapter 259 for justices of the peace as ex officio coroners, and further, that the provisions of NRS 259.150 to 259.180, inclusive, will continue to apply, even if such office is created.

Respectfully submitted,

ROBERT LIST, *Attorney General*

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**207 Emotionally Disturbed and Mentally Retarded Children—The financial and custodial responsibility for emotionally disturbed or mentally retarded children as defined in Chapter 433 of Nevada Revised Statutes is within the**

**Nevada State Welfare Division under NRS 432.010 et seq., assuming all other requirements for placement in the custody of Welfare under NRS Chapter 432 are met, since emotionally disturbed and mentally retarded children are handicapped within the meaning of NRS 432.020.**

CARSON CITY, September 23, 1976

MR. ROGER S. TROUNDAY, *Director, Department of Human Resources*, Director's Office, Kinkead Building, Room 600, 505 East King Street, Carson City, Nevada 89710

DEAR MR. TROUNDAY:

You have recently requested an opinion of this office on the following question:

QUESTION

Is the financial and custodial responsibility for emotionally disturbed or mentally retarded children as defined in Chapter 433 of Nevada Revised Statutes within the Nevada State Welfare Division under NRS 432.010 et seq., or within the Division of Mental Hygiene and Mental Retardation under NRS 433A.500 et seq. and NRS Chapter 435?

ANALYSIS

In order to analyze this question it will be necessary to reflect on the factual background out of which this issue has arisen.

The State Welfare Division under NRS Chapter 432 has pervasive authority over the maintenance and care of children who are placed in its custody. Occasionally, while providing care in the discharge of its duties, it will be noted by Welfare that children in its custody begin to exhibit symptoms of emotional disturbance or mental retardation within the meaning of NRS Chapter 433. See NRS 433.104 and 433.174, respectively.

When this occurs, it is Welfare's contention that, pursuant to an appropriate court ordered change of custody to the Division of Mental Hygiene and Mental Retardation (hereinafter MH-MR), MH-MR should then assume full financial responsibility for maintenance and care of the child while so placed in its custody. MH-MR, on the other hand, contends that, while it may have the authority and duty to render certain specialized psychological services to is clients, where the client otherwise qualifies as a custodial charge of Welfare, financial responsibility for the care of the child should remain with Welfare.

Turning to the statutory authority and powers of these agencies, it will be noted that Welfare is authorized under NRS 432.020, subsection 1, to:

> * * * [P]rovide *maintenance* and *special services* to:
> * * *
> (b) *Handicapped* children who are receiving specialized care, training or education.
> (c) Children who are placed in the custody of the welfare division, and who are placed in * * * *group care facilities* or other care centers or institutions. * * * (Italics added.)

"Maintenance" under NRS 432.020, subsection 1, means general expenses for care such as board, shelter, clothing, transportation and other necessary or incidental expenses, while "special services" includes medical, hospital, psychiatric, surgical or dental services, or any combination of these. See NRS 432.010.

Thus, Welfare is empowered to provide, in addition to maintenance, special services to both handicapped children who are receiving specialized care, training or education, and children who are in the custody of Welfare and who are placed in group

care facilities or other care centers or institutions. "Group care facilities" are those establishments operated and maintained for the purpose of furnishing food, shelter and laundry and providing personal care and services to, among others, handicapped individuals. See NRS 449.005 et seq.

Resolution of the question then at least partially turns on the meaning of "handicapped" within the intendment of the above provisions of Nevada Revised Statutes. While the term "handicapped" is not defined in either NRS Chapter 432 or 433, it is commonly accepted to refer to those persons who are at a disadvantage in economic competition because of physical or mental defects. See Webster's New International Dictionary, Second Edition, p. 1122. Children suffering form mental defects may, therefore, clearly be regarded as handicapped within the purview of Welfare's authority to provide maintenance and special care under NRS 432.020, subsection 1. Furthermore, the term "mental defect" is sufficiently broad so as to include the emotionally disturbed and mentally retarded within its meaning.

From the above analysis it becomes apparent that, while MH-MR may have certain responsibilities for rendering psychological services to handicapped children in the custody of Welfare (see p. 5, infra) the fact that a child qualifies for such services does not of itself relieve Welfare of its responsibility to the child under NRS 432.020.

This is not an anomalous situation. Indeed, under some state statutes, public authorities may recover from other public authorities the expenses of maintaining insane persons in a public institution. 44 C.J.S. Insane Persons § 75, p. 182. Construing applicable provisions of Nevada Revised Statutes together makes it clear that Nevada is apparently in line with such states. Militating in favor of this conclusion are the provisions of NRS 433A.580, relating to payment for MH-MR services, which provides in part as follows:

> No person may be admitted to a * * * division mental health facility pursuant to the provisions of this chapter unless mutually agreeable financial arrangements relating to the costs of treatment are made between the * * * division facility and the * * * person requesting his admission.

The clear intent of the Legislature, therefore, is that the client or person requesting his admission (in this case Welfare) defray the costs of treatment in accordance with certain fee schedules and ability to pay. See NRS 433A.580 et seq., and NRS 433.354.

This result is in harmony with the various statutory provisions under which MH-MR administers its various programs. For example, under NRS 433A.540 the administrator of MH-MR is authorized to "receive any emotionally disturbed child for *treatment* in a treatment facility or any other division facility. * * * (Italics added.)

Treatment is defined under NRS 433A.500 as follows:

> As used in NRS 433A.510 to 433A.570, inclusive:
>
> 1. "Treatment" means treatment designed to facilitate the adjustment and effective functioning of an emotionally disturbed child in his present or anticipated life situation, and includes but need not be limited to:
>
> (a) Outpatient services such as:
>
> (1) Family counseling;
>
> (2) Group therapy for parents, adolescents and children;
>
> (3) Classes for parents in effective child management techniques;
>
> (4) Individual therapy for children; and
>
> (5) Evaluation services, including personal assessments and studies of individual social environments.
>
> (b) Day care services, involving half-day or after-school educational programs and individual or group therapy programs.

(c) In cooperation with the welfare division of the department, placement in transitional homes operated by professionally trained parents working in close consultation with the clinic director and his staff.

(d) Short-term residential services providing 24-hour supervision, evaluation and planning and intensive family counseling, individual and group therapy and educational evaluation and consultation.

It is apparent then that the administrator in receiving children under NRS 433A.540 performs a very specialized professional and administrative service for the benefit of the child. It will be noted in this regard that responsibility for general custodial care or maintenance is nowhere alluded to within the above definition of treatment. It will also be noted that there is no provision for long-term treatment under this provision of Nevada Revised Statutes. It follows that where such care is required, it must be purchased from providers other than MH-MR.

It could be argued against the above analysis that the administrator receives emotionally disturbed children in his "custody" under NRS 433A.540, subsection 1, and that for this reason he also has financial responsibility for general maintenance and care. However, this contention is totally inconsistent both with NRS 433A.580 (p. 4, supra), relating to the requirement that mutually agreeable financial arrangements be made prior to commitment, and with NRS 433.354 and 433A.650.

NRS 433A.550 provides as follows in regard to emotionally disturbed children:

1. In any case involving commitment by court order, admission to the treatment facility shall be *only after consultation with and approval by the clinic director* or his designee, whose responsibility it shall be to determine whether the treatment available at the facility is appropriate or necessary for the child's health and welfare.

2. A child committed by court order shall not be released from a treatment facility until the clinic director determines that treatment in the facility is no longer beneficial to the child. (Italics added.)

It should be noted that court ordered placements in MH-MR facilities may be accomplished only with the approval of the clinic director. Similarly, NRS 435.081 provides, in regard to mentally retarded persons as follows:

1. The administrator or his designee may receive and care for mentally retarded persons of the State of Nevada in a facility operated by the division when:

(a) A person is judicially committed to the care of the administrator; or

(b) Voluntary admission of a person is requested by his parent, parents or guardian upon application to the administrator,

and space is available in a facility operated by the division which is designed and equipped to provide appropriate care, treatment and training for mentally retarded persons.

2. A minor child over 2 years of age may be received, cared for and examined at a division mental retardation facility without commitment, if such examination is ordered by a juvenile court having jurisdiction of the minor in accordance with the provisions of paragraph (c) of subsection 1 of NRS 62.200, in which event the administrator or his designee shall report the result of the examination to the juvenile court and shall detain the child until the further order of the court, but not to exceed 15 days after the administrator's report.

Note here that placements in mental retardation facilities are conditioned upon availability of space and upon the facility's being equipped to provide appropriate care, treatment and training.

The clear intendment of these provisions is to place responsibility for clinical decision making on the experts in mental health and not on the courts or Welfare. Thus, a child may be accepted in MH-MR programs when the child's best interests can thereby be served. MH-MR also has authority to transfer clients from one program to another under NRS 433A.410 and to discharge when appropriate. That being the case, it cannot be said that the Legislature intended for MH-MR to have custodial and financial responsibility for a child, otherwise eligible for welfare benefits, because he happens to have a mental disorder.

Construing the above sections of Nevada Revised Statutes together, then it is submitted that "custody" within the meaning of NRS 433A.540, therefore, clearly relates solely to the administrator's accountability to the committing court on the child's progress under treatment, including his readiness for discharge or need for further treatment for extended periods of time.

CONCLUSION

The financial and custodial responsibility for emotionally disturbed or mentally retarded children as defined in Chapter 433 of Nevada Revised Statutes is within the Nevada State Welfare Division under NRS 432.010 et seq., assuming all other requirements for placement in the custody of Welfare under NRS Chapter 432 are met, since emotionally disturbed and mentally retarded children are handicapped within the meaning of NRS 432.020.

Respectfully submitted,

ROBERT LIST, *Attorney General*

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**208 State Contractors' Licenses—The State has preempted the field of licensing contractors in the State of Nevada and, therefore, it would be illegal for local government entities to grant business licenses to persons as contractors when such persons have not previously been licensed by the State Contractors' Board.**

CARSON CITY, October 5, 1976

MR. ROBERT L. STOKER, *Secretary, State Contractors' Board,* 328 South Wells Avenue, Reno, Nevada 89502

DEAR MR. STOKER:

You have requested a formal, official opinion regarding the following question:

QUESTION

May a city or county business license division issue business licenses to persons or firms acting as contractors when such person or firms are not, in fact, licensed contractors under the State Contractors' Law?

ANALYSIS

NRS 624.230 makes it unlawful for any person, firm, etc., to engage in the business or act in the capacity of a contractor in the State of Nevada without having a contractor's license issued by the State Contractors' Board. NRS 624.020 defines a

contractor as any person, except a licensed architect or registered professional engineer or any person who acts as an employee of another, who constructs, alters, repairs, adds to, subtracts from, improves, moves, wrecks or demolishes any building, highway, road, railroad, excavation or other structure, project, development or improvement.

As can be seen, the definition of a contractor is extremely broad. It is, therefore, apparent that the Legislature intended to preempt the field of licensing contractors in the State of Nevada through passage of Chapter 624 of Nevada Revised Statutes.

Cities and counties in the State generally have the right to enact business license ordinances. Such business licenses are for revenue purposes only. Cf. Attorney General's Opinion No. 626, dated October 29, 1969. Although once the State Contractors' Board has given a license to a person to be a contractor, a city or county may require that person to also obtain a business license for revenue purposes (Attorney General's Opinion No. 626, supra). A different situation would appear to arise where the Contractors' Board had not issued a contractor's license to any person or firm.

A city or county business license, though revenue producing in nature only, does permit a person to carry on a business when it is issued, but the city or county may not permit a person to carry on a business as a contractor when that person has not been licensed as a contractor by the State. The State has preempted the field, and the city or county may not enact legislation, or apply it in such a way, as to oust the State from its regulatory activities. Kelly v. Clark County, 61 Nev. 293, 299, 127 P.2d 221 (1942).

CONCLUSION

Therefore, since the State has preempted the field, it is the opinion of this office that it would be illegal for local government entities to grant business licenses to persons to act as contractors when such persons have not previously been licensed by the State Contractors' Board.

Respectfully submitted,

ROBERT LIST, *Attorney General*

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