

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1981

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

OPINION NO. 81-1 Water Rights—State Consent By Nevada Tax Commission To Federal Acquisitions—The consent of the Nevada Tax Commission pursuant to [NRS 328.150](#) is not a necessary prerequisite to new appropriations of water under the application and permit system of [NRS Chapter 533](#) and 534 administered by the state engineer. Tax commission consent is necessary in connection with federal acquisitions of any existing appropriated water rights.

CARSON CITY, January 13, 1981

ROY E. NICKSON, *Executive Director, Department of Taxation, Capitol Complex, Carson City, Nevada 89710*

DEAR MR. NICKSON:

You have requested an opinion from this office pertaining to the following:

QUESTION

To what extent is the consent of the Nevada Tax Commission necessary for the acquisition by the United States of new water rights or the acquisition of existing water rights in Nevada under the application and permit system administered by the Nevada State Engineer?

ANALYSIS

Your inquiry requires careful consideration of the intent and operation of two disparate statutory schemes—[NRS Chapter 328](#) providing general authority for state consent to land or water right acquisitions by the United States of America and [NRS Chapters 533](#) and 534 establishing a comprehensive application and permit system administered by the state engineer to allocate Nevada's scarce water resources among competing claimants.

The provisions of [NRS 328.030](#) to [NRS 328.150](#) establish general guidelines for the state, acting through the Nevada Tax Commission, to grant its consent to federal acquisitions of property rights within the state. Apart from the general principles involved, your inquiry requires special consideration due to the unique nature of water resources, particularly in the arid western states.

Nevada, by virtue of its ownership interest in water and its exercise of general police powers, regulates and controls the allocation of its scarce water resources among all competing claimants. In order to satisfy successfully its responsibilities in this regard, the state has enacted [NRS chapters 533](#) and 534 to create a comprehensive and equitable distribution scheme for the use of its water. Under this statutory scheme, the federal government is treated as any other claimant when acquiring water rights through the application and permit system. [NRS 533.010](#).

In order to resolve your inquiry, a determination must be made whether consent of the tax

commission is a necessary prerequisite to the appropriation of unappropriated water pursuant to the existing permit system. In this context, where two separate statutory provisions seem applicable to the same situation, the general rules of statutory construction aid in achieving a harmonious interpretation of the laws.

It is a well accepted maxim of statutory construction that specific provisions prevail over general ones relating to the same subject matter. As the Nevada Supreme Court has recently reaffirmed in *Sierra Life Insurance v. Rottman*, [95 Nev. 654](#) (1979):

However, it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally.

According to this rule, it is reasonable and appropriate to conclude that the specific statutory scheme for allocating water is the appropriate vehicle by which the state shall determine the propriety of applications by the federal government for new appropriations of unappropriated water.

This conclusion is reinforced, as well, by a related but independent line of analysis. An application for appropriation of water by the United States must be approved or rejected by the state engineer within one year of the final date for filing protest. [NRS 533.370\(3\)](#). Although express conditions exist in that statute under which the state engineer may withhold action on an application, none of the expressed conditions for delaying action include awaiting tax commission consideration of new appropriations. This is in dramatic comparison with [NRS 533.370\(6\)](#) which expressly provides that under certain circumstances the state engineer may not act upon an application until another state agency, the Division of Colorado River Resources, has acted. Although a similar provision could have conditioned the actions of the state engineer on tax commission action, no such provision has been included in our statutes.

The 1979 Nevada Legislature was presented with an opportunity to add such a provision to our statutes with the introduction of A.B. 724. This amendment to [NRS 533.370](#) would have specifically qualified the consideration of an application filed by the United States upon prior tax commission consent. The consideration and express rejection of this amendment supports the conclusion mandated by construction of the statutes that the specific provisions of the water law of Nevada prevail over other, more general provisions.

Under this interpretation of the statutory scheme, the purview of [NRS chapter 328](#) would be limited to consideration of an existing, already appropriated water right being acquired by the federal government. The Nevada Tax Commission could then consider if the acquisition might conflict with or impair the value of existing rights or otherwise be detrimental to the public interest and welfare, although the scope of that inquiry is restricted by [NRS 328.120](#) which provides:

On matters under the provisions of [NRS 328.030](#) to [328.150](#), inclusive, affecting water rights, reclamation, flood control and watershed protection, the Nevada tax commission shall call upon the state engineer for technical and engineering advice *and the water law of this state shall be the rule of decision in all matters relating to water rights.* (Emphasis added.)

The effect of [NRS 328.120](#) is to insure that the authority to grant consent in this context does not exempt the United States from the otherwise applicable water law of the state as expressed in [NRS Chapter 533](#) and 534.

CONCLUSION

It is the opinion of this office that Nevada Tax Commission consent is not a necessary

prerequisite to the approval or denial by the state engineer of an application to appropriate unappropriated water filed by the United States. Tax commission consent is necessary in connection with the acquisition of any existing appropriated water right by the federal government.

Very truly yours,

RICHARD H. BRYAN, *Attorney General*

By TIMOTHY HAY, *Deputy Attorney General*

OPINION NO. 81-2 Federal Privacy Act, Conviction Data, Disclosure to State Agencies—
The Federal Privacy Act of 1974 covers a myriad of types of information maintained by federal agencies on individuals. The act does not apply to state agencies unless the state agency is acting as a federal government contractor as defined in 5 U.S.C. § 552a(m). Chapter 179A of NRS and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, do not restrict a Nevada agency of criminal justice from disclosing to the Nevada State Personnel Division conviction information pertaining to an applicant for state employment. The division may disclose such information to the applicant's prospective state appointing authority.

CARSON CITY, February 5, 1981

MR. JAMES WITTENBERG, *Personnel Administrator*, Capitol Complex, Carson City, Nevada
89710

DEAR MR. WITTENBERG:

You have asked this office to answer questions pertaining to the Federal Privacy Act of 1974, and federal and Nevada statutes relating to criminal history record information. Your specific questions are as follows:

QUESTION NO. ONE

What types of information are specifically covered by the Federal Privacy Act of 1974 (Pub.Law 93-579, 88 Stat. 1896) and does the act apply to the State of Nevada?

ANALYSIS TO QUESTION NO. ONE

The Federal Privacy Act of 1974 is found in the United States Code at 5 U.S.C. § 552a. All references to the act in this opinion will be to the code section number.

The purpose of § 552a “* * * is to promote governmental respect for the privacy of citizens by requiring all departments and agencies of the [federal] executive branch and their employees to observe certain constitutional rules in the computerization, collection, management, use and disclosure of personal information about individuals.” S.Rep. No. 93-1183, 93rd Cong., 2nd Sess., reprinted in 1974, U.S. Code Cong. & Ad. News 691, 691. To fulfill this purpose Congress applied the act to “records” maintained on individuals. “Records” are defined at § 552a(a)(4) as “any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contain his name or identifying number, symbol, or other identifying particulars assigned to the individual, such as a finger or voice print or a photograph. * * *” As can be seen from this enumeration, § 552a applies to almost all the types

of information that may possibly be collected on a prospective employee. However, as will be discussed below, the Privacy Act, with the limited exception noted, does not apply to state agencies.

When S. 3418, the senate bill which became 5 U.S.C. § 552a, was introduced it “* * * applied to all governmental and private organizations which maintained a personal information system.” S.Rep. No. 93-1183, *supra*, reprinted in U.S. Code Cong. & Ad. News, *supra*, at 6932. This was deleted in committee and, as enacted, the “Act applies only to agencies of the federal government; state * * * systems of information are * * * unaffected [unless they are federal agency contractors, discussed *infra*].” 1976 Duke L.J. 301 at 303. The act applies only to agencies as defined therein. As defined the term “agency” only includes within its scope components of the federal government. See § 552a(a)(1) and 5 U.S.C. 552(e).

Under certain conditions a state agency may be deemed a federal agency contractor, in which case § 552a would apply to the state agency. Pursuant to § 552a(m) “[w]hen an agency [, of the federal government,] provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to [the] system [maintained by a contractor].” Subsection (m), by its terms, does not apply every time a state agency enters into a contractual relationship with a federal agency. Rather, it is limited to a specific type of contract. Subsection (m) applies only to those contracts which provide “for the operation by or on behalf of an agency of a system of records to accomplish an agency function. * * *” § 552a(m). Under this language the contract with the federal government must, as a line item or other type of clearly expressed clause, require the operation of an information system. “This requirement * * * is intended to avoid coverage of those systems operated by contractors under contract to the federal agencies who use such systems as a result of their own management decision or management option. The example that was in the forefront of the thinking on this point was the desire not to cover the personnel systems of major defense contractors, and this was a method of providing that such systems were not covered by [subsection m].” Bedell, “Government Contractors and the Initial Steps of the Privacy Act,” 34 Fd. B. J. 330 at 331 (1975).¹ In an analogous fashion, a system of records maintained by a state agency on its employees would not be covered by subsection (m) merely because the agency receives and administers federal grants. Moreover, subsection (m) requires an affirmative act on the part of a federal agency before § 552a is applicable to a contractor. “[T]he agency shall * * * cause the requirements of [§ 552a] to be applied to [the] system [maintained by the contractor].” § 552a(m). “[T]herefore, there should be maximum incentive on the part of the [federal] agencies to make certain that when it drafts its contracts * * * that these commitments by the contractor [to follow § 552a] are understood. * * *” Bedell, *supra*, at page 333.

The Federal Privacy Act, 5 U.S.C. § 552a, is not the only federal statute relating to the confidentiality of information maintained on individuals. However, it is often confused with other federal statutes on the same subject and, therefore, we would like to take this opportunity to illustrate the distinction. While as stated above the Privacy Act does not apply to state agencies (except “contractors”) many federal statutes have a direct application on and control the activities of state grant-in-aid agencies. For example, 42 U.S.C. § 602(a)(9) requires that state agencies receiving federal money for the Aid To Families With Dependent Children (AFDC) program “provide safeguards which restrict the use [or] disclosure of information concerning applicants or recipients to purposes directly connected with [the AFDC program].” A state AFDC agency would, therefore, be under constraints in disclosing such information, not because of the Federal Privacy Act of 1974, but because of 42 U.S.C. 602(a)(9). An analogous federal provision is discussed below with respect to criminal history record information.

CONCLUSION TO QUESTION NO. ONE

The Federal Privacy Act of 1974 covers a myriad of types of information maintained by

federal agencies on individuals. The act does not apply to state agencies unless the state agency is acting as a federal government contractor as defined in 5 U.S.C. § 552a(m).

¹When Mr. Bedell wrote the article he was Assistant General Counsel, Office of Management and Budget.

QUESTION NO. TWO

Do the Federal Omnibus Crime Control and Safe Streets Act of 1968 (Pub. Law 90-351, 82 Stat. 197) as amended by the Crime Control Act of 1973 (Pub. Law 93-83, 87 Stat. 197) or Chapter 179A of NRS prevent or restrict the Nevada State Personnel Division from disclosing to prospective state appointing authorities a listing of the prior criminal convictions of an applicant for state employment when the listing is received from an agency of criminal justice?

ANALYSIS TO QUESTION NO. TWO

Those portions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Crime Control Act of 1973, pertinent to the analysis of the question posed here are found in Chapter 46 of Title 42 of the United States Code, 42 U.S.C. § 3701 to § 3796c inclusive. All portions of the two acts discussed here will be cited as code sections. As will be explained below, these sections were the impetus for the legislature's enactment of Chapter 179A of NRS in 1979. Chapter 179A is dispositive of the question asked here, *inter alia*, because the Omnibus Crime Control and Safe Streets Act of 1968, as amended, does not, per se, restrict the disclosure of conviction information by a state agency.

Pursuant to 42 U.S.C. § 3711 there was established within the Federal Department of Justice, a Law Enforcement Assistance Administration, hereinafter referred to as the administration. The administration is authorized to “* * * make grants to the States for the establishment and operation of State law enforcement and criminal justice planning agencies. * * *” 42 U.S.C. § 3722. These state agencies are referred to in Chapter 46, *supra*, as “State Planning Agencies.” *Id.* However, the administration is only authorized to make such grants if a state planning agency agrees to submit to the administration a “Comprehensive State Plan” which shows that the state will conform to the purposes and requirements of Chapter 46. 42 U.S.C. § 3733. The Chapter requirement relevant here is found in 42 U.S.C. § 3771(b) which provides, in pertinent part, as follows:

All criminal history information collected, stored, or disseminated through support under this chapter shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures [that] assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes.

Criminal history information includes a record or summary of a person's prior convictions. 42 U.S.C. § 3781(o).

The legislation that led to the enactment of Chapter 179A of NRS was first introduced as Assembly Bill 524. Testimony on A.B. 524 was had before the Judiciary Committees of the Assembly and Senate respectively. In testimony, the sponsors of the bill stated on several occasions that the bill was designed, *inter alia*, to insure State of Nevada compliance with the requirements of 42 U.S.C. § 3701 to § 3796c (see above), in order to eliminate the possibility of

a termination of federal funding. See 42 U.S.C. § 3722, *supra*. Minutes of the testimony before the Assembly Judiciary Committee on March 29, 1979 and before the Senate Judiciary Committee on May 22, 1979. A.B. 524 was enacted as Chapter 689 Statutes of Nevada 1979 and placed in a new Chapter 179A of NRS. The provisions of 179A control the dissemination of conviction records in Nevada by an agency of criminal justice.

Pursuant to [NRS 179A.100\(1\)](#), “[r]ecords of criminal history which reflect conviction records only may be disseminated by an agency of criminal justice without any restriction pursuant to * * * chapter [179A of NRS].” In testifying on that portion of A.B. 524 which became [NRS 179A.100\(1\)](#), Norman Herring, a member of the committee which prepared the A.B. 524 bill drafts, stated that this section makes it clear that conviction information is a public record. Minutes of testimony before the Assembly Judiciary Committee on March 29, 1979. Therefore, from the plain language of [NRS 179A.100\(1\)](#), it is clear that an agency of criminal justice may disseminate to and the Nevada State Personnel Division may receive, conviction information. At [NRS 179A.030](#) an “agency of criminal justice” is defined as any “governmental agency which performs a function in the administration of criminal justice pursuant to a statute * * * and which allocates a substantial part of its budget to a function in the administration of criminal justice.” The Nevada Commission on Crimes, Delinquency and Corrections is such an agency. See Chapter 216 of NRS.

While it is very clear that the Nevada State Personnel Division may receive conviction data on prospective state employees from an agency of criminal justice, it is not quite so clear that the division may disclose this data to prospective appointing authorities. [NRS 179A.110](#) provides, in part, that “[n]o person who receives records of criminal history pursuant to [Chapter 179A] may disseminate it further without express authority of law. * * *” If the division discloses information contained in such records to a prospective appointing authority, via persons employed by each, and that disclosure constitutes a “further dissemination,” a violation of [NRS 179A.110](#) will occur. “Dissemination” is defined at [NRS 179A.060](#) as “disclosing records of criminal history * * * to a person or agency outside the organization which has control of the information. * * *” For the reasons expressed below, this office is of the opinion that the division is but a subpart of the “organization which has control of the information,” namely the state, acting in the capacity of prospective employer, and therefore a “dissemination” would not occur. The term “organization” includes a government. *United States v. California State Automobile Ass’n*, 385 Fed.Supp. 669 (E.D. Calif. 1974). There is no differentiation between departments of a single entity. *Capitol City First Nat’l Bank v. Lewis State Bank*, 341 So.2d 1025 (Fla.App. 1977). The personnel division has major responsibilities in recruiting prospective employees. [NRS 284.105\(2\)\(h\)](#). The personnel division also has responsibility for screening applicants and may, under certain circumstances, disqualify a person for state employment. [NRS 284.240](#). The division tests applicants for employment to determine their relative fitness for state service and, from a list of successful examinees, certifies to the prospective appointing authority those persons who may be selected for employment. [NRS 284.205](#), [NRS 284.250](#) and [NRS 284.255](#). In performing these functions, the personnel division is acting as an arm of state government. Therefore the disclosure in issue here would be within a single “organization” and thus not a “dissemination.”

CONCLUSION TO QUESTION NO. TWO

Chapter 179A of NRS and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, do not restrict a Nevada agency of criminal justice from disclosing to the Nevada State Personnel Division conviction information pertaining to an applicant for state employment. The division may disclose such information to the applicant’s prospective state appointing authority.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By ROBERT H. ULRICH, *Deputy Attorney General*

OPINION NO. 81-3 Administrative Law, Medicaid Provider Agreements—Absent any statute or regulation establishing the qualifications of applicants for Medicaid provider status except for the requirement that physician applicants be licensed to practice medicine, it is impermissible for the Medicaid program of the Nevada State Welfare Division to refuse to enter a provider agreement with any prospective provider other than a nonlicensed physician. However, the Nevada State Welfare Division is authorized by federal and state law to establish “reasonable” qualifications for all applicants for provider status and may properly refuse to enter into a provider agreement with any applicant who fails to meet the standards adopted. Finally, the Medicaid program has the authority to impose any special conditions in the agreement which it believes would be necessary or desirable in a particular case.

LAS VEGAS, February 11, 1981

MR. MINOR L. KELSO, *Chief, Medical Care Services, Nevada State Welfare Division, 251 Jeanell Drive, Carson City, Nevada 89710*

DEAR MR. KELSO:

You recently asked this office to answer a question regarding the issuance of Medicaid provider agreements by the Nevada State Welfare Division. The specific question you have asked is as follows:

QUESTION

What legal authority does the Nevada State Welfare Division have to refuse to enter into a provider agreement with an applicant for Medicaid provider status?

ANALYSIS

The State Aid to the Medically Indigent Program (hereinafter referred to as the “Medicaid program”) was established in the State of Nevada in 1967 with the adoption of [NRS 428.150](#), which provides: “There is hereby established a state plan for assistance to the medically indigent, pursuant to Title XIX of the Social Security Act (42 U.S.C. §§ 1396-1396d).”

The statutory scheme for the Medicaid program is contained in [NRS 428.150](#) to [NRS 428.370](#), inclusive. Specifically relating to your inquiry, [NRS 428.260](#) provides:

The department of human resources through the [welfare] division shall:

1. Administer the plan for assistance to the medically indigent.
2. Serve as the single state agency responsible for carrying out the provisions of [NRS 428.150](#) to [428.360](#), inclusive.
3. Cooperate with the Federal Government in matters of mutual concern pertaining to state aid to the medically indigent.
4. Make such rules and regulations and take such action as may be necessary or desirable to carry out the provisions of [NRS 428.150](#) to [428.360](#), inclusive, including but not limited to:
 - (a) The establishment of reasonable standards consistent with the objectives of [NRS 428.150](#) to [428.360](#), inclusive, to determine eligibility for medical and connected or other services or for other services; and

(b) The determination of the nature and extent of such assistance.

5. Provide for cooperation between the welfare division and the health division of the department of human resources, and cooperate with the state board of health and vocational rehabilitation services in the provision of medical or remedial care under [NRS 428.150](#) to [428.360](#), inclusive.

There can be no doubt that the adoption of rules and regulations regarding the qualifications of prospective Medicaid providers would be “necessary and desirable” as contemplated by [NRS 428.260](#). [NRS 428.330](#) also contemplates the denial of provider status in that it states the welfare division “may” enter into such agreements.

The federal Medicaid regulations also authorize the states to adopt regulations regarding qualifications of prospective Medicaid providers. This authorization is found in 42 C.F.R. § 431.51, which provides:

(a) This sec. implements section 1902(a) (23) of the Act, which provides that recipients may obtain services from any qualified medicaid provider.

(b) A State plan (except in Puerto Rico, the Virgin Islands, and Guam) must provide that any recipient may obtain medicaid services from any institution, agency, pharmacy, person, or organization that is qualified to perform the services, including an organization that provides these services or arranges for their availability on a prepayment basis.

(c) If the medicaid agency contracts on a prepayment basis with an organization that provides services additional to those offered under the State plan, the agency may restrict the provision of the additional services to recipients who live in the area served by the organization and wish to obtain services from it.

(d) *Paragraph (b) of this section does not prohibit the agency from—*

(1) Establishing the fees it will pay providers for medicaid services; or

(2) *Setting reasonable standards relating to the qualifications of providers.*

[Emphasis supplied.]

Given the authority of the division to enact rules and regulations, it is proper for the division to “make rules and regulations calculated to carry into effect the expressed legislative intention.” *Cashman Photo v. Nevada Gaming Comm.*, [91 Nev. 424](#), 428, 538 P.2d 158, (1975).

All rules and regulations enacted by the Welfare division pursuant to [NRS 428.360](#) are contained in the Division Medicaid Manual (hereinafter referred to as the “manual”). Chapter I of the manual is entitled “Eligibility, Coverage and Limitations” and contains all of the rules and regulations regarding Medicaid providers.

My review of the manual provisions and regulations contained in Chapter I of the manual reveals no establishment of qualifications for prospective Medicaid providers except that physician’s services must be performed “by an individual licensed under state law to practice medicine or osteopathy, * * *” *See* Manual Section 103.6. This regulation is supported by [NRS 428.230](#) which defines a physician as “a person licensed to practice as such.”

The only substantive regulations concerning providers are found in Manual Section 104.1, which requires each Medicaid provider to agree:

- A. To adhere to professional standards of medical care and/or services.
- B. To submit any claims for covered services within 90 days of the last day of the last date of service.
- C. To accept SAMI payment as payment in full and not to bill patients or relatives for an additional amount for covered services.
- D. Not to discriminate in any way on the basis of race, color, creed, sex or national origin.

- E. To conduct his practice or his business in such a way that the recipient has free choice of provider.
- F. To keep such records, consistent with sound medical and fiscal practice, as are necessary to fully disclose the nature and extent of the services provided.
- G. To furnish the Medical Care Section with such information regarding payment claimed and the data upon which such claim is based as the agency may from time to time require.
- H. To adhere to such other clauses as the Medical Care Section finds necessary to incorporate into a specific agreement.

However, these regulations are not helpful in this analysis since they deal with situations arising after the decision to enter into a provider agreement has been made.

Given the fact that no regulation of statute exists at this time establishing qualifications of applicants for Medicaid provider status except as to non-licensed physicians, the legal issue is narrowed to whether the Medicaid program may deny provider status to applicants other than non-licensed physicians. It is a fundamental requirement of administrative law that a government instrumentality may not act arbitrarily or in a manner which denies a citizen or group of citizens dealing with it due process of law. *State ex rel. Johns v. Gragson*, [89 Nev. 478](#), 515 P.2d 65 (1973). Administrative regulations supply standards which define the purpose and operation of a governmental agency, as well as what the public may expect in dealing with it. The rationale for this rule was best clarified in *Boller Beverages, Inc. v. Davis*, 183 A.2d 64 N.J. (1962):

The theory of administrative rule-making is, of course, that in certain fields and in certain respects the public interest is better served by delegating a large part of detailed lawmaking to the expert administrator, controlled by policies, objects and standards laid down by the legislature, rather than by having all the details spelled out through the traditional legislative process. Administrative rule-making remains in essence, however, the enactment of legislation of general application prospective in nature. The object is not legislation *ad hoc* or after the fact, but rather the promulgation, through the basic statute and the implementing action and conduct in the particular field of regulation so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards, administrative control lacks the essential quality of fairly predictable decisions. Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation.

183 A.2d at 71.

Even a very broadly drafted statute or regulation could set an acceptable standard by which the Medicaid program could assess qualifications of applicants and refuse to enter into agreements with those who did not meet the standard imposed. In *State of Nevada v. Rosenthal*, [93 Nev. 36](#), 559 P.2d 830 (1977), for example, the Nevada Supreme Court upheld the denial of a gaming license based on a statute which permitted the Nevada Gaming Commission to deny a license “for any cause deemed reasonable.” The court also noted that administrative regulations can supplement regulatory statutes and even fill “gaps” in deficient ones. However, here we do not even have the broad statute or a similar regulation as was present in *Rosenthal*.

Based on the foregoing analysis, it is the opinion of this office that the Medicaid program may not refuse to enter a Medicaid provider agreement with an applicant except in the case of a non-licensed physician applicant.

However, although the Medicaid program may not refuse to enter a provider agreement at

this time, it may propose an agreement in a particular case which addresses the particular areas of concern involved. This authority is found in Manual Section 104.1 H, *supra*. A specially drafted provider agreement could undoubtedly impose as many special conditions as the Medicaid program believed were “necessary or desirable” pursuant to [NRS 428.260\(4\)](#), *supra*. It would be up to the prospective provider to choose to enter into the agreement or not.

CONCLUSION

It is the opinion of this office that in the absence of administrative regulations setting reasonable standards as to the qualifications of prospective Medicaid providers, the Medicaid program of the Nevada State Welfare Division may not deny Medicaid provider status to any applicant except a non-licensed physician. It is permissible, however, for the Medicaid program to adopt regulations setting the qualifications for applicants and to refuse to enter a provider agreement with any applicant who failed to meet those standards. Finally, it is permissible for the Medicaid program to include any special conditions in a provider agreement which the program finds to be necessary or desirable in the circumstances.

Very truly yours,

RICHARD H. BRYAN, *Attorney General*

By TERRANCE P. MARREN, *Deputy Attorney General,*
Chief Counsel to Welfare Division

OPINION NO. 81-4 Nevada Judicial Discipline Commission; Justices of the Peace and Municipal Judges; Authority for Disciplinary Action Limited to Removal From Office; Effect of Commission Action on Reelection Status—Nevada Judicial Discipline Commission has limited authority to remove or involuntarily retire justices of the peace and municipal judges pursuant to [NRS 1.440](#). Once such a justice or judge is subject to the jurisdiction of the commission, a justice’s or judge’s resignation from office renders the proceeding moot. The removal of such a justice or judge from a term of office does not disqualify such person from seeking reelection and serving a new term in office, provided the person complies with the statutory qualifications established for the elective judicial office in question.

CARSON CITY, March 3, 1981

NEVADA COMMISSION ON JUDICIAL DISCIPLINE, c/o Mike Brown, *Secretary, Administrative Office of the Courts*, Capitol Complex, Carson City, Nevada 89710

DEAR MEMBERS OF THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE:

This is in response to your recent inquiry, concerning the extent to which the Nevada Commission on Judicial Discipline (hereinafter termed commission) may take disciplinary action against justices of the peace and municipal court judges within the Nevada court system, pursuant to its constitutional and statutory authority.

QUESTIONS PRESENTED

Three questions have been posed to this office. For the sake of clarity and ease of comprehension, each of the questions presented will be separately stated prior to each of the analyses set forth below.

QUESTION ONE

Does the commission have the constitutional authority to censure, remove, and involuntarily retire justices of the peace and judges of municipal courts in the Nevada court system, pursuant to its legislatively-mandated powers and responsibilities set forth in [NRS 1.440](#)?

ANALYSIS—QUESTION ONE

In order to analyze the constitutional authority, if any, of the commission to censure, remove, and involuntarily retire justices of the peace and municipal court judges in the Nevada court system, it is necessary to give a brief history of the constitutional amendments approved by the Nevada electorate in the 1970s as well as related statutory amendments, which have resulted in the establishment of a unified Nevada court system.

In 1972, the voters rejected a comprehensive reform of the judicial branch of government in Nevada by defeating SJR No. 23 of the 55th Session of the Nevada Legislature. SJR No. 23 would have established an entirely new “Article 6” in the Nevada Constitution, creating a judicial department which included a unified court system comprised of a supreme court, a district court, and county courts, as well as commissions for judicial selection and judicial discipline. Significantly, this proposal would have eliminated the offices of justices of the peace and municipal judges by creating county courts to perform their functions.

Thereafter, the 1973 and 1975 Nevada Legislative Sessions approved several amendments to Article 6 containing many of the provisions contained in SJR No. 23. These amendments were adopted by the Nevada electorate in the 1976 General Election. These amendments established a unified Nevada court system administratively headed by the Chief Justice of the Nevada Supreme Court. However, instead of abolishing justices of the peace or municipal courts from this unified court system, they became part of it, subject to the control of the electorate who elects justices and judges to these lower courts. Unlike the 1972 proposal, the concept of “county courts” was not included in any of the judicial reform proposals submitted to the voters in 1976. This omission has acquired some significance with respect to another reform proposal that was also approved in 1976, the creation of the Commission on Judicial Discipline, a quasi-administrative body within the judicial department, having the constitutional authority to adjudicate matters referred to it and to discipline “a justice of the supreme court or a district judge.” See: Section 21, Article 6, Nevada Constitution. The constitutional language setting forth the powers and duties of the commission makes no reference to justices of the peace or municipal judges. In contrast, the 1972 proposal rejected by the voters would have given the commission express constitutional authority over “county courts.”

In addition to the constitutional amendments approved by the voters in 1976, the Nevada Legislature approved another amendment to Article 6 of the Nevada Constitution pertaining to justices of the peace, which was adopted by the electorate in the 1978 General Election. This amendment gave complete authority to the Nevada Legislature to determine the limits of the civil and criminal jurisdiction of justice courts. No change was made in the legislature’s authority to determine the qualifications and terms of office of justices of the peace. See: Section 8, Article 6, Nevada Constitution.

Prior to the 1978 General Election, the 1977 Nevada Legislature amended [NRS 283.300](#) and [283.440](#) (providing for the removal of public officers), to exclude justices and judges of the Nevada court system from the removal proceedings set forth in these statutes. In lieu thereof, the 1977 Nevada Legislature enacted S.B. 453, Chapter 471 Statutes of Nevada 1977 (now codified in [NRS 1.440](#)) which provides in pertinent part as follows:

1. The commission on judicial discipline has exclusive jurisdiction over the censure, removal and involuntary retirement of justices of the peace and judges of municipal courts which is coextensive with its jurisdiction over justices of the supreme court and judges of the district courts and shall be exercised in the same manner and

under the same rules.

See: [NRS 1.440](#), subsection 1.

The legislative record of Chapter 471 Statutes of Nevada 1977 indicates that Judge Richard Minor, a justice of the peace and president of the Nevada Judges Association, appeared before both Judiciary Committees of the Assembly and Senate in support of this legislation. He testified before the Assembly Judiciary Committee that the bill had been prepared at the request of the Nevada Judges Association and would bring the courts of limited jurisdiction under the Code of Judicial Conduct and under the jurisdiction of the Commission on Judicial Discipline, a step in the direction of a uniform court system that the Nevada Judges Association was still working toward in 1977. See: Page 3, Assembly Judiciary Committee Minutes, 59th Legislative Session, 20 April 1977. His testimony before the Senate committee was to the same effect. See: Page 797, Senate Judiciary Committee Minutes, 59th Legislative Session, 12 April 1977. Also included in the legislative record of Chapter 471 is a memorandum dated April 12, 1977 from the Chief Justice of the Nevada Supreme Court to Governor Mike O'Callaghan, which was read into the record in support of S.B. 453. To the extent it illuminates the legislative intent behind Chapter 471, the following excerpt from Chief Justice Gunderson's memo appears relevant:

The primary purpose of S.B. 453 is to establish that justice and municipal court judges are not subject to redundant disciplinary measures, but instead are governed by the Code of Judicial Conduct prescribed by the Supreme Court, and are to be disciplined or removed from office in accordance with procedures applicable to other judges. In summary, then, it is believed that S.B. 453 represents a sound and practical response to handling the problem posed by Question 6, which imposes on this court the obligation of central control of the entire court system, considered in light of the inadequacies of Question 8.

Chief Justice Gunderson's remarks may have added significance when considered in light of remarks in opposition to S.B. 453 presented by John R. McCloskey, a member of the newly created Commission on Judicial Discipline who also wrote a letter dated April 8, 1977, to Governor O'Callaghan that was read into the legislative record. Mr. McCloskey opposed extending the authority of the commission "to meddle in the affairs of 'inferior' courts including justices of the peace and municipal judges." He believed there was already "ample provision for disciplinary action against, or removal from office of, the 58 justices of the peace and 16 municipal judges" in Nevada. The three provisions he mentioned were: "1. Court action based upon a grand jury accusation. 2. Complaint of a citizen seeking removal for malfeasance or nonfeasance. 3. Recall."

Interestingly, Mr. McCloskey did not mention in his letter whether or not in his judgment the legislature had the authority to extend the jurisdiction of the commission to justices of the peace and municipal court judges. In fact, a review of the legislative record of Chapter 471 reveals that no objection was raised as to the authority of the legislature in enacting this legislation. A reasonable conclusion that can be drawn from the legislative record is that the legislature assumed it had such authority. This is significant, because many of the state legislators serving in the 1977 Legislative Session that enacted Chapter 471, *supra*, also served in the 1973 and 1975 Legislative Sessions when the constitutional amendment creating the commission was approved.

Notwithstanding the legislature's attempt to provide a uniform system of discipline for the Nevada court system, through enactment of [NRS 1.440](#), two district judges in Nevada have concluded that [NRS 1.440](#) is unconstitutional.

In 1978, a municipal court judge successfully blocked a disciplinary hearing by the commission, concerning his ability to continue to serve on the bench, on the grounds that the commission did not have jurisdiction to discipline lower court judges under the language of

Section 21, Article 6 of the Nevada Constitution, which expressly provides that “a justice of the supreme court or a district judge” may be censured, retired, or removed by the commission.

The district judge who heard the matter concluded in pertinent part as follows:

1. That Article VI, Section 21, which creates the Commission on Judicial Discipline, specifically, unambiguously, and by affirmative words limits the grant of the Commission’s subject matter jurisdiction to justices of the supreme court and district judges and does not apply to justices of the peace or municipal judges.
2. That nothing in Article VI, Section 21, or elsewhere, permits the legislature to expand the grant of subject matter jurisdiction specified therein.
3. That [NRS 1.440](#)(1), which purports to expand the Commission’s jurisdiction granted by Article VI, Section 21, is unconstitutional, void, and of no force or effect as to plaintiff.

See: “Findings of Fact and Conclusions of Law, December 5, 1978,” The Honorable John H. Matthews v. The Nevada Commission on Judicial Discipline, Case No. 78-7046, Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

Subsequent to the Washoe County decision in late 1978, a decision was rendered on January 4, 1979 in the Third Judicial District Court in Churchill County in a matter involving a grand jury report purporting to censure the conduct of a justice of the peace in Churchill County. The district judge expunged those portions of the report that constituted a censure of the justice of the peace in question and thus concluded there had been no violation of [NRS 1.440](#), which purportedly gives exclusive jurisdiction over the censure of justices of the peace to the commission. However, the judge also went on to note in his decision that in his opinion [NRS 1.440](#) was unconstitutional because “the legislature has no authority to expand the jurisdiction of the Commission on Judicial Discipline to justices of the peace except through constitutional amendments as approved and ratified by the people.” See: In the Matter of the Churchill County Grand Jury Report, dated January 12, 1978, Case No. 12699, in the Third Judicial District Court of the State of Nevada in and for the County of Churchill.

Thus, by negative implication, two district courts in Nevada have ruled that the subject matter jurisdiction of the commission is constitutionally limited to only supreme court justices and district judges and cannot be expanded by the legislature to cover municipal judges or justices of the peace. The well-recognized rule of constitutional and statutory construction on which the decisions of these lower courts were based is: *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). Many cases decided by the Nevada Supreme Court have applied this maxim.

In *State of Nevada v. Hallock*, [14 Nev. 202](#), 33 Amer. Rep. 559 (1879) at 205-206 Nevada’s high court stated: “The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy.” See also: *Lake v. Lake*, [17 Nev. 230](#), 3 Pac. 880 (1882); *State of Arrington*, [18 Nev. 412](#), 4 Pac. 735 (1884); and *Ex Parte Arascada*, [44 Nev. 30](#), 189 Pac. 619 (1920).

Perhaps the best explanation of the rationale underlying this rule of construction is found in the dissenting opinion of Nevada Supreme Court Justice Patrick McCarran in the case of *Ormsby County v. Kearney*, [37 Nev. 314](#), 142 Pac. 803 (1914), in which Justice McCarran noted:

The constitution is the creation of the people, and the legislature is the creation of the constitution. It follows that the people, speaking through their constitution, are superior to the legislature, and that the enforcement of the constitutional limitations upon legislation is the execution of the people’s will, and not the execution of judicial edicts. Courts neither make laws nor constitutions, but should remain indifferent between them. . . . Hence, *when . . . statutes are enacted, they must by some means or another bring themselves into conformity with the provisions of the constitution, or, at least, they must*

not be in conflict with some specific constitutional inhibition. (Emphasis supplied.)

37 Nev. at 392.

Even though the above stated principles are persuasive, this office has not concluded that the maxim discussed above is dispositive of the extent to which the commission may exercise its jurisdiction over justices of the peace and municipal judges.

This office believes that, in response to Question One, a proper analysis must begin with an examination of whether or not the Nevada Constitution has granted to the legislature the power to extend the authority of the commission to take disciplinary action against justices of the peace and judges of municipal courts.

There are two provisions in the Nevada Constitution which could be viewed as empowering the legislature to provide for an expansion of the commission's authority over justices of the peace and municipal court judges:

1. Subparagraph 9(d) of Section 21 of Article 6 of the Nevada Constitution provides that the Commission may "exercise such further powers as the legislature may from time to time confer upon it.

2. Section 4 of Article 7 of the Nevada Constitution states that the Nevada Legislature may provide "by law for the removal from Office of any Civil Officer other than those in this Article previously specified, for Malfeasance, or Nonfeasance in the Performance of his duties.

An Analysis of Article 6, Section 21, Subparagraph 9(d)

A jurisdictional grant of authority to an administrative agency in Arizona similar to that noted above in subparagraph 9(d) of Section 21 of Article 6 of the Nevada Constitution has been examined by the Arizona Supreme Court. In that case, the Arizona Legislature attempted to expand the powers of the Arizona Corporation Commission to include regulation of a municipally-owned busline. The operator of a competing bus line brought an injunctive action against the City of Phoenix, Arizona to prevent the city from operating its municipal bus line without a certificate of convenience and necessity issued by the Arizona Corporation Commission. The city successfully opposed the Corporation Commission's attempt to assume jurisdiction over its bus line pursuant to a statute enacted by the legislature, because the Arizona Constitution only empowered the commission to regulate "all corporations *other than municipal* engaged in carrying persons or property for hire . . ." As noted by the Arizona Supreme Court, the language of the Arizona Constitution expressly prohibited the legislature from empowering the Arizona Corporation Commission to exercise jurisdiction over a municipal corporation, such as the City of Phoenix. However, with respect to areas not expressly prohibited in the Arizona Constitution, the Arizona Supreme Court noted as follows: "[The legislature] may enlarge or extend the powers and the duties of the [Corporation] Commission over the subject matter of which it has already been given jurisdiction, and other matters of the same class, not expressly or impliedly exempt by other provisions of the [Arizona] Constitution." (Emphasis supplied.) See: *Menderson v. City of Phoenix*, 51 Ariz. 280, 76 P.2d 321, at 323 (1938).

Thus, the *Menderson* opinion noted that a general power section, quite similar to subparagraph 9(d) of Section 21 of Article 6 of the Nevada Constitution, enabled the Arizona Legislature to extend the power, or jurisdiction, of an administrative agency over similar subject matter of the same class but not over matters expressly prohibited by the constitution.

Certainly the discipline of justices of the peace and municipal judges involves the same subject matter as that referred to in Section 21 of Article 6 of the Nevada Constitution, respecting discipline within the unified Nevada court system. In fact, taking the subject matter of Article 6 of the Nevada Constitution as a whole, an argument can be made that the Nevada Constitution has empowered the legislature to clarify the powers and duties of the commission to achieve the

overall objective of a unified court system and a uniform system of discipline within that court system. Unfortunately, justices of the peace and municipal judges are not in the same class of judicial officers expressly mentioned in Section 21 of Article 6 of the Nevada Constitution. Thus, this office is of the opinion that even though the *Menderson* decision could support an argument that the general powers clause of subparagraph 9(d) of Section 21 of Article 6 gives the legislature power to expand the commission's authority over the subject matter assigned to it, the more persuasive argument is that the language in Section 21 of Article 6 is clear and unambiguous on its face in limiting the jurisdiction of the commission conferred by that section to two classes of judicial officers—supreme court justices and district judges. Subparagraph 9(d) would thus not be available to extend the commission's jurisdiction to classes of judges not expressly referenced in Section 21 of Article 6. Therefore, if Chapter 471 Statutes of Nevada 1977 ([NRS 1.440](#)) is to be constitutionally sustained, we must look to another provision in the Nevada Constitution.

An Analysis of Article 7, Section 4

Section 4 of Article 7 of the Nevada Constitution has been interpreted by the Nevada Supreme Court as empowering the legislature to provide by statute for the removal of district, county, and township officers. See: *Robison v. District Court*, [73 Nev. 169](#), 313 P.2d 436 (1957).

The authority of the legislature to enact laws respecting the rules by which local officers may be removed from office for malfeasance and nonfeasance is well established. The case of *Gay v. District Court*, [41 Nev. 330](#), 171 Pac. 156 (1918) is particularly instructive. This case involved a statute enacted by the Nevada Legislature pursuant to the authority conferred upon it in Section 4, Article 7 of the Nevada Constitution, by which the district courts were empowered to remove certain public officers from office for malfeasance or nonfeasance in office. It was noted in the opinion that the district courts had acquired no jurisdiction to remove public officers from office under Section 6, Article 6 of the Nevada Constitution, which specified the constitutional jurisdiction of the district courts. Nevertheless, the Nevada Supreme Court upheld the statutory authority of the district court, pursuant to which a county sheriff had been ordered removed from office; and in the opinion of the high court, it was recognized that the Nevada Constitutional Convention made it plain that powers other than those expressly mentioned in Section 6, Article 6, of the Nevada Constitution could be delegated to district courts by the legislature in Nevada, pursuant to the authority contained in Section 4 of Article 7. The power given to the legislature in Section 4 of Article 7 was viewed as virtually unlimited, as noted in an opinion of the Supreme Court of Minnesota cited by the Nevada Supreme Court, which construed the authority of the Minnesota Legislature under a similar constitutional provision as follows:

The power thus conferred is plenary, and confers authority upon the legislature to vest the power of removal, and the determination of the question whether cause for removal exists, in any department of the government, or in any officer or official body, it may deem expedient.

See: *Gay v. District Court*, *supra*, at 339 (1918), quoting *State v. Peterson*, 50 Minn. 239, 52 N.W. 655.

The *Gay* decision is consistent with the general legal principle that, in the absence of a constitutional prohibition, a state legislature has power to confer upon a court of general or limited powers jurisdiction over proceedings to remove officers. This may be done under a constitutional section directing that provision shall be made for removal of officers, even where the provision defining the jurisdiction of courts does not specify removal proceedings. See: *Public Officers and Employees*, 63 Am.Jur.2d, Sec. 224 (1972).

Prior to the enactment of [NRS 1.440](#), the Nevada Legislature had provided for the removal from office of any district, county, township or municipal officers, including a justice of the peace, in [NRS 283.300](#) and [288.440](#). Thus, the legislature has long considered justices of the

peace to be included in the class of local officers subject to the statutory removal procedures enacted by the legislature pursuant to its authority in Section 4 of Article 7 of the Nevada Constitution.

With respect to municipal courts, the Nevada Supreme Court has noted that these courts exist as a coequal “branch of local government” within the judicial department of this state. See: *City of North Las Vegas v. Daines*, [92 Nev. 292, at 295](#), 550 P.2d 399 (1976). Thus, municipal judges would likewise be included in the class of local officers subject to the legislature’s aforesaid authority to provide for their removal from office for malfeasance or nonfeasance.

It therefore appears that there is indeed constitutional authority for the legislature to expand the powers of the commission to provide for the removal from office of justices of the peace and municipal judges. Furthermore, it is interesting to note that neither of the district court opinions cited above considered Section 4 of Article 7 of the Nevada Constitution in reaching their conclusions that [NRS 1.440](#) was unconstitutional. Therefore, in the opinion of this office, to the extent that [NRS 1.440](#) provides for removal proceedings against justices of the peace and municipal judges, we find that there is a constitutional basis on which those portions of [NRS 1.440](#) can be upheld.

With respect to the provision of [NRS 1.440](#) which purports to empower the commission to censure justices of the peace and municipal court judges, our office is mindful of the well-established general principle of law that a statute is presumed constitutional and that any doubts on this point will be resolved in favor of its constitutionality. See: Attorney General’s Opinion 93 (Nev.), August 21, 1972. However, as pointed out in the preceding paragraphs, our office has been unable to ascertain a constitutional provision which would specifically empower the legislature to provide for the censure of justices of the peace and municipal judges.

CONCLUSION—QUESTION ONE

In the opinion of this office, that portion of [NRS 1.440](#) which authorizes the commission to remove and involuntarily retire justices of the peace and municipal court judges is constitutional. The commission’s jurisdiction to do so is based on the legislature’s authority in Section 4 of Article 7 of the Nevada Constitution to provide for the removal from office of local civil officers for malfeasance or nonfeasance. This office finds no constitutional authority by which the legislature is empowered to authorize the commission to censure justices of the peace and municipal judges.

QUESTION TWO

Can the commission take disciplinary action, including suspension or permanent removal, against a justice of the peace or a municipal court judge who is no longer in office, whether occasioned by resignation or completion of the term of office to which such judicial officer was elected?

ANALYSIS—QUESTION TWO

This office has been unable to find any case authority in the State of Nevada, which would indicate the extent to which the commission can take disciplinary action against a justice of the peace or municipal judge who is no longer in office, whether through resignation or completion of the term of office. The principle normally applied in these circumstances is set forth in *Courts*, 20 Am.Jur.2d, Sec. 142, 148 (1965) as follows:

Ordinarily, a court that has acquired jurisdiction of a case will not be ousted by subsequent events in the course of its proceedings, even if such subsequent events are of such a character as would have prevented jurisdiction from attaching in the first instance.

See also: *Courts*, 21 CJS, Sec. 93 (1940).

As pointed out in *Silver Surprise, Inc. v. Sunshine Mining Company*, 74 Wash.2d 519, 523,

445 P.2d 334, 336-7 (1968), if the converse of the above rule were true, it would be within the power of a defendant to preserve or destroy the jurisdiction of a court at his own whim.

Thus, assuming that the commission commences disciplinary proceedings against a justice of the peace or a municipal judge prior to the resignation or completion of the term of office in question, the commission would not automatically lose jurisdiction over the matter.

The leading case on the imposition of sanctions against a judge who has resigned his office prior to the imposition of sanctions is *In Re Peoples*, 296 No. Car. 109, 250 S.E.2d 890 (N.C. 1978). In this case, the judge in question resigned after being notified by the disciplinary commission that a preliminary investigation was being undertaken and after a formal complaint had been served upon him two days before the effective date of his resignation. Subsequent to his resignation, the judge ran for another judicial office and was elected without contest, after the disciplinary commission completed a hearing and recommended that the North Carolina Supreme Court remove the judge from office and order that he be disqualified from receiving retirement pay, based on activities occurring during the term from which he resigned.

The North Carolina Supreme Court upheld the decision of the commission and imposed the sanctions recommended, overruling the judge's contention that the disciplinary proceeding had become moot as a result of his resignation. Significantly, the statute construed in *In Re Peoples*, *supra*, provided that a judge removed for other than mental or physical incapacity by the North Carolina Supreme Court, upon recommendation of the commission, could receive no retirement compensation, and was disqualified from holding further judicial office. As noted by the North Carolina Supreme Court, *if the statute limited the sanctions for willful misconduct in office to censure or removal, the resignation of the judge would have rendered the proceedings moot*. However, three remedies were available against a judge who engaged in serious misconduct justifying his removal: loss of present office, disqualification from future judicial office, and loss of retirement benefits. Only the first of these was rendered moot by the judge's resignation. See: *In Re Peoples*, *supra* at page 914.

Under Nevada law, the range of disciplinary action that can be taken against a justice of the peace or municipal judge by the commission is limited to removal from office. This result is based on the analysis of the constitutional authority on which [NRS 1.440](#) is based, as discussed in the Analysis to Question One above.

If a justice of the peace or a municipal judge resigns from office, Nevada statutes do not provide for the imposition of any sanctions against such officers other than removal from office. Unlike North Carolina, the State of Nevada has not disqualified justices of the peace or municipal judges from holding future judicial office, once disciplinary action is commenced and completed. Furthermore, Nevada statutes do not deprive these judicial officers of their service retirement benefits if removed from office by action of the commission, though a justice or judge who is retired for disability may thereafter receive only such compensation as the legislature may provide. See: Subparagraph 7, Section 21, Article 6, Nevada Constitution.

All other sanctions provided in Section 21, Article 6 of the Nevada Constitution involve the removal of a justice or judge from office either pending a disciplinary hearing or after it has been completed.

Thus, even though the commission can retain jurisdiction for the purpose of completing a disciplinary adjudication after a justice of the peace or municipal judge has resigned or vacated his or her position, the continuation of the case will depend on the extent to which the commission can take disciplinary action other than removing the subject jurist from office. Unless sanctions are provided by law in addition to removal from office with respect to disciplinary proceedings against a justice of the peace or municipal judge, no further purpose would be served by the commission in continuing to consider a case in which the subject of the proceeding has already removed himself or herself from office.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the authority of the commission to take disciplinary action against a justice of the peace or municipal judge is limited to removing these local judicial officers from office. With respect to such a justice or judge who has resigned or otherwise vacated his or her term of office after the commission has properly acquired jurisdiction of the matter, the lack of any legal authority to impose sanctions in addition to removal from office would render the proceeding moot.

QUESTION THREE

Is the justice of the peace or municipal court judge qualified to seek reelection or to serve in such judicial office for a new term, after having been suspended or removed by the commission in connection with said justice's or judge's conduct during a prior term of office?

ANALYSIS—QUESTION THREE

The Nevada Constitution clearly empowers the Nevada Legislature to establish the qualifications of justices of the peace within the Nevada court system. See: Section 8, Article 6, Nevada Constitution. In addition, the legislature *may* establish courts for municipal purposes only in incorporated towns and cities, and in connection with said municipal courts, the legislature shall provide by law for the powers, duties, and responsibilities of said courts. See: Sections 1 and 9, Article 6, Nevada Constitution. Thus, with respect to municipal courts, the existence and nature of said courts is left entirely to the discretion of the legislature. Since they are statutory creatures, the legislature has complete control over said courts. "The legislature may remove at will officers of its own creation . . ." *State ex rel. Howell v. Wildes*, [34 Nev. 94](#), 119-120, 116 Pac. 595 (1911).

The Nevada Legislature has to date not enacted legislation which would bar a justice of the peace or municipal judge from running for reelection after retirement or removal by action of the commission. The sole qualification for the office of justice of the peace is that the person must be a qualified elector. See: [NRS 4.010](#). The eligibility of persons to seek election as municipal court judges is left to the municipalities, and the statutes are silent as to whether or not a municipal court judge can be qualified to stand for reelection if retired or removed by the commission. See: [NRS 5.020](#). By way of contrast, the legislature has barred a supreme court justice and a district court judge from running for reelection after retirement or removal by the commission. See: [NRS 2.020](#) and [NRS 3.060](#).

In the absence of contrary legislative action, this office believes that under current Nevada law a municipal judge or justice of the peace having been disciplined by the commission may still run for election as a justice of the peace or a municipal court judge, if otherwise qualified, and may serve if elected. The rationale for this position is found in *In Re Greenberg*, 457 Pa. 33, 318 A.2d 740 (Pa. 1974), where a concurring opinion affirming the reinstatement of an elected judge who had been convicted of a felony stated as follows:

Equally as significant is that the people of this Commonwealth rejected the institution of an appointive selection of judges and required that judges stand for popular election. Article V, Section 13. Thus, the Constitution of this Commonwealth has vested within the people of this State the final judgment as to whom should be permitted to serve as their judges. Petitioner, having been elected by the people of the City of Philadelphia in the municipal election of 1965 to commence a 10-year term of office beginning January, 1966, must if he wishes to continue to serve in that capacity stand for retention election in the municipal elections of 1975. See Article V, Section 15. If as contended by the dissent petitioners' actions have occasioned a loss of confidence in his ability to discharge his judicial duties it will best be demonstrated at that time.

In Re Greenberg, *supra*, at page 747.

Until the Nevada Legislature chooses to further define the qualifications of justices of the peace and municipal court judges to restrict or prohibit justices or judges who have been retired or removed from office by the commission from serving in these judicial positions, this office is of the opinion that disciplinary action taken against said judicial officers by the commission would not in itself affect their qualification to run for office or to serve in these judicial offices, if they met other statutory qualifications and were reelected.

CONCLUSION—QUESTION THREE

It is the opinion of this office that a justice of the peace or a municipal court judge otherwise qualified to seek reelection may be a candidate for and serve in such judicial office for a new term, notwithstanding his or her suspension or removal from a prior term of office by the commission.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

By LARRY D. STRUVE, *Chief Deputy Attorney General*

OPINION NO. 81-5 Taxation; Threshold Allowances; Constitutional Limitations
Regarding Tax Relief—The legislature must establish a uniform and equal mode of assessment and rate of taxation based on a just valuation for the taxation of ALL property, unless exempted for purposes specified in the Nevada Constitution. A threshold allowance uniformly applied against the appraised or assessed valuation of all property could only be based on the constitutional authority to exempt property from taxation for “other charitable purposes.” Such a broad-based tax exemption, though arguably permissible, would be subject to legal challenge as an overextension of the legislative authority to except property from taxation for such a purpose. Tax relief directed primarily to residential property, in the nature of a tax rebate plan, may be permissible if based on proper criteria and founded upon adequate legislative findings.

CARSON CITY, April 16, 1981

MR. DAVID B. SMALL, *Carson City District Attorney*, 208 N. Carson Street, Carson City, Nevada 89701

DEAR MR. SMALL:

On behalf of the Nevada District Attorney’s Association, you have requested an opinion from this office regarding the constitutionality of a certain means of providing tax relief. Specifically, you inquire whether a “threshold allowance,” uniformly applied against the appraised or assessed value of all property in the state, may be enacted. Additionally, you inquire whether similar tax relief may be implemented for some distinct but limited class of property, such as owner-occupied residences. An adequate response to your inquiry requires a brief review of the constitutional and statutory provisions upon which property taxation in Nevada is premised.

OVERVIEW

Article 10, Section 1 of the Nevada Constitution provides in part:

The legislature shall provide by law for a *uniform and equal rate of assessment and*

taxation, and shall prescribe such regulations as shall secure a *just valuation* for taxation of all property, real, personal and possessory, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed. * * * (Emphasis added.)

The fundamental elements of the Nevada property tax system are derived from this constitutional provision, and the final result of that system—tax liabilities for property owners—is determined by the interaction of those elements.

In order to discharge effectively the constitutional mandate to “secure a just valuation for taxation of all property,” the Nevada Legislature has enacted a comprehensive statutory scheme for valuing property and levying ad valorem taxes. Chapters 361, 361A, and 362 of NRS. The general structure of that statutory scheme divides the taxation process into three phases. First, an appraised “full cash value” is determined for all taxable property. See: [NRS 361.227](#) and [361.025](#). Secondly, an assessment ratio is applied to the full cash value of the property to arrive at the assessed value of the property. [NRS 361.225](#) currently provides that all property is to be assessed at 35 percent of its full cash value. The final step in the process is to apply the local tax rate to the assessed value in order to determine the ultimate tax liability. [NRS 361.453](#) currently provides for a maximum tax rate of \$3.64 per \$100 of assessed valuation, subject to adjustment by the State Board of Examiners.¹ Thus, a property with a full cash value of \$65,000 would be assessed at \$22,750 and, assuming a \$3.64 tax rate, would have an ultimate tax liability of \$828.10.

Adjustments to any of the three components of the property tax system can effectuate tax relief by lowering the ultimate tax liability which attaches to property. For instance, reducing either the tax rate or the assessment ratio would reduce, by a proportionate amount, the ultimate tax liabilities of all property.

The authority of the legislature to make adjustments to the essential

¹Under the provisions of Section 38, Chapter 593, Statutes of Nevada 1979, p. 1251, the maximum ad valorem tax rate may fluctuate between a maximum of \$3.94 and a minimum of \$3.46 depending on the yield of other state taxes. The current maximum rate is \$3.74 under the 1979 provisions. Tax rates vary throughout the state, and the \$3.64 is used merely as an example for purposes of analysis.

components of the property tax system must be considered within the general parameters of the Nevada Constitution, which provides that the rate of taxation and assessment *must* be “uniform and equal” and that there shall be determined a “just valuation” for the taxation of all property. The ultimate success of any tax reform plan must be measured by the key constitutional concepts of *uniformity*, *equality*, *justness*, and *fairness*. See: *Boyne v. State, ex rel. Dickerson*, [80 Nev. 160](#), 166, 390 P.2d 225, 228 (1964).

The Nevada Supreme Court has often been called upon to interpret the constitutional language regarding taxation of property, beginning shortly after statehood. See generally: *The City of Virginia v. Chollar-Potosi Mining Company*, [2 Nev. 86](#) (1866); *State v. Eastabrook*, [3 Nev. 173](#) (1867); *State v. Kruttschnitt*, [4 Nev. 178](#) (1868); *State v. Manhattan Silver Mining Co.*, [4 Nev. 318](#) (1868). These early cases construed the meaning of uniformity and equality as used in Article 10, Section 1 of the Nevada Constitution. The best explication of these terms by the court is found in *State v. Eastabrook, supra*, as follows:

The first phrase to which our attention is called is this: “A uniform and equal rate of assessment and taxation.” We have no hesitation in saying that the Constitutional Convention, in using the language last quoted, meant to provide for at least one thing in regard to taxation: that is, that all *ad valorem* taxes should be of a uniform rate or percentage. That *one species of taxable property should not pay a higher rate of taxes than other kinds of property*. If the language we have quoted did not express this idea, then it was perfectly meaningless. The language used may mean much more than this, but it cannot mean less. (Emphasis supplied.)

Id. at 177.

The *Eastabrook* holding illustrates the two major constitutional requirements facing the legislature when attempting to adjust the statutory elements of the property tax structure: (1) the rates of assessment and taxation must be equal for all property; and (2) property may not be classified into species, without express constitutional authorization, which bear a dissimilar tax burden as a result of the application of different assessment or tax rates to different classes of property.

However, within these constitutional parameters there are alternatives for granting property tax relief. For example, Article 10 of the Nevada Constitution grants to the legislature the authority to except from taxation such real property exempted by law for “municipal, educational, literary, scientific or other charitable purposes.” Such authority has in fact been used to secure tax relief for limited classes of property owners such as widows, orphans, veterans, and the blind. See: [NRS 361.080](#), [361.090](#), 361.091, and 361.085.

Another example involves the legislature’s authority to exclude by definition certain property from the taxation scheme. Under this approach, the legislature defines what constitutes taxable property for the purposes of just taxation, rather than exempting from taxation what would *otherwise* be taxable property. For instance, in [NRS 361.030](#), the legislature has defined what is included in the term “personal property” for purposes of taxation. [NRS 361.030](#)(f) then enumerates specific categories of animals subject to taxation but also specifies that these animal categories do not mean and include “calves and lambs that have not been weaned.” Thus, unweaned calves and lambs are not *exempted* from taxation but rather are initially defined as not being taxable property. See: Attorney General’s Opinion (Nev.) 110, dated February 11, 1964.

For the purposes of this opinion, it has been assumed that the legislature’s authority to provide tax relief by excluding certain property from the definition of taxable property would be restrictively applied, in view of the constitutional mandate to provide for “*taxation of all property*.” See: Nevada Constitution, Article 10, Section 1; and [NRS 361.045](#). Thus, the definition of property like unweaned calves and lambs as nontaxable would most likely be restricted to like circumstances in which the property in question had not yet acquired a readily ascertainable economic value. Since virtually all other kinds of property do have a readily ascertainable market value, our office does not believe it is necessary to pursue this option in the following opinion.

Based on the above overview, the following portion of the opinion specifically analyzes the two questions you have referred to our office.

QUESTION ONE

May the Nevada Legislature statutorily provide a threshold allowance against the appraised or assessed value of a parcel of real property for purposes of determining ad valorem taxes, so long as the allowance is uniformly applied to all property in the state?

ANALYSIS OF QUESTION ONE

The above question involves the constitutional authority of the Nevada Legislature to provide by statute for a particular type of property tax relief, to-wit: the exclusion, exemption, or

reduction of a certain amount of real property value for taxation purposes *after* the property has been appraised by the proper authorities. For the purpose of the Analysis of Question One, it shall be assumed that the concept of a “threshold allowance” against appraised or assessed values of parcels of real property would require the legislature to segregate property valuation throughout the state into two or more layers or tiers of value comprising the total full cash value determined for all property upon which the assessment and taxation of said property is based.

The Nevada Legislature, since the beginning of statehood, has exercised a wide degree of control over each of the essential steps in the taxation process, subject to certain constitutional limitations noted above. Within these constitutional parameters, the Nevada Supreme Court has accorded the legislature considerable latitude in specifying the methods and procedures by which property is to be assessed and taxable value is to be ascertained. As stated by the court itself: “We have no doubt the legislature may direct the method of assessing property, provided the object is to attain a *just* valuation. This court could not declare any law directing the mode of assessment void unless it manifestly violated those principles of justice which are required by the tenth Article of the Constitution.” *State v. Eastabrook*, *supra*, at 179.

A. Broad-based charitable exemption applicable to all property.

The Nevada Supreme Court has been especially amenable to legislative discretion in the area of charitable exemptions, which, as noted in the overview above, is one method that has already been used by the legislature in establishing a threshold allowance expressed as an exemption in terms of a specified dollar amount against assessed property values for certain classes of persons. This particular approach has never been used so as to apply to all property in the State of Nevada but only to property owned by special classes of persons, such as widows and orphans, blind persons, veterans, and disabled veterans. Furthermore, the amount of the exemptions has been relatively limited, ranging from \$1,000 against assessed valuation for widows, orphans, and veterans to \$3,000 for blind persons to \$10,000 for veterans with a total permanent disability.

In *Hendel v. Weaver*, [77 Nev. 16](#), 359 P.2d 87 (1961), the \$1,000 veterans’ tax exemption against assessed valuation was challenged on the ground it did not promote a charitable purpose. The Nevada Supreme Court upheld its constitutionality, notwithstanding the fact that a financial benefit was conferred on wealthy persons within the class entitled to the exemption who were not in need of charity. It is obvious from the opinion that the court was influenced by the long history of the statute creating the veterans’ exemption, as well as the enactment of the widows’ and orphans’ tax exemption in the First Session of the Nevada Legislature, which likewise did not distinguish between wealthy persons entitled to the exemption and those in need of charity. The supreme court was satisfied with the “apparent determination” of the legislature that the objective of the veterans’ tax exemption statute was for a charitable purpose. Interestingly, the court cited with approval a 1929 Nevada case, which set forth a definition of charity that was exceedingly broad in scope:

Mr. Justice Gray, in *Jackson v. Phillips*, 14 Allen (Mass.) 539, defined a charity as follows:

A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.

Bruce v. Young Men’s Christian Association, [51 Nev. 372](#), 380-381, 277 Pac. 798 (1929), cited in *Hendel v. Weaver*, [77 Nev. 16](#), 22-23, 359 P.2d 87, 91 (1961).

Clearly, if the legislature concludes that it is necessary and desirable to establish a threshold allowance against assessed valuation by means of a tax exemption for all property in Nevada in

order to achieve a charitable purpose as broadly defined as above, an argument can certainly be made in support of such action. The success of such an argument will turn on the sufficiency of the legislative findings or legislative history demonstrating the public need for charitable relief in the form of such a broad based tax exemption.

It must be pointed out, however, that this argument would be weakened by the absence of any similar statute of longstanding providing similar relief to property owned by the general population, as distinguished from property owned by specific classes of persons who could be considered as legitimate subjects of charity. Furthermore, our office has found no case law in which the Nevada Supreme Court has indicated that the framers of the Nevada Constitution contemplated or intended that the legislature could utilize its authority to exempt from taxation for “other charitable purposes” a portion of assessed valuation of all property in the state. The legislature’s sparing use of this power, as evidenced by the relatively limited amounts of charitable tax exemptions allowed to date to very limited classes of persons in the general population, is a further indication that the courts may well view the legislature’s authority in this regard to be limited.

Accordingly, our office believes that the establishment of a threshold allowance by means of a charitable exemption applied against the assessed valuation of *all property* in the state would probably be ruled as an over-extension of the legislature’s authority to except property from taxation for this purpose.

B. Threshold assessments or differential assessment rates.

In addition to the tax exemption scheme discussed in the preceding section, our office reviewed tax relief schemes in other states utilizing a similar concept involving a “threshold allowance.”

As noted in the overview above, the legislature is expressly authorized by the Nevada Constitution to provide by law for a *uniform and equal rate of assessment* and taxation. Nothing in the constitutional language specifies what type of assessment method must be employed, provided the manner of assessment and taxation does not result in one species of taxable property paying a higher rate of taxes or having a greater burden of ad valorem taxation than other kinds of property. If there is nothing in the manner of assessment prescribed by the legislature which is grossly unjust or in violation of the principle of uniformity and equality prescribed in the constitution, the Nevada Supreme Court has indicated it would not interfere with the legislature’s action. See: *The City of Virginia v. Chollar-Potosi Mining Co.*, *supra*, at 92.

Indeed, the legislature has provided different methods by which various species or classes of property may be appraised in order to ascertain its full case value, upon which a uniform assessment rate can be based. Such different plans or methods of appraisal for distinct classes or species of property have been upheld by the Nevada Supreme Court. See: *Sawyer v. Dooley*, [21 Nev. 390](#) (1893).

In view of the flexibility accorded the legislature in prescribing the method or methods by which the assessed valuation is to be determined for each parcel of real property after its full cash value has been established, some consideration has been given to a legislatively created threshold assessment based on a uniform layer or tier of value up to a maximum amount, which threshold value is assessed for all property at a rate differently than the assessment rate established for any additional layer or tier of value above the threshold level. The resulting total of assessed value based on the two-tiered formula created by the legislature would thus still represent a proportion of the full case value for all property but would be computed on the basis of a uniform rate established for each layer of valuation rather than on a single assessment ratio, such as the 35 percent of full cash value now provided by statute.

As an example, if the appraised or full cash value of a parcel of property were \$65,000, a threshold allowance, such as \$50,000, would be assessed at one rate, such as 10 percent of assessed value; and any value above the threshold amount would be assessed at another rate, such as the current 35 percent. Thus, the assessed value for a parcel of property having a full cash

value of \$65,000 would be computed as follows:

10 percent of \$50,000 = \$5,000.00
35 percent of \$15,000 = \$5,250.00
Total assessed value \$10,250.00

The tax rate would be levied on the total assessed value. At a tax rate of \$3.64 per \$100 of assessed valuation, the tax with such a threshold allowance would be \$373.10 and without it \$828.10—a tax savings of approximately 55 percent.

Unfortunately, this approach to tax relief has not been upheld by the supreme courts of the states that have enacted such a tax relief scheme. In a nutshell, these courts have concluded that such an approach to tax relief would not be consistent with the principle of taxing by a uniform rule, such as found in Nevada's Constitution. The best explanation of the implications of the uniform rate rule of taxation has been set forth by the Ohio Supreme Court as follows: "Taxing by a uniform rule requires uniformity, not only in the *rate* of taxation, but also uniformity in the *mode* of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation." Exchange Bank of Columbus v. Hines, Treas., 3 Ohio St. 1, 15 (1853), cited in Kroger Co. v. Schneider, 9 Ohio St.2d 80, 223 N.E.2d 606, 609 (1967).

Idaho's Supreme Court also invalidated a scheme in that state, in which different assessment rates were established for different classes of property. The Idaho Constitution required the legislature to levy a tax by valuation, so that every person would pay a tax "in proportion to the value of his, her, or its property." Even though property could be classified for taxation in that state, the Idaho Supreme Court noted that the constitutional rule of uniform ad valorem taxation forbids legislative classifications of property for the purpose of imposing a greater burden of ad valorem taxation on one class than on another." * * * [A]ll property not exempt from taxation must be assessed at a uniform percentage of actual cash value, and a single fixed rate of taxation must apply against all taxable property." See: 1 Cooley, Taxation, §§ 298 and 299 (4th ed. 1924), cited in Idaho Telephone Company v. Baird, 91 Ida. 425, 423 P.2d 337, 341 (1967).

Though an assessment mode involving different layers or tiers of value has never been established in Nevada, this office is of the opinion that if it were enacted and challenged in the Nevada courts, it would probably be invalidated for the same reason similar schemes as noted above have been struck down. Unless Nevada's Constitution were [was] amended to provide legislative authority for both classification of property for taxation purposes and establishment of different assessment modes within each classification, this option would not appear to be a viable alternative for tax relief.

CONCLUSION TO QUESTION ONE

The Nevada Constitution requires the legislature to provide by law for a uniform and equal mode of assessment and rate of taxation. Within these parameters the legislature may exempt property from taxation by exempting a portion of property valuation for "other charitable purposes." A broad-based threshold allowance uniformly applied against the appraised or assessed valuation of all property as a charitable exemption may be arguably permissible, if based on sufficient legislative findings demonstrating the public need for charitable relief of this magnitude. However, a legal challenge to such a scheme based on the argument it would be an overextension of legislative authority to exempt property from taxation for charitable purposes should be anticipated.

Establishment of differential assessment rates for separate layers or tiers of property valuation, including a threshold amount, would probably be ruled as violative of the constitutional requirement for uniformity in the assessment and taxation of property, even if applied in the same manner to all property in Nevada. A constitutional amendment would be

required to assess property in this manner.

QUESTION TWO

May the legislature statutorily provide an allowance against property taxes due—or a rebate of taxes paid—for a limited class of property, such as owner-occupied residences?

ANALYSIS OF QUESTION TWO

Your second query concerns whether tax relief similar to that considered in Question One may permissibly be directed at only a limited class of property, such as owner-occupied residences. You also inquire whether the same effect may be achieved by providing a direct rebate for a portion of the property taxes paid by a limited class of taxpayers.

A. Exemptions for limited class of taxpayers.

As has already been noted, the constitutional mandate for “a uniform and equal rate of assessment and taxation” has been consistently interpreted as prohibiting classification of property for taxation purposes. See: *State v. Eastabrook*, [3 Nev. 173](#) (1867); *Boyne v. State ex rel. Dickerson*, [80 Nev. 160](#), 390 P.2d 225 (1964). The *Boyne* case held specifically that classification of agricultural lands for taxation purposes was unconstitutional, because the owners of agricultural property were given a distinct tax advantage over other real property owners in violation of the clear constitutional mandate that the legislature provide a uniform and equal rate of assessment and taxation. A subsequent amendment to the constitution, however, permitted such a classification to protect “greenbelt” lands.

A tax relief scheme which treats owner-occupied residences differently than other real property for taxation purposes, giving owners of such property tax advantages over other property owners, would thus appear to violate the “uniform and equal” provisions of the constitution, because it would create an unauthorized classification of property. However, it should be noted that legislation has been introduced to amend the constitution so as to allow classification of residential property for taxation, similar to the amendments proposed after the *Boyne* decision. If the constitution is ultimately amended in this fashion, tax relief directed specifically at residential property would become possible.

Aside from classifying property for different tax treatment, one alternative for providing tax relief would involve the establishment of a tax exemption patterned after exemptions provided for widows, orphans, veterans, and the blind, discussed in the Analysis of Question One. As noted, the constitutional foundation for such an exemption would be the constitutional language allowing the legislature to exempt real property from taxation for “other charitable purposes.” As the *Hendel* case, *supra*, illustrates, the Nevada Supreme Court has to date given great deference to legislatively created exemptions for charitable purposes. The fact that certain members of a class may not be in need of charity does not defeat an exemption for that class. Accordingly, given the court’s liberal interpretation of the “charitable purpose” language in the constitution, it is quite possible that a property tax exemption limited to a class of property owners, such as owner-occupied residential property owners, restricted in amount so as to benefit those in the class who are in need of charity because of the overwhelming effect of inflation on property values, may be upheld by the Nevada Supreme Court. However, in the opinion of this office, it would be essential, in order to make a successful argument, that the legislature indicate through findings or through a well-developed legislative history that a broad-based tax exemption such as described above would be necessary to extend charitable benefits to the property owners in the recipient class, many of whom could be shown to be in need of charity as defined in *Bruce v. Young Men’s Christian Association*, *supra*.

Though the arguments in favor of a charitable exemption for owner-occupied residences, restricted as indicated above, may be stronger than those for an exemption applied to all property in view of the seemingly greater need for charitable property tax relief in the owner-occupied class, this office believes there is no assurance the courts would uphold such a scheme. There will always be the risk that courts may view a broad-based exemption for a particular class of

property as a subterfuge for classifying property for the purpose of applying differential tax rates to such property. This, of course, would violate the “uniform and equal” provisions of the Nevada Constitution, because of the unequal tax burdens that would be imposed on different classes or species of property subject to taxation.

B. Tax rebates.

Your query regarding a direct rebate of taxes paid to homeowners as a method of achieving property tax relief raises questions largely unrelated to the analysis of either Question One or Question Two. The constitutionality of such a scheme will largely be determined according to how the plan is structured and how it operates. If a rebate scheme appears to be nothing more than a circumvention of the limitations on classifications of property, it may be subject to constitutional challenge; however, if such a plan is an expenditure program of the state geared to aiding a particular category of citizens, it is likely to succeed.

The fundamental premise of a property tax relief plan based upon direct rebates of taxes paid or credit for taxes due is that the legislature possesses plenary authority to enact any legislation which is not expressly prohibited by the United States Constitution or the Nevada Constitution. See: *Riter v. Douglass*, [32 Nev. 400](#) (1910). There exist no constitutional provisions that limit the legislature’s discretion to enact programs that benefit certain classes of citizens, if the laws enacted are general laws and of uniform application throughout the state.

Such an approach to tax relief has precedent within our current statutory scheme. In 1973, the legislature enacted the Senior Citizen’s Property Tax Assistance Act, [NRS 361.800](#), *et al.* Under that legislation, qualifying claimants receive a percentage credit for their property taxes due, or in the case of renters, a refund of rent deemed to constitute accrued property tax. In order to qualify for the benefits, however, a claimant must have an income less than \$11,000 and the lower the claimant’s income under that threshold, the greater the percentage benefit that is allowed.

If a similar approach were adopted to benefit residential property owners as a class, any benefits should be qualified according to other criteria separate from the property tax liability of the claimant. A property tax rebate scheme which merely provides for a percentage or fixed dollar amount of property taxes paid to be refunded to all residential property owners would invite challenge as merely an unconstitutional attempt to classify property for taxation purposes. However, the further such a plan is removed from the property tax system alone, by qualifying any benefits according to factors separate from a claimant’s tax liabilities, the less likely a successful challenge would become.

In the senior citizens example noted, benefits are qualified according to the claimant’s income. Although the appropriate factors to be considered in a similar program designed to benefit residential property owners raise fundamental questions of policy, the legislature could probably look to a number of criteria that would be appropriately considered. If the plan were qualified by these factors that are separate from the property tax liability of the claimant, a successful challenge is unlikely.

CONCLUSION TO QUESTION TWO

Without specific amendments to the Nevada Constitution, it is unlikely that separate classifications of residential property for tax purposes could be sustained. A specific exemption for a portion of the property valuation of residential property might be successfully defended, provided the legislative findings adequately demonstrate the necessity of extending charitable benefits to property owners in this class. A properly structured scheme for giving a credit or refund of a proportion of residential property taxes could also be constitutional, if the criteria for determining the recipients of tax rebates were not solely dependent on the property tax liability of such persons.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

By LARRY D. STRUVE, *Chief Deputy Attorney General*

OPINION NO. 81-6 Uniform Reciprocal Enforcement of Support Act and Visitation—The parent who has a duty of child support and is an obligor within the meaning of Chapter 130 of NRS may not lawfully decline to pay child support in a proceeding initiated pursuant to URESA when the absent parent refuses to allow visitation privileges. Failure to include the address or domicile of the dependent child in the petition for enforcement of support divests the court of jurisdiction to hear the matter in a URESA proceeding; and accordingly, an obligor may not decline to pay child support based on an allegation that the state has failed to identify the location of the child when a petition has been properly filed.

CARSON CITY, April 16, 1981

PETER L. KNIGHT, *District Attorney*, Nye County Courthouse, Post Office Box 593, Tonopah, Nevada 89049

DEAR MR. KNIGHT:

You recently requested an opinion of this office involving the extent, if any, to which a person, who has a duty to pay child support (an obligor) and who is involved in a proceeding governed by the Revised Uniform Reciprocal Enforcement of Support Act (URESAs), may decline to pay child support when the custodian of the dependent child refuses to allow visitation by the obligor. The specific questions you have asked are:

QUESTION ONE

May an obligor, as defined by Chapter 130 of NRS, lawfully decline to pay child support in a civil enforcement proceeding initiated in accordance with URESA, when the custodian of the child refuses to allow the obligor visitation privileges?

ANALYSIS

Chapter 130 of the Nevada Revised Statutes (URESAs) was enacted by the 1952 Nevada Legislature and amended in 1969 as part of a uniform reciprocal act among the several states. The legislatively declared purposes of Chapter 130 are “to improve and extend by reciprocal legislation the enforcement of duties of support.” [NRS 130.030](#). However, another significant purpose of URESA is revealed in the following excerpts of notes of the National Conference of Commissioners on Uniform State Laws, which drafted the model act upon which Chapter 130 is based:

With the increasing mobility of the American population the problem of interstate enforcement of duties of support became acute. A deserting husband was beyond the reach of process in the state where he had abandoned his family and the family had no means to follow him. Welfare departments saddled with the burden of supporting destitute families were often prevented from enforcing the duty of support in the state where the husband could be found by decisions holding that the duty existed only as to obligees within the state.

* * *

In June 1949 the Social Security Administration announced that the total bill for aid

to dependents where the father was absent and not supporting was approximately \$205,000,000 a year for the nation and the states.

Commissioner's Prefatory Note (1950) Enforcement of Support Act (1950) *Uniform Laws Annotated*, Vol. 9A, p. 751.

Over the years many thousands of cases have been brought under the Act and many millions of dollars have been recovered. As a result the duty of family support is placed where it belongs, on the shoulders of the one who, under state law, owes the duty. The state is thus relieved from keeping on its relief rolls those, often in destitute circumstances, to whom the duty is owed.

Commissioner's Prefatory Note (1968) Enforcement of Support Act (1968) *Uniform Laws Annotated*, Vol. 9A, p. 644.

Thus, the state has a primary interest in child support proceedings instituted pursuant to URESA, which provides reimbursement to its taxpayers for public assistance paid:

But the state or political subdivision thereof may also seek reimbursement for support already furnished to the family. [Section 8] will allow the states to recapture a good part of the \$200,000,000 a year now spent in supporting deserted families and is perhaps the most important provision of the act.

Commissioner's Prefatory Note (1950) Enforcement of Support Act (1950) *Uniform Laws Annotated*, Vol. 9A, p. 752.

Nowhere in Chapter 130 of NRS is the prosecuting attorney charged with the duty of enforcing or defending visitation or custody claims. Chapter 130 of NRS provides a special statutory procedure designed to provide a convenient forum for the efficient resolution of *support disputes*; and proceedings instituted pursuant to this chapter are unaffected by any interference with the rights of custody or visitation granted by a court to the person owing a duty of support. See [NRS 130.210](#). Thus, in proceedings commenced under URESA, the issue of child support is separate and distinct from the issue of visitation. In fact, the only issue in most cases is the amount of support which should be paid.

The unique purposes and procedures employed in a URESA proceeding differ significantly from non-URESAs civil cases in which the enforcement of a support decree is sought and in which the issues of custody and visitation may be raised. The non-URESAs cases generally arise when all parties, including the children, are under the court's jurisdiction and are to be distinguished from a URESA proceeding, wherein it is generally only the petitioner or the respondent who is before the court.

A leading non-URESAs case, frequently cited as authority for joining the issues of visitation and custody with the issue of support, is *State of New Jersey v. Morales*, 35 Ohio App.2d 56, 229 N.E.2d 920 (1973). The Ohio court held that the father could legally withhold support for the child and that the trial court may condition payment of support for children of separated or divorced parents upon the return of the children to the court's jurisdiction for purposes of visitation by the obligor father. In fact, the father had legal custody of the child, and he was willing and prepared to assume actual custody. The court noted that:

Where there is a judicial order relating to the custody of minor children, that order has the effect of law and is that which should determine the obligation of the respective parents to their minor children.

229 N.E.2d 920, 924. See also *Hethcox v. Hethcox*, 146 Ga.App. 430, 246 S.E.2d 444 (1978).

To like effect is the case of *Van Zee v. Van Zee*, 226 N.W.2d 865 (Minn. 1974) involving a case in which the custodial parent sought to punish the absent parent by denying visitation because the absent parent was in arrears. The Minnesota court stated: “* * * arrearages [arrearages] in child support payments alone is not sufficient grounds for denial of visitation of a natural parent.” *Id.* at 865.

However, there is no uniformity of decision in non-URESA cases where the issues of visitation and custody have been raised. Some courts have held in non-URESA cases that denial of visitation is no defense to a petition for support. For example, “The duty to support a child is a continuing obligation, unaffected by the conduct of the custodial parent.” *D.A.Z. v. M.E.T.*, 575 S.W.2d 243 (Mo. 1978). “The right of a father to visit his children on his own terms or only in the state where he resides is not a prerequisite to the enforcement of a support order * * * under the Uniform Act * * *” *Bourdon v. Bourdon*, 201 A.2d 889 (N.H. 1964). In *Cooper v. Cooper*, 59 Ill.App.3d 457, 375 N.E.2d 925 (1978), the father made repeated legitimate efforts to enforce his visitation rights before resorting to the tactic of withholding support. The Illinois statutes permitted relief if a party failed to comply with a court order. The Illinois appellate court upheld the trial court’s finding that the father was in contempt for failure to pay child support saying “* * * a mere violation of visitation terms will not excuse the father’s obligation to support his children.” *Id.*, at 931.

In proceedings commenced pursuant to URESA, courts have uniformly denied relief based on charges of denial of visitation privileges: “This duty of support is the only subject matter covered by URESA. Nothing in the act allows the adjudication of child custody or visitation privileges or other matters commonly determined in domestic relations cases.” *Pifer v. Pifer*, 31 N.C.App. 486, 299 S.E.2d 700 (1976). “Participation in any proceedings under this Act shall not confer upon any court jurisdiction of any of the parties thereto in any other proceedings.” *Commonwealth v. Posnanaky*, 201 Pa.Super. 280, 232 A.2d 73 (1967). “* * * [S]upport payments may not be used as a weapon to force a child’s visitation.” *Henshaw v. Henshaw*, 83 Mich.App. 68, 268 N.W.2d 289 (1978). And in the most recent case on these issues, California has stated: “* * * RURESA [sic] provides no forum for litigating disputes over interference with custody and visitation rights.” *Moffat v. Moffat*, 165 Cal.Rptr. 877, 612 P.2d 967 (1980).

In another context, when the state is involved as a party to the action and is seeking reimbursement of public assistance monies paid, courts have held the issues of visitation and/or custody may not be interposed as a defense to paying back support to the state. The rationale is that when welfare payments are being made to the child, the injustice to the taxpayer is greater than the injustice to the parent whose visitation or custodial rights have been denied.

In *McCoy v. McCoy*, 53 Ohio App.2d 331, 374 N.E.2d 164 (1977), the father had legal custody; but the mother took the child to another state, thus precluding the father’s custody or visitation. The mother and child became recipients of public assistance. The appellate court found that the “trial court erred as a matter of law in holding that there was no duty of support because the obligee, Linda McCoy, had removed the child from the court’s jurisdiction.” *Id.*, at 165. Thus the court in *McCoy* found that the father had a duty to reimburse the state for welfare paid on behalf of his child, notwithstanding the fact that he had legal custody. The grant of welfare constituted a change of circumstances strong enough to override a prior divorce decree.

If denial of visitation is *ever* properly raised as a defense in a support hearing, it is in the context of a divorce proceeding. Where the Nevada District Court has jurisdiction over the parties and the children, [NRS 125.140\(2\)](#) provides:

2. In actions for divorce the court may:

(a) During the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as appears in their best interest;

The collision of the issues of visitation and support were considered in the 1970 non-URESA Nevada case of *Noble v. Noble*, [86 Nev. 459](#), 470 P.2d 430. In *Noble* the trial court allowed suspension of child support payments by the father because the mother had continuously thwarted visitation. The Nevada Supreme Court remanded the matter to the district court for adequate findings on the question of what effect the suspension of child support payments would have on the child, and the court noted:

With reference to the suspension of the child support payments, we note a head-on confrontation between the court's inherent power to enforce its lawful orders, decrees and judgments [citations] and the basic principle that the best interest and welfare of a minor child is paramount. [Citations.] Both of these basic concepts have been adhered to in this and other jurisdictions for many years.

86 Nev. at 464.

If neither party receives public assistance, and both are capable of compliance with the court's order, one parent's refusal to grant visitation to the other may have some relevance to the other's withholding of support in a non-URESA case. But visitation and custody issues were never considered to be within the purview of the URESA tribunal. See Uniform Act of 1968 and [NRS 130.210](#). Furthermore, Chapter 130 of NRS does not provide the machinery to afford due process to a petitioning parent if those issues are presented. Most often the petitioner is only before the court through representation by the prosecuting attorney, and it is not reasonable to expect that the judge in a URESA proceeding can fairly consider both sides of the important issues of custody and visitation by proceeding in the absence of the petitioner parent.

Finally, if the noncustodial parent truly wishes to enforce rights of visitation, he or she can always institute a separate action to consider that specific issue. The most promising avenue available for resolution of custody and visitation disputes across state lines is the Uniform Child Custody Jurisdiction Act (UCCJA), which was enacted by the 1975 Nevada Legislature as Chapter 125A of the Nevada Revised Statutes. The UCCJA is the complement to URESA and incorporates many of the same principles of comity, due process and forum conveniens. At least one court has recommended recourse to the UCCJA rather than the interposition of issues of visitation and custody in a URESA hearing. See *County of Clearwater, Minn. v. Petrash*, 598 P.2d 138, 140 (Colo. 1979).

Furthermore, on December 20, 1980, the president signed federal legislation which requires that states give full faith and credit to sister state custody orders. 28 U.S.C. 1738A. That legislation also provides that each state may enter into an agreement with the Secretary of Health and Human Services to use the Federal Parent Locator Service to track down "Child-snatching" parents. This service is available to Nevadans through the Department of Human Resources, Welfare Division.

In sum, the essence of a URESA proceeding is speed and simplicity in obtaining the goal of child support, and there is no opportunity in a URESA proceeding for resolution of issues other than support. Speaking to this point, the Kansas court said:

The goal sought by this legislation (URESA) is to provide a prompt, expeditious way of enforcing the duty to support minor children without getting the parties involved in other complex collateral issues. The Act specifically declares that the remedies therein provided are in addition to and not in substitution for any other remedies.

Patterson v. Patterson, 2 Kan.App.2d 447, 581 P.2d 824 at 825.

In agreement is a Florida court which stated:

A reading of the whole Support Law indicates that it furnishes a uniform informal and rather speedy remedy, reciprocally, whereby the duties of support may be enforced * * * The Support Law is the duty of support. Nowhere is mentioned child custody or child visitation or any other item subject to adjudications as are commonly found in domestic relations cases.

Vecellio v. Vecellio, 313 So.2d 61 (Fla.App. 1975).

CONCLUSION TO QUESTION ONE

Based on the foregoing analysis, it is the opinion of this office that the obligor under Chapter 130 of NRS (URESA) may not lawfully decline to pay child support where the circumstances are such that the custodian of the dependent child refuses to allow the obligor visitation privileges.

QUESTION TWO

If the custodian or rendering state declines to disclose the location of the dependent child, thus effectively precluding the obligor's visitation privileges, may the obligor decline to pay child support?

ANALYSIS

When the petitioner files a complaint for enforcement of child support in URESA, the complaint *must* contain the address of the person for whom support is sought. [NRS 130.120](#). In addition, the Parent Locator Service may be utilized in some circumstances to obtain the address of the dependent child.

Two courts have considered the issue raised by the failure to include the address of the child, and both have reached the conclusion that omission of the child's address divests the court of jurisdiction to hear the matter. In *Kirby v. Kirby*, 338 Mass. 263, 155 N.E.2d 165 (1959) the supreme court held that the trial court could not assume that the parties' children were living with petitioner. The failure of the verified petition to show the residence or domicile of the children constituted a non-compliance with URESA. See also *Wohlforth v. Wohlforth*, 146 N.Y.S.2d 490, 1 A.D.2d 658, Appeal denied 149 N.Y.S.2d 267, 1 A.D.2d 804 (1955). Thus, when the custodian or rendering state purports to decline to disclose the location of the dependent child, the URESA proceeding cannot even be commenced, for the reason that the court is without jurisdiction to hear the matter.

CONCLUSION TO QUESTION TWO

The law requires that a petitioner for support enforcement must, as a jurisdictional necessity, disclose the address of the child. The petitioner's failure to do so divests the court of the authority to act. Accordingly, in a proper URESA proceeding, the location of a dependent child would always be disclosed to the obligor on the face of the petition; and thus the obligor may not decline to pay child support based on an allegation that the location of the child has not been disclosed by the state.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By SHARON L. MCDONALD, *Deputy Attorney General,*
Counsel to Welfare Division

OPINION NO. 81-7 Schools—Transportation—Pupil Fees—A board of trustees of a local school district that has decided to furnish transportation for public school students cannot charge a fee for the transportation of pupils to and from school.

CARSON CITY, June 2, 1981

TED SANDERS, *Superintendent of Public Instruction*, Capitol Complex, Carson City, Nevada
89710

DEAR MR. SANDERS:

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

QUESTION

Can the board of trustees of a school district charge a fee for the transportation of pupils to and from school?

ANALYSIS

The statutory provisions regarding transportation of pupils are found in [NRS 392.300](#), *et seq.* [NRS 392.300](#)(1), the operative transportation provision, provides as follows:

As provided in this Title, the board of trustees of any school district may, in its complete discretion, furnish transportation for all resident children of school age in the school district attending public school, including pupils assigned to special schools or programs for handicapped minors:

- (a) Who are not excused from school attendance by the provisions of this Title; and
- (b) Who reside within the school district at such a distance from the school as to make transportation necessary and desirable.

Each school district in the State of Nevada has the discretion to decide whether or not to furnish transportation for public school students in that district. When a school district exercises its discretion to provide transportation, the question becomes whether “to furnish transportation” means without charge to the pupils.

The legislature provided for transportation of children to and from school as early as 1915. Sections 4-6, 11a, Chapter 29, Statutes of Nevada 1915, pp. 28-29. The statutes allowed school district trustees to make an estimate of the amount of money needed to cover the costs of transportation, with the real property in the district to be taxed accordingly. The taxes collected were to be kept in a separate transportation fund which was to be drawn only for purposes of transportation of school children to and from school.

In 1931 the legislature permitted county and district boards of education to transport high school pupils to and from district and county high schools. Again, the costs of transportation were to come from county taxes. Section 1, Chapter 28, Section 1, Chapter 140, Statutes of Nevada 1931, pp. 32-33, 228-229.

In 1947 the legislature revised the law regarding transportation of pupils at Chapter 24, Statutes of Nevada 1947, pp. 153-157. This law gave school boards discretionary authority to furnish transportation and made it mandatory for the school boards to either furnish or discontinue such transportation if there was an election or petition of the registered electors on the subject. Sections 160-161. If transportation were furnished to pupils, the costs were to be paid through tax moneys levied and collected for school purposes. The legislature allowed the decision to furnish transportation to be discretionary with school boards or the electors; however, once it was decided to make transportation available it was provided at public expense.

The current law for transportation of pupils, [NRS 392.300](#) *et seq.*, is a result of the 1956 legislative revision of Nevada school law. [NRS 392.300](#) states, “the board of trustees of any

school district may, in its complete discretion, furnish transportation. * * *” Section 389, Chapter 32, Statutes of Nevada 1956, p. 166. The statute does not specifically state that transportation for pupils will be furnished at the public’s expense; however, the entire history of school transportation law in Nevada has provided for the costs of transportation through tax revenue. Since 1915, the legislature has reflected an intent that transportation to and from school be provided without cost to the pupil. At no place in the law has the legislature shown a deviation from that intent.

It is the general rule that the power and duty of school authorities to provide transportation to students is purely statutory and does not exist independently of a statute creating it. *Bruggeman v. Independent School Dist.*, 289 N.W. 5, 9 (Iowa 1939); *Carothers v. Board of Education*, 109 P.2d 63, 64 (Kan. 1940), *St. Louis-San Francisco Ry. Co. v. Bryan County*, 97 P.2d 77, 78 (Okla. 1939). Concomitantly, school districts may not exceed their express statutory authorization when proceeding to provide such transportation. At [NRS 392.300](#) to [392.410](#), inclusive, there is no authority to charge pupils for transportation once it is provided. Neither is there authority in Chapter 387 of NRS which governs the “Financial Support of the School System.” The only reference to transportation in Chapter 387 is found at [NRS 387.205](#)(1) which states as follows:

Moneys on deposit in the county school district fund or in a separate account, if the board of trustees of a county school district has elected to establish such an account under the provisions of [NRS 354.603](#), shall be used for:

- (a) Maintenance and operation of public schools.
- (b) Payment of premiums for Nevada industrial insurance.
- (c) Rent of schoolhouses.
- (d) Construction, furnishing or rental of teacherages, when approved by the superintendent of public instruction.
- (e) Transportation of pupils, including the purchase of new buses.
- (f) School lunch programs, if such expenditures do not curtail the established school program or make it necessary to shorten the school term, and each pupil furnished lunch whose parent or guardian is financially able to do so pays at least the actual cost of such lunch.
- (g) Membership fees, dues and contributions to the Nevada interscholastic activities association.

Although [NRS 387.205](#)(1)(f) allows schools to charge financially able parents for the actual cost of lunches, there is no provision in Chapter 387 for allowing school districts to charge for transportation. Without a specific statutory provision, therefore, it cannot be concluded school districts may charge for transportation.

Although Attorney General’s Opinion No. 197 (Nev. 1936) was written long before the transportation statutes in question were promulgated, the following language is appropriate to the present situation:

[B]oards of school trustees and boards of education under the laws of this State possess only such powers as are granted them in and by the Acts of the Legislature pertaining to the public school system of the state. Nowhere in such Acts can be found the power granted . . . to make or allow to be made, a charge for transporting persons or school children to any place whatsoever.

Attorney General’s Opinion No. 197 (Nev.) at 158.

At [NRS 392.040](#) to [392.125](#), inclusive, the Nevada Legislature has set forth the compulsory education law. “The concept of transporting pupils to and from public schools by the school district is a function of the compulsory education law, *i.e.*, if students are required to attend

school, they should be provided safe passage to and from school, when necessary, in order that every child will have an equal opportunity to obtain an education.” E. G. Gee and D. J. Sperry, *Education Law and the Public Schools: A Compendium*, T-45 (1978), see Attorney General’s Opinion No. 316, (Nev. 1957). When transportation is discretionary with the school district and the district chooses to provide transportation, then it must do so in a safe and nondiscriminatory manner. *Education Law and the Public Schools*, *supra* at T-45, 46. The discretion “must be exercised with the view of securing the greatest economy to the district consistent with the greatest benefit to the pupils.” Attorney General’s Opinion No. 214 (Nev. 1936).

In one school desegregation case, the school board sought to charge parents, who could afford it, \$100.00 per year for each child enrolled in secondary schools and to provide free transportation to those who could not. *Sando v. Alexandria City School Board*, 330 F.Supp. 773 (E.D.Va. 1971). The court found that parents who could pay should not be required to pay a disproportionate cost of desegregating the dual school system. The transportation costs should be paid out of local school funds and state and federal funds available for such purpose. The court stated as follows:

Where necessary, as here, bus transportation must be furnished on an equal basis—free to all, regardless of race, color, creed or economic status.

330 F.Supp. at 775.

For a school district to charge pupils for transportation costs would be inconsistent with the school district’s duty to provide transportation in a nondiscriminatory manner.

Further examining the transportation provisions of Chapter 392 of Nevada Revised Statutes one finds that a school board of trustees may pay for a pupil’s transportation by private or common carrier when such transportation is more “economical, expedient, and feasible” than the transportation furnished by the school district. [NRS 392.330](#). In addition, when the daily transportation of a pupil is not practical or economical the board may make payments “to assist the parents or guardian in defraying the costs of board, lodging and other subsistence expenses of the pupil in a city or town having a public school.” [NRS 392.250](#). For the school district to charge a fee to those pupils who are able to take advantage of the transportation furnished by the district would be anomalous to the legislative scheme as indicated in the above statutes.

The history of school transportation law and the legislative scheme of current school transportation law indicate an intent on the part of the legislature that the transportation of pupils to and from school be at public expense. Where a school district has exercised its discretion to furnish transportation to and from school, a school district may not charge pupils a fee for that transportation.

CONCLUSION

The board of trustees of a school district that has decided to furnish transportation for public school students cannot charge a fee for the transportation of pupils to and from school.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

By EMMAGENE SANSING, *Deputy Attorney General*

OPINION NO. 81-8 Administrative Regulations—Establishment of Minimum Procedural and Qualification Standards for Selection of Broker of Record for the State Committee

on Group Insurance—Minimum procedural and qualification standards utilized by the State Committee on Group Insurance in selecting a broker of record must be promulgated in regulation form in accordance with [NRS Chapter 233B](#) since they have a substantial impact on the rights and obligations of parties who may appear before the committee.

CARSON CITY, June 22, 1981

DR. ALFRED STOESS, *Chairman, State Committee on Group Insurance*, 405 Marsh Avenue,
Reno, Nevada 89509

DEAR DR. STOESS:

This is in response to your letter of May 12, 1981, in which you asked the following:

QUESTION

Does the establishment of a broker of record selection process, which includes minimum procedural and qualification standards, require the adoption of regulations in compliance with [NRS Chapter 233B](#)?

FACTUAL BACKGROUND

In 1980, this office received a complaint from a Las Vegas attorney on behalf of his client complaining about certain alleged anti-trust violations by your committee in its previous selections of brokers of record. After a thorough review of those complaints, this office concluded that no anti-trust or other violations of law were apparent. However, we recommended to you at that time that regulations be promulgated by your committee setting forth the criteria and procedure utilized by the committee in selecting its broker of record. That recommendation was premised on the belief that the promulgation of regulations under the Nevada Administrative Procedure Act ([NRS Chapter 233B](#)) would allow a thorough exploration of all relevant considerations since the public receives notice of the proposed regulation and interested parties are given full opportunity to present evidence and arguments either supporting or opposing the standards, requirements and procedures which are thereby established.

As of the date of this opinion, certain proposals have been formulated which would require that a broker of record:

- A. Be a duly licensed resident or non-resident insurance broker pursuant to the provisions of Chapter 683A of the Nevada Revised Statutes;
- B. Possess brokers' errors and omissions liability insurance coverage in an amount not less than \$1 million per occurrence; and
- C. Have at least two qualified and appropriately licensed account managers who have each placed and serviced at least two group health insurance policies covering 300 or more persons.

The proposals also call for all brokers applying for the broker of record designation to have a completed questionnaire returned to the chairman of the committee no later than March 1 of the even numbered year in which the selection is to take place or the date specified by the committee if the selection is to occur by virtue of the termination of the presently acting broker.

Finally, you have indicated to this office that a broker's failure to meet the qualifications or procedural deadline finally prescribed by the committee would disqualify him from selection as your broker of record.

ANALYSIS

A review of [NRS 287.043](#)(5) reveals that your committee expressly has the power to “Adopt such regulations and perform such other duties as may be necessary to carry out the provisions of [NRS 287.041](#) to [287.049](#), inclusive.” Thus, it is apparent that the committee has the power to adopt regulations in discharging its statutory responsibilities.

Generally, administrative regulations are promulgated to serve one or any combination of three basic purposes. They may establish the methods by which an agency will carry out its appointed functions (procedural regulations), interpret the statutes under which the agency operates (interpretive regulations) or establish new substantive requirements with which compliance is required (substantive or legislative regulations). See, Cooper, *State Administrative Law*, pages 173-176 (1965). The determinations that your committee seeks to make, in our view, involve both procedural matters (*i.e.*, the filing of applications by brokers seeking to be chosen as brokers of record) and substantive and legislative concerns (*i.e.*, the minimum qualifications which applicants for the broker of record designation must meet).

We turn to a review of Nevada statutes and case law to ascertain whether those determinations are required to be made in regulation form adopted pursuant to the Nevada Administrative Procedure Act.

[NRS 233B.038](#) defines “regulation” as follows:

“Regulation” means an agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes a proposed regulation and the amendment or repeal of a prior regulation, but does not include:

1. A statement concerning only the internal management of an agency and not affecting private rights or procedures available to the public;
2. A declaratory ruling;
3. An intraagency memorandum;
4. An agency decision or finding in a contested case; or
5. A regulation concerning the use of public roads or facilities which is indicated to the public by means of signs and signals.

Our research indicates that no Nevada case precedent has either analyzed the language of [NRS 233B.038](#) or explained the nature of the distinction between a regulation adopted in accordance with [NRS Chapter 233B](#) and an informal guideline promulgated without compliance with those statutory provisions. While the Nevada Supreme Court did assume *arguendo* in *Harrison v. Department of Highways*, [87 Nev. 183](#), 484 P.2d 716 (1971) that a Highway Department Policy and Procedures Memorandum, which described in detail certain procedures to be followed in determining the location of highways was a regulation because it described “the organization, procedure or practice requirements of the Department,” we view that case as merely an indication of how Nevada courts might interpret [NRS 233B.038](#) if that statute’s interpretation was ever presented for consideration.

While the distinction between a “guideline” or a “regulation” is certainly far from clear, some courts have attempted to explain what causes a proposal to take on the characteristics of one of the two alternatives.

Thus, the label placed by the agency on the exercise of its administrative power is not determinative. It is what the agency does in fact that renders the most appropriate clue as to a policy’s classification: *Lewis-Mota v. Secretary of Labor, supra*; and if a rule has a substantial impact on the rights and obligations of parties who may appear before the agency in the future, it is a substantive or legislative rule requiring compliance with the notice and hearing provisions of the UAPA. (Emphasis added.)

Cheshire Convalescent Center v. Com'n. on Hospital, 386 A.2d 264, 270-271 (Conn. 1977).

In the *Cheshire* case, the court reviewed the action of the Connecticut Commission on Hospitals and Health Care. That body had established, and consistently applied, what it denominated a "guideline" stating that skilled nursing home beds should not exceed 70 per 1000 population age 65 and over. The commission applied that "guideline" to the application of Cheshire Convalescent Center for additional nursing home beds in the community, and, upon a finding that the new beds would exceed the level suggested as acceptable in the "guideline," the commission rejected the application. The Connecticut Supreme Court in reviewing the commission's application of the "guideline" stated that:

The evidence clearly indicated that the commission's nursing home bed allocation formula was not only intended as a regulation but was indeed applied as a regulation despite commission characterization of it as a "criterion" and a "guideline." It is obviously an agency statement of general applicability that implements, interprets or prescribes law or policy. It is equally clear that, because the commission did not even make an attempt to comply with the UAPA rulemaking provisions, the regulation could not have been lawfully adopted in accordance with the provisions of § 4-168(a), and accordingly, is invalid as provided by § 4-168(c). Not only is the 70 beds to 1000 population policy null and void but any action taken in reliance upon it is also null and void.

Cheshire Convalescent Ctr. v. Com'n. on Hospitals, 386 A.2d 264, 270 (Conn. 1977).

The conclusion reached by the Connecticut Court has also been accepted in other jurisdictions in other cases where minimum standards have been established or changed by administrative agencies without compliance with the applicable administrative procedures act. See, *State Dept. of Admin., etc. v. Harvey*, 356 So.2d 323 (Fla.App. 1977) (Minimum training and experience standards for state employment must be in regulation form.); *Ortiz v. Adult & Family Services Division*, 609 P.2d 1309 (Or.App. 1980) (Definition of "good cause" to be effective in terminating Aid to Dependent Children—Unemployment benefits must be in regulation form rather than in office manual.); and *Aiken v. Obledo*, 442 F.Supp. 628 (E.D. Calif. 1977) (Requirements of "collateral contact" in connection with food stamp certification pending verification and limitation of frequency of such certification to once every six months must be in regulation form.).

Further, the committee's broad discretion to perform duties necessary to carry out its responsibilities under [NRS 287.041](#) to [287.049](#), inclusive, is being implemented by the adoption of minimum criteria which any broker of record applicant must meet. In a like situation, the Director of Industrial Relations in the State of California was allowed broad latitude in determining what conditions would suffice to allow an employer to self-insure his workmen's compensation obligations. There, the director required the completion of a certain form prior to the granting of the authority to self-insure. The form contained an agreement and undertaking without which the director would not approve an employer's application to self-insure. In contemplating the adoption of the form, the director sought the California Attorney General's opinion as to whether the form was in fact a regulation. In response to that inquiry and in construing a statute defining "regulation" in language more limited than that of [NRS 233B.038](#), the California Attorney General stated:

However, if an administrative agency adopts a particular form and intends that in every situation that arises the form is to be employed then we believe that the form is a standard of general application which implements the law to be administered by the agency and is therefore a regulation.

25 Ops. Att’y Gen. 241 (1955).

In our view, the minimum standards contained in the California Director of Industrial Relations’ form are analogous to the minimum qualifications that your committee seeks to require of applicants for the broker of record designation. In either case, the failure to meet the minimum criteria will result in the rejection of the application for the desired certificate or appointment.

The language of the United States Court of Appeals for the District of Columbia which discusses the Federal Administrative Procedure Act is also instructive:

The fact that even this case, which at first blush seems to relate purely to a matter of mechanics, is identified as one that is not free from difficulty, and calls for judgment, leads us to advert to the observation of Congress: “None of these exceptions * * * is to be taken as encouraging agencies not to adopt voluntary public rule making procedures where useful to the agency or beneficial to the public.” Our own court, not bound by APA requirements, has adopted notice and comment practice even for its own procedural rules. This course was recommended by a reflective commission composed of members appointed by the President, the Chief Justice, and Congressional leaders. There is increasing recognition that opportunity for outside comment does enhance perspective, and has benefits that typically outweigh modest impediments to administration. An agency would acquire the additional advantage of avoiding both litigation and the risk of upset by a court taking a different view of the requirement for notice and comment.

Guardian Federal S & L v. Federal S & L Ins. Corp., 589 F.2d 658, 668-669 (D.C. Cir. 1978).

CONCLUSION

Based on the discussion set forth above, this office is of the opinion that your committee must adopt regulations under the Nevada Administrative Procedure Act to implement mandatory procedures and minimum qualifications pertaining to its selection of a broker of record, since those requirements will have a substantial impact on the rights and obligations of parties who may appear before the committee in the future.

Very truly yours,

RICHARD H. BRYAN, *Attorney General*

By WAYNE D. WILSON, *Deputy Attorney General*

**OPINION NO. 81-9 State Employment, Payment of Wages Upon Termination,
Applicability of Chapter 608 of NRS—The provisions of [NRS 608.020](#), [608.030](#), [608.040](#),
and [608.050](#) do not apply to the State of Nevada when the State is acting as an
employer.**

CARSON CITY, September 24, 1981

MR. JAMES WITTENBERG, *Administrator, Personnel Division*, Capitol Complex, Carson City,
Nevada 89710

DEAR MR. WITTENBERG:

You have asked this office to answer a question pertaining to Chapter 608 of NRS. Specifically, your inquiry is as follows:

QUESTION

Do the provisions of [NRS 608.020](#), [608.030](#), 608.040 and 608.050 apply to the State of Nevada when the state is acting as an employer?

ANALYSIS

A. Background.

The provisions referred to in your question are as follows:

1. [NRS 608.020](#):

Whenever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately.

2. [NRS 608.030](#):

Whenever an employee resigns or quits his employment, the wages and compensation earned and unpaid at the time of such resignation or quitting shall be paid within 24 hours after a demand therefor.

3. [NRS 608.040](#):

1. Should an employer fail to pay within 3 days after the same shall become due and payable under the provisions of this chapter any wages or compensation, without deduction, of any employee who is discharged from or who resigns or quits his employment, then, as a penalty for such nonpayment of such wages or compensation, the same shall continue from the date of the cessation of employment at the same rate until paid; but such wages or compensation shall not continue for more than 30 days.

2. Any employee who secretes or absents himself to avoid payment of such wages or compensation, or refuses to accept the same when fully tendered to him, shall not be entitled to the payment thereof for such time as he so secretes or absents himself to avoid such payment.

4. [NRS 608.050](#):

1. Whenever an employer of labor shall discharge or lay off his or its employees without first paying them the amount of any wages or salary then due them, in cash and lawful money of the United States, or its equivalent, or shall fail, or refuse on demand, to pay them in like money, or its equivalent, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, whether employed by the hour, day, week or month, each of his or its employees may charge and collect wages in the sum agreed upon in the contract of employment for each day his employer is in default, until he is paid in full, without rendering any service therefor; but he shall cease to draw such wages or salary 30 days after such default.

If the State of Nevada is deemed to be an “employer” within the meaning of Chapter 608 of NRS, the answer to your question would be easily determined. In this regard, the Attorney General’s Office opined on November 2, 1967, that some parts of Chapter 608 are limited to private employment while others are not and the opinion concluded that [NRS 608.110](#) was applicable to public as well as private employees. See: Attorney General’s Opinion (Nev.) No.

455, November 2, 1967. At the time this 1967 Attorney General's Opinion was rendered, there was no definition of "employer" in Chapter 608. The 1975 Nevada Legislature added such a definition, which is currently included in the Nevada Revised Statutes and states as follows:

2. "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative or other person having control or custody of any employment, place of employment or any employee.

([NRS 608.010](#)(2), Chapter 741, Statutes of Nevada 1975.)

As is evident from this definition, there is no limiting language excluding the State of Nevada from being an "employer" for the purposes of Chapter 608 of NRS. However, based on the analysis below, we have reached the conclusion that Chapter 608 of NRS in its entirety is not applicable to the State of Nevada, because this chapter was intended to control private employment only. Accordingly, to the extent Attorney General's Opinion (Nev.) 455, *supra*, is inconsistent with this conclusion, it is overruled, particularly as to its conclusion that portions of Chapter 608 of NRS are controlling on the State of Nevada as an employer of state employees.

B. Scope of Chapter 608 of NRS.

The definition of "employer" in [NRS 608.010](#)(2) could conceivably include the state as an employer within the scope of Chapter 608. However, when the provisions of this chapter are read in context, it is clear that this was not intended. [NRS 608.020](#), [608.030](#), [608.040](#), and [608.050](#) had their origins in Section 2 of Chapter 71, Statutes of Nevada 1919, which was entitled, "An Act regulating the payment of wages or compensation in private employments. * * *" "In determining what the legislature intended, the title of the statute may be considered in construing the statute. *Torreyson v. Board of Examiners*, [7 Nev. 19](#) (1871)." *A Minor v. Clark County Juvenile Ct. Servs.*, [87 Nev. 544](#), 548, 490 P.2d 1248, 1250 (1971). The Nevada Supreme Court has announced this rule of construction because "* * * the members of the legislature must necessarily largely depend for their knowledge of the purposes of the proposed legislation upon the title under which they are presented. [Citations omitted.] Another important test is that the provisions of the act must correspond with the subject expressed in the title." *State v. Payne*, [53 Nev. 193](#), 197, 295 P. 770, 771 (1931). This test is also consistent with the requirements of Article 4, Section 17 of the Nevada Constitution.¹

Thus the above noted sections should be construed as only applying to private employment. See also *Wichita Public Schools Emp. U., Local No. 513 v. Smith*, 397 P.2d 357, 360 (Kan. 1964); "* * * statutes pertaining to employer and employee relations must be construed to apply only to private industry, at least until such time as the legislature shows a definite intent to include [the state]."

It should also be pointed out that our office has been informed by the State Labor Commissioner that his office has never construed Chapter 608 of NRS to be applicable to the State of Nevada in its capacity as an employer. Furthermore, Chapter 741, Statutes of Nevada 1975, which added the definition of "employer" found at [NRS 608.010](#)(2), *supra*, was entitled, like Chapter 71, Statutes of Nevada 1919, "AN ACT *relating to employees in private employment*. * * * (Emphasis added.)"

In Attorney General's Opinion (Nev.) No. 455 (November 2, 1967), there is no analysis set forth demonstrating the basis on which it was concluded that some parts of Chapter 608, such as [NRS 608.110](#), were applicable to both public and private employment and other parts were only applicable to private employment. Thus, based on the foregoing analysis, we must, in effect, overrule Attorney General's Opinion (Nev.) No. 455, *supra*, insofar as that opinion concluded that the state was an "employer" as that word is used in Chapter 608 of NRS.

CONCLUSION

The provisions of [NRS 608.020](#), [608.030](#), [608.040](#), and [608.050](#) *do not apply* to the State of

Nevada when the state is acting as an employer. Attorney General's Opinion (Nev.) No. 455, November 2, 1967, to the extent it is inconsistent with this opinion is hereby overruled.

Very truly yours,

RICHARD H. BRYAN, *Attorney General*

By ROBERT H. ULRICH, *Deputy Attorney General*

¹Article 4, Section 17, in pertinent part, provides:

Each law enacted by the Legislature shall embrace but one subject, and matter, properly connected therewith, which subject shall be briefly expressed in the title; * * *

OPINION NO. 81-10 Justices of the Peace; Private Law Practice—Justices of the peace in a township over 60,000 population may have a restricted private law practice that does not involve any appearances as an attorney of record in any court and whose judicial conduct conforms to the canons of the Nevada Code of Judicial Conduct.

CARSON CITY, October 23, 1981

NEVADA COMMISSION ON JUDICIAL DISCIPLINE, P. O. Box 48, Carson City, Nevada 89702

Attention: ANNE M. PEIRCE, *Secretary*

Re: Your file D-59-80-2; Right of justices of the peace in a township over 60,000 population to practice law

DEAR NEVADA JUDICIAL DISCIPLINE COMMISSION:

This is in response to your request of September 28, 1981, in which you have asked our office to render an opinion on the following matter:

QUESTION

Does a Justice of the Peace in a county serving a township over 60,000 in population have the right to practice law at all?

ANALYSIS

I. General Background.

In 1979, the Nevada Legislature considered whether justices of the peace in townships having a population of more than 60,000 should be permitted to practice law. Chapter 600, Statutes of Nevada 1979, which has now been codified as [NRS 4.215](#) states as follows:

A justice of the peace in a township having a population of more than 60,000, as determined by the last preceding national census of the Bureau of the Census of the

United States Department of Commerce, may not act as attorney or counsel in any court except in an action or proceeding to which he is a party on the record.

Section 3 of Chapter 600, *supra*, provided that the restriction on the right to practice law noted above was not applicable to any justice of the peace during a term which was current on July 1, 1979. However, for the purposes of this opinion, it shall be assumed that any justice of the peace now in office in a township having a population of more than 60,000 would be subject to the requirements of [NRS 4.215](#).

Chapter 600 also amended [NRS 3.120](#) in 1979, which had regulated the right of district judges to practice law. The amendment appears in Section 1 of Chapter 600 as follows: “3.120. A district judge [shall not act as attorney or counsel in any court except in an action or proceeding to which he is a party on the record.] *may not engage in the private practice of law.*” Note: material within brackets was deleted by the amendment and new material is italicized. Clearly, the standard established for district judges respecting private law practice was different than that established for justices of the peace in a township having a population of more than 60,000. District judges are now prohibited outright from having a private law practice, whereas justices of the peace in a township having a population of more than 60,000 have had their right to practice law restricted, in that they cannot act as an attorney or counsel in any court. In cases where justices are parties and are representing themselves in court, the applicable statute expressly allows them to do so. In situations where they are performing legal services for others out of court, the statute is silent.

The legislative history of Chapter 600, Statutes of Nevada 1979, indicates that one of the purposes of this legislation was to induce justices of the peace in townships having a population of more than 60,000 to serve on a full-time basis. In order to accomplish this objective, the legislators and witnesses supporting this legislation noted the importance of salary adjustments to enable full-time justices of the peace to earn a livable wage. However, there is no indication in the legislative history that the enactment of Chapter 600, Statutes of Nevada 1979, was made contingent on salary adjustments for these justices of the peace, even though our office has been informed that virtually all of the justices of the peace in townships having a population of more than 60,000 are now being compensated on the basis that they are serving as full-time judges.

There are also some comments in the minutes of the State Senate Judiciary Committee and Assembly Judiciary Committee to the effect that the anticipated purpose of Chapter 600 was the exclusion of private law practice with respect to justices of the peace in townships of over 60,000 persons. See: Minutes of Senate Judiciary Committee, March 26, 1979, p. 6; Minutes of Assembly Judiciary Committee, April 20, 1979, p. 1. However, the language actually contained in the statute does not expressly prohibit all private law practice.

In addition to the statutory provisions discussed above, several canons in the Nevada Code of Judicial Conduct appear applicable in analyzing the question at issue. Among those of particular interest are the following:

1. *Canon 3:*

A judge should perform the duties of his office impartially and diligently. The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

- A. * * * [not applicable.]
- B. * * * [not applicable.]
- C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

- (a) He has a personal bias or prejudice concerning a party, or personal

knowledge of disputed evidentiary facts concerning the proceeding;

(b) He has served as lawyer for any of the parties or has been a material witness in the particular action or proceeding before the court; or a lawyer with whom he previously practiced law was during such association a material witness concerning the matter;

(c) A lawyer with whom he previously practiced law served during such association as a lawyer in the particular action or proceeding before the court;

(d) * * * [not applicable.]

(e) He knows that he or his spouse, or a person within the third degree of relationship to either of them:

(i) * * * [not applicable.]

(ii) Is acting as a lawyer in the proceeding;

(iii) * * * [not applicable.]

(iv) * * * [not applicable.]

* * *

2. Canon 5:

A judge should regulate his extrajudicial activities to minimize the risk of conflict with his judicial duties.

A. * * * [not applicable.]

B. * * * [not applicable.]

C. Financial activities.

(1) * * * [not applicable.]

(2) A judge should not involve himself in frequent transactions with lawyers or persons likely to come before the court on which he serves.

* * *

D. * * * [not applicable.]

E. * * * [not applicable.]

F. Practice of law.

A judge should not practice law except as permitted by law.

The above requirements in the Nevada Code of Judicial Conduct are applicable to anyone who is an officer of a judicial system performing judicial functions except part-time judges, judges pro tempore and retired judges. Since our office has been advised that justices of the peace in townships of 60,000 population or more are serving on a full-time basis, it will be assumed for the purposes of this opinion that the aforementioned canons would be applicable to such justices.

II. Legal analysis.

The statutory limitation on private law practice for justices of the peace in townships of a population of over 60,000 appears consistent with rules established in other states, in which the right of a judge of a lower court to practice law is merely restricted and not absolutely prohibited. See generally: 46 Am.Jur.2d "Judges," Section 53; 89 A.L.R.2d 886, *et seq.*

In the absence of an explicit statute regulating the right of a judge to practice law, the general rule appears to have been stated in the Illinois case of *Bassi v. Langloss*, 22 Ill.2d 190, 174 N.E.2d 682, 89 A.L.R.2d 881, (1961), in which the Illinois Supreme Court stated as follows:

We are of the opinion that the practice of law by an attorney during his tenure as county judge, in or out of court, directly or indirectly, is incompatible with his judicial responsibilities and duties and contrary to public policy.

See: 174 N.E.2d at 684, 89 A.L.R.2d at 885. The Illinois Supreme Court went on to limit the

effect of its holding, so that it only applied to judges assuming office at a future date. This gave the Illinois Legislature an opportunity to adjust the salaries of those county judges who were compensated at such a low rate that it would not be possible for them to properly maintain themselves and their families if they were not allowed private law practice.

Our office is of the opinion that this general rule would not be applied to justices of the peace in Nevada in townships having a population of more than 60,000, because the Nevada Legislature has expressly addressed this issue. Their right to practice law has been restricted but not absolutely prohibited. However, our office is also of the opinion that any such justice of the peace who engages in a limited practice of law that does not involve his appearance as attorney or counsel in any court would have to comply with all applicable standards set forth in the Nevada Code of Judicial Conduct, including the canons set forth above.

The general test applied in determining the propriety and permissibility of a judge allowed to engage in a restricted practice of law has been summarized in an annotation contained in 89 A.L.R.2d 886, 887, Section 2, as follows:

The decision as to whether the judge of a particular court falls within the terms of a constitutional or statutory provision preventing judges from practicing law depends not only on the language of the prohibition itself, but also upon the jurisdiction of the court over which the judge presides, the amount of compensation paid to the judge, the extent to which public confidence in the integrity of the judiciary will be affected by his practice of law, and the extent to which engaging in the practice will interfere with the duty of performing judicial functions.

As noted above, a Nevada statute, [NRS 4.215](#), sets forth the language by which justices of the peace in townships having a population of 60,000 or more are limited in the practice of law. Unlike the language used in [NRS 3.120](#) respecting district judges, justices of the peace are greatly restricted but not absolutely prohibited from engaging in a law practice, provided they do not appear as an attorney representing a client in any court.

However, since these justices of the peace are being compensated on the basis that they are full-time judges, any part-time private law practice out of court must not interfere in any way with the judge's performance of his judicial duties, in accordance with the canons of the Nevada Code of Judicial Conduct applicable to full-time judges, including those set forth above. Such compliance is necessary to assure that public confidence in the integrity of the judiciary would not be affected by the restricted practice of law permitted certain justices of the peace in the State of Nevada.

CONCLUSION

A justice of the peace in a township over 60,000 in population has a limited right to practice law in conformance with [NRS 4.215](#) (not involving an appearance in any court except when such justices are parties to an action and representing themselves), provided his or her judicial conduct is in compliance with the applicable canons contained in the Nevada Code of Judicial Conduct.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

By LARRY D. STRUVE, *Chief Deputy Attorney General*

OPINION NO. 81-11 Gaming: Law Enforcement Activities of the Nevada Gaming Control

Board—The Nevada State Gaming Control Board and its agents engage in certain law enforcement activities for purposes of 5 U.S.C. 552a(b)(7), the law enforcement exception to the Privacy Act of 1974, 5 U.S.C. 552a. That law enforcement activity is authorized by law, and the Nevada State Gaming Control Board is an instrumentality of the State of Nevada, a governmental jurisdiction within or under the control of the United States.

CARSON CITY, November 19, 1981

MR. RICHARD BUNKER, *Chairman, Nevada State Gaming Control Board*, 1150 E. William Street, Carson City, Nevada 89710

DEAR MR. BUNKER:

You have asked this office for an opinion of whether the State Gaming Control Board and its agents engage in “law enforcement activity” for purposes of 5 U.S.C. 552a(b)(7), the law enforcement exception to the Privacy Act of 1974, 5 U.S.C. 552a. Before addressing that question, the following introductory comments are appropriate.

INTRODUCTORY COMMENTS

The Privacy Act is designed to strengthen the individual’s control over information gathered and disseminated by the federal government concerning him. It authorizes the individual to obtain access to information which is contained in government files concerning himself or herself and to restrict the disclosure by the government of that information to others without his or her consent. P.L. 93-579, Section 2(b).

The general rule governing disclosure under the Privacy Act provides that disclosure of information held by a federal agency shall not be made without a request by or the written consent of the individual who is the subject of the information sought. 5 U.S.C. 552a(b). However, certain exceptions to that general rule are provided. 5 U.S.C. 552a(b)(1) through (11). Among those exceptions is the so-called “(b)(7)” or “law enforcement” exception.

Prior to analyzing the language of that exception, it is important to note that none of the exceptions, including the law enforcement exception, is operational or relevant where the individual to whom the record pertains properly consents to the disclosure or requests the information. 5 U.S.C. 552a(b). Therefore, for purposes of this opinion, consent is presumed to be absent or ineffective.

The “law enforcement exception” to the Privacy Act appears at 5 U.S.C. 552a(b)(7):

(b) No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, *unless disclosure of the record would be*

* * *

*(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought; * * * (Emphasis added.)*

The language of that exception therefore permits disclosure without the individual’s consent in the following circumstances: (1) where disclosure is to another agency or instrumentality of any governmental jurisdiction within or under the control of the United States, (2) for a civil or

criminal law enforcement activity, (3) if the activity is authorized by law, and (4) if the head of the agency or instrumentality has made a written request to the agency which maintains the record, (5) specifying the particular portion desired and the law enforcement activity for which the record is sought.

The legal questions presented by the language of the exception, and which will be addressed by this opinion, are:

1. Whether the State Gaming Control Board is “another agency or instrumentality of any governmental jurisdiction within or under the control of the United States;”
2. Whether a request by the State Gaming Control Board for disclosure of information is “for civil or criminal law enforcement activity;” and
3. Whether that activity is “authorized by law.”

The remaining conditions of the exception (whether the “head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought”) present questions of fact which can only be determined by the unique circumstances surrounding each request for disclosure. Because they are not questions of law, those issues cannot be addressed by this opinion. See [NRS 228.150](#)(1).

QUESTION ONE

Whether the State Gaming Control Board is another agency or instrumentality of any governmental jurisdiction within or under the control of the United States.

ANALYSIS

The Privacy Act, like the Freedom of Information Act, is “directly applicable only to federal agencies.” THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *PRIVACY: PERSONAL DATA AND THE LAW* 52 (1976). The definition of “agency” contained in the Privacy Act is that definition provided by the Freedom of Information Act. See 5 U.S.C. 552a(a)(1); 5 U.S.C. 552(e). In his treatise of those acts, James T. O’Reilly notes that the “agency” definition does not apply to state or local agencies unless a federal agency has contracted with the state or local agency “for the retention of ‘a system of records to accomplish an agency function * * *.’” II O’REILLY, *FEDERAL INFORMATION DISCLOSURE* 20-15 (1981); See also 5 U.S.C. 552A(m). Therefore, absent such a contract, the Nevada Gaming Control Board is not “another agency” for purposes of the law enforcement exception, 5 U.S.C. 552a(b)(7).

However, the State Gaming Control Board is within the exception as “an instrumentality of any government jurisdiction.” The board is created by, and exists under, the laws of the State of Nevada. See [NRS 463.030](#), *et seq.* As such, it is clearly “an instrumentality” of the State of Nevada, which is, in turn, a “governmental jurisdiction within or under the control of the United States.”

That analysis of the language of the exception is amplified by Mr. O’Reilly in his discussion of “Exceptions to the Consent Requirement [of the Privacy Act]:”

Exception (b)(7) permits an unconsented disclosure where another agency *or a* federal, *state, or local* law enforcement authority has requested disclosure.

* * *

For example, an alleged bank robber’s file from the Federal Bureau of Prisons could be reviewed by police for the City of Chicago, upon a written request by the Chicago Chief of Police for information about a past prison term, which states the investigation status of the file subject. (Emphasis added.)

O’REILLY, *supra*, at 21-13, 21-14.

Like the City of Chicago, the State of Nevada is within the language of the exception as “any governmental jurisdiction.” And, as more fully discussed in Question Two below, the Nevada Gaming Control Board is analogous to the Chicago Police Department for the reason that it too engages in law enforcement activities and is “an instrumentality” of “any governmental jurisdiction within or under the control of the United States.”¹

CONCLUSION AS TO QUESTION ONE

It is the opinion of this office that the State Gaming Control Board is an instrumentality of a governmental jurisdiction within or under the control of the United States.

QUESTION TWO

Whether a request by the State Gaming Control Board for disclosure of information is for a civil or criminal law enforcement activity.

ANALYSIS

The State Gaming Control Board (and the Nevada Gaming Commission) are created by the Nevada Legislature to administer the gaming laws “for the protection of the public and in the public interest in accordance with the policy of [the] state.” [NRS 463.140](#)(1). The state’s policy is set forth at [NRS 463.130](#), and provides in pertinent part that:

(b) The continued growth and success of the gaming industry is dependent upon public confidence and trust that licensed gaming is conducted honestly and competitively *and that the gaming industry is free from criminal and corruptive elements.* (Emphasis added.)

That policy is implemented in what may be characterized as the preapproval and post-approval phases of gaming control. As demonstrated below, requests for disclosure made at either phase include activities which are traditionally characterized as, and associated with, law enforcement.

Before proceeding with that discussion, it is important to note that the State Gaming Control Board (and the Nevada Gaming Commission) are further empowered under the state’s gaming statutes to:

* * * initiate proceedings or actions appropriate to enforce the provisions of [[NRS Chapter 463](#)], and may request that a district attorney or recommend that the attorney general prosecute any public offense committed in violation of any provision of [the gaming statutes of Nevada].

[NRS 463.141](#), as amended by Section 2, Chapter 292, Statutes of Nevada 1981.

That power to initiate prosecution is the traditional power granted to policemen, sheriffs, and other law enforcement authorities who discover unlawful acts.

¹Nothing herein is intended to imply that an instrumentality of the government of the State of Nevada, such as the Nevada Gaming Control Board, is a direct part of the federal government of the United States. Rather, the phrase, “within or under the control of the United States” refers to the functioning of government under the authority of state or federal constitutions which comprise the system of government established in the United States.

A. *Requests for Disclosure at Pre-Approval Phase.*

The Nevada Revised Statutes governing gaming provide that:

1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine or any horserace book or sports pool;

(b) To provide or maintain any information service the primary purpose of which is to aid the placing or making of wagers on events of any kind; or

(c) To receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running or carrying on any game, slot machine, horserace book or sports pool,

without having first procured, and thereafter maintain in effect, all federal, state, county and municipal gaming licenses as required by statute, regulation or ordinance or by the governing board of any unincorporated city or town.

[NRS 463.160](#)(1). *See also* [NRS 463.489](#), *et seq.*, regarding licensing of corporations and partnerships and related requirements concerning findings of suitability as prerequisites to lawful gaming operations.

A willful violation of [NRS 463.160](#)(1) is a felony, punishable by imprisonment for not less than one year nor more than 20 years or by a fine of not more than \$50,000.00, or by both fine and imprisonment. [NRS 463.360](#)(3).

Persons seeking a gaming license or finding of suitability must make application to the State Gaming Control Board, which must: (1) conduct an investigation into the qualifications of the applicant, and (2) make a formal recommendation, based upon the results of that investigation, to the Nevada Gaming Commission concerning the qualifications of the applicant. *See* Section 8, Chapter 528, Statutes of Nevada 1981. If the board recommends denial of the issuance of a license or finding of suitability, that recommendation must set forth, in writing, the factual basis supporting the recommendation. [NRS 463.210](#)(2).

Section 8, Chapter 528, Statutes of Nevada 1981 provides:

1. The board *shall investigate the qualifications of each applicant* under this chapter before any license is issued or any registration, finding of suitability or approval of acts or transactions for which commission approval is required or permission is granted, and shall continue to observe the conduct of all licensees and other persons having a material involvement directly or indirectly with a licensed gaming operation or registered holding company *to ensure that licenses are not issued or held by, nor is there any material involvement directly or indirectly with a licensed gaming operation or registered holding company by unqualified, disqualified or unsuitable persons, or persons whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places or locations.*

2. The board has full and absolute power and authority to recommend the denial of any application, the limitation, conditioning or restriction of any license, registration, finding of suitability or approval, the suspension or revocation of any license, registration, finding of suitability or approval or the imposition of a fine upon any person licensed, registered, found suitable or approved for any cause deemed reasonable by the board.

3. The commission has full and absolute power and authority to deny any application or limit, condition, restrict, revoke or suspend any license, registration, finding of suitability or approval, or fine any person licensed, registered, found suitable or

approved, for any cause deemed reasonable by the commission. (Emphasis added.)

The qualifications for licensing and a finding of suitability are set forth in [NRS 463.170](#). In pertinent part, that statute provides:

1. Any person who the commission determines is qualified to receive a license or be found suitable under the provisions of this chapter, having due consideration for the proper *protection of the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada* and the declared policy of this state, may be issued a state gaming license or found suitable. The burden of proving his qualification to receive any license or be found suitable is on the applicant.

2. An application to receive a license or be found suitable *shall not be granted unless* the commission is satisfied that the applicant is:

(a) *A person of good character, honesty and integrity;*

(b) *A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; and*

(c) *In all other respects qualified to be licensed or found suitable consistently with the declared policy of the state.*

3. A license to operate a gaming establishment shall not be granted unless the applicant has satisfied the commission that:

(a) He has adequate business probity, competence and experience, in gaming or generally; and

(b) The proposed financing of the entire operation is:

(1) Adequate for the nature of the proposed operation; and

(2) From a suitable source.

Any lender or other source of money or credit which the commission finds does not meet the standards set forth in subsection 2 may be deemed unsuitable. (Emphasis added.)

It is obvious that those provisions involve traditional police powers by requiring consideration of the appropriateness of licensing in relation to “the proper protection of the health, safety, morals, good order and general welfare of the State of Nevada.” [NRS 463.170\(1\)](#). See also, [NRS 463.130\(1\)](#); [463.140\(1\)](#).

Moreover, the board must consider, in direct relation to the qualifications of an applicant, any “prior activities,” “criminal record,” “reputation,” “habits,” and “associations” which “pose a threat to the public interest or to the effective regulation and control of gaming,” or which “create or enhance the dangers of unsuitable, unfair, or illegal practices, methods and activities,” and whether financing of the operation is “from a suitable source.” [NRS 463.170\(2\)](#) and (3).

In addition to the board’s duties as set forth above concerning gaming operators, [NRS 463.335](#) requires that employees of the gaming industry (as defined by Section 3, Chapter 528, Statutes of Nevada 1981) be controlled by the board. As in the case of licensing and findings of suitability, that authority is couched in terms of the state’s policy. [NRS 463.335](#) provides, in pertinent part, as follows:

1. The legislature finds that, *to protect and promote the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and to carry out the policy declared in [NRS 463.130](#)*, it is necessary that the board:

- (a) Ascertain and keep itself informed of the identity, prior activities and present location of all gaming employees in the State of Nevada; and
- (b) Maintain confidential records of such information. (Emphasis added.)

[NRS 463.335](#)(1), as amended by Section 1, Chapter 294; Section 34, Chapter 528, Statutes of Nevada 1981.

Moreover, no person may be employed as a gaming employee in Nevada unless he has been issued a work permit. [NRS 463.335](#)(2), as amended 1981.

The board must be notified where an application for a work permit is made, and may object to the issuance of the permit, in which case the permit “shall” be denied or revoked. [NRS 463.335](#)(3) and (4), as amended 1981. The board may object “for any cause deemed reasonable by the board,” including cases wherein the applicant has:

- (a) Failed to disclose, misstated or otherwise attempted to mislead the board with respect to any material fact contained in the application for the issuance or renewal of a work permit;
- (b) Knowingly failed to comply with the provisions of this chapter or chapters 463B, 464 or 465 of NRS or the regulations of the [Nevada gaming] commission at a place of previous employment;
- (c) *Committed, attempted or conspired to commit any crime of moral turpitude, embezzlement or larceny against his employer or any gaming licensee, or any violation of any law pertaining to gaming, or any other crime which is inimical to the declared policy of this state concerning gaming;*
- (d) *Been identified in the published reports of any federal or state legislative or executive body as being a member or associate of organized crime, or as being of notorious and unsavory reputation;*
- (e) *Been placed and remains in the constructive custody of any federal, state or municipal law enforcement authority; or*
- (f) Had a work permit revoked or committed any act which is a ground for the revocation of a work permit or would have been a ground for revoking his work permit if he had then held a work permit. (Emphasis added.)

[NRS 463.335](#)(6), as amended 1981.

The considerations of licensing and findings of suitability of gaming operators and the complementary control of employees of the gaming industry reflect responsibilities and information traditionally shared by all law enforcement personnel in the performance of law enforcement activities. The fact that those matters are considered in relation to the gaming industry and delegated by the Nevada State Legislature to the Gaming Control Board does not detract from their character as law enforcement activities. The mandatory pre-licensing board investigation of gaming license applicants is analogous to investigations conducted by any policemen or other law enforcement personnel to curb criminal or illegal activities, and the activities of board agents relative to pre-licensing investigations are a specialized version of the overall duties of law enforcement. The same rationale applies to the control of gaming employees, where qualifications are determined by statute and must be satisfied as prerequisites to involvement as an employee of a gaming establishment. By delegating those duties to the Gaming Control Board, the State Legislature has merely recognized the uniqueness of the gaming industry and the correlative need for specialized law enforcement skills. *See, e.g., State v. Rosenthal*, [93 Nev. 36](#), 559 P.2d 830 (1977), *appeal dismissed*, 434 U.S. 803, 98 S.Ct. 32 (1977); *Nevada Gaming Commission v. Consolidated Casinos Corp.*, [94 Nev. 139](#), 575 P.2d 1337 (1978).

As used in the Privacy Act, the phrase “law enforcement activities” has been explained on the

floor of the United States House of Representatives to mean “law enforcement in its general meaning and in the broadest reach of the term.” *See, e.g.*, Statement of Congressman Ichord, 120 Cong.Rec. 36651 (Nov. 20, 1974).

Licensing of gaming operators and the control of employees in the gaming industry clearly include law enforcement activities. Virtually all of the gaming laws are enforced through the mechanism of licensing, and it is through the licensing process and the issuance of work permits that criminal and illegal activities are initially screened out of the gaming industry. Under Nevada statutes, licensing and a finding of suitability cannot occur without a recommendation from the State Gaming Control Board,² and the State Gaming Control Board cannot issue its recommendation without conducting an investigation into the qualifications of the applicant.

²The only exception is where a tie vote of the members of the board occurs. See [NRS 463.220](#), as amended by Section 32, Chapter 528, Statutes of Nevada 1981. Prior to the 1981 amendment, a tie vote was interpreted by this office as neither a recommendation for approval nor denial.

Likewise, employees of the gaming industry must be approved by the board after an investigation into their qualifications.

Where federal agencies possess information related to the qualifications of an applicant for licensure or a finding of suitability, as set forth in [NRS 463.170](#), and of an applicant for a work permit as set forth in [NRS 463.335](#), as amended, and choose to disclose that information to the board, such disclosure would be for law enforcement activities because of the delegated authority of the Gaming Control Board.

B. *Request for Disclosure at Post-Approval Phase.*

The post-licensing request for information presents an equally clear illustration of “law enforcement activity.” The legislature has provided that the board must:

* * * continue to observe the conduct of all licensees and other persons having a material involvement directly or indirectly with a licensed gaming operation or registered holding company to ensure that licenses are not issued or held by, nor is there any material involvement directly or indirectly with a licensed gaming operation or registered holding company by unqualified, disqualified or unsuitable persons, or persons whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places or locations.

Section 8, Chapter 528, Statutes of Nevada 1981.

Moreover, the legislature has recently amended the provisions of [NRS 463.140](#) to provide:

The board may investigate, *for the purpose of prosecution*, any suspected criminal violation of the provisions of this chapter [Licensing and Control of Gaming] or chapter [sic] 463B [Supervision of Certain Gaming Establishments], 464 [Pari-mutuel Betting] or 465 [Crimes and Liabilities] of NRS. For the purpose of the *administration and enforcement* of this chapter and chapters 463B, 464, and 465 of NRS and of chapter 205 of NRS [Crimes Against Property] so far as it involves crimes against the property of gaming licensees, the board, the commission and the executive, supervisory and investigative personnel of both the board and the commission *have the powers of a peace officer*, of this state. (Emphasis added.)

[NRS 463.140](#)(4), as amended by Section 26, Chapter 528, Statutes of Nevada 1981.

In Nevada, law enforcement officers are defined as “peace officers.” *See, e.g.,* [NRS 169.125](#)(2) [Sheriffs of counties and metropolitan police departments and their deputies]; 169.125(7) [Marshals and policemen of cities and towns]; and 169.125(15) [Deputy Director, superintendent and correctional officers of the department of prisons]. Among those included in the definition of “peace officer” are agents of the Gaming Control Board and Commission. *See* [NRS 169.125](#)(18).

By designating the board and its agents as peace officers, the Nevada statutes give to the board and to its agents all of the traditional law enforcement powers. *See, e.g.,* [NRS 171.114](#) [Execution of Warrant or Summons]; 171.123 through 171.1232, inclusive [Stop and Frisk, Search & Seizure of Evidence, Arrest]; 171.124 through 171.1538, inclusive [Arrests]. The Nevada gaming authorities may exercise such law enforcement authority both on and off the premises of gambling establishments as that power relates specifically to gaming. Furthermore, the Nevada gaming authorities are authorized to exercise such police powers over non-gaming crimes against property where such criminal activity occurs against the property of any gaming licensee.

Thus, the authority of the board to exercise law enforcement power is total and complete as it pertains to gaming violations wherever they may occur. And, as it pertains to non-gaming crimes, the authority is total and complete where those crimes are committed against the property of a gaming establishment.

CONCLUSION TO QUESTION TWO

It is the opinion of this office that an investigation undertaken by the State Gaming Control Board pertaining to the qualifications of an applicant for a gaming license or finding of suitability, for purposes of approving the issuance of work permits, and for purposes of prosecuting any suspected criminal violation of the gaming laws of Nevada or Chapter 205 of NRS against the property of a gaming licensee, is a “law enforcement activity.”

QUESTION THREE

Whether the [law enforcement] activity is authorized by law.

ANALYSIS

Based upon the discussion of “law enforcement activity” above and the statutes cited therein, an investigation by the board, whether pertaining to the qualifications of an applicant for licensure, finding of suitability, or a work permit or for purposes of prosecution, is authorized by law. *See* [NRS 463.130](#); 463.140, as amended 1981; 463.160(1); 463.170; 463.335 as amended 1981; 463.360(3); Section 8, Chapter 528, Statutes of Nevada 1981.

CONCLUSION TO QUESTION THREE

It is the opinion of this office that the law enforcement activity for which the information is sought is authorized by law.

OPINION

It is the opinion of this office that an investigation undertaken by the Nevada State Gaming Control Board: (1) pertaining to the statutory qualifications of an applicant for a gaming license or finding of suitability, (2) for purposes of approving the issuance of work permits to employees of gaming establishments, and (3) for purposes of prosecuting any suspected criminal violation of the gaming laws of Nevada or [NRS Chapter 205](#) when committed against the property of a gaming licensee, is a law enforcement activity. That law enforcement activity is authorized by law, and the Nevada State Gaming Control Board is an instrumentality of a governmental jurisdiction within or under the control of the United States.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By CLAUDIA K. CORMIER, *Deputy Attorney General,*
Gaming Division

OPINION NO. 81-12 State Classified Employment, No Vested Right to Remain Classified as Against Legislative Enactment Placing Position in Unclassified Service—A state classified employee having once attained permanent status in the position he is occupying does not have a vested property or contractual right to remain in the same position as a permanent classified employee subsequent to the effective date of a legislative enactment which places the position in the unclassified service.

CARSON CITY, November 30, 1981

MR. ACE MARTELLE, *Director, Department of Human Resources,* Capitol Complex, Carson City, Nevada 89710

DEAR MR. MARTELLE:

You have recently asked this office to answer the following question.

QUESTION

Does a state classified employee, having once attained permanent status in the position he is occupying, have a vested property or contractual right to remain in the same position as a permanent classified employee subsequent to the effective date of a legislative enactment which places the position in the unclassified service?

ANALYSIS

A state classified employee who has attained permanent status can only be validly discharged for cause. *Oliver v. Spitz*, [76 Nev. 5](#), 348 P.2d 158 (1960). “Generally, an employee who can only be discharged for cause has a property right in his employment. * * *” *State ex rel. Sweikert v. Briare*, [94 Nev. 752](#), 755, 588 P.2d 542, 544 (1978). With this in mind, we first turn to an analysis of how this property right is created and how it may be validly eliminated:

Property interests [in public employment] are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules * * * that stem from an independent source such as state law—rules * * * that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684, 690.

In the case of a permanent state classified employee, the “benefit” referred to in *Board of Regents*, *supra*, is state employment. The “rules” that secure this “benefit” and that support a claim of entitlement to continued possession of this “benefit” are found in [NRS 284.385](#), *et seq.* These sections of Nevada law and the regulations adopted pursuant to them, *Rules for Personnel Administration*, Rule XII *et seq.*, provide that a permanent classified employee may only be discharged from his employment for cause, after written notification of the grounds for his

dismissal. This employee has the right to appeal his discharge. Because of these “rules” this employee has a “property right or interest” in his employment which is entitled to due process constitutional protection. *State ex rel. Sweikert, supra*.

However, when the employee’s position is removed from the coverage of the “rules” upon which the entitlement is based, “the employee’s ‘property interest’ cease[s] to exist.” *Baker v. Civil Service Commission*, 245 S.E.2d 908, 913 (W.Va. 1978). See also *Gallas v. Sanchez*, 405 P.2d 772 (Ha. 1965), *Kingston v. McLaughlin*, 359 F.Supp. 25 (D.Mass. 1972), affirmed without opinion, 411 U.S. 923, 93 S.Ct. 1900, and *Risley v. Board of Civil S. Com’rs of City of Los Angeles*, 140 P.2d 167 (Ca.App. 1943).

We now turn to an analysis of whether the type of employee in issue here has a contractual right to remain a permanent employee in the classified service. Article 1, Section 10 of the United States Constitution provides that “No State shall pass any * * * law impairing the obligation of contracts.” See also Art. 1, Section 5 of the Nevada Constitution. If the relationship between a permanent classified employee and the state is a contractual one, then the statutory amendments in issue here would be a law which attempts to impair the obligation of a contract and therefore would be prohibited by both Article 1, Section 10, *supra*, and Art. 1, Section 5, *supra*.

The leading Nevada case related to this issue is *Shamberger v. Ferrari*, [73 Nev. 201](#), 314 P.2d 384 (1957). Ferrari was elected Surveyor General of the State of Nevada at the November, 1954 general election for a four year term ending December 31, 1958. At the same election the voters ratified a constitutional amendment which removed the Office of Surveyor General from the Nevada Constitution. (See Article V, Section 22 before its amendment in 1954.) In 1957 the legislature abolished the Office of Surveyor General and directed the Surveyor General to turn over his files to the newly created State Department of Conservation and Natural Resources. Ferrari refused to comply because, he contended, he had a constitutional right to serve his full four year term and the 1957 abolishment could not constitutionally alter or affect his tenure in office. In ordering Ferrari to comply, the Supreme Court specifically found that subsequent to the above referenced constitutional amendment the Office of Surveyor General no longer was an office created by the State Constitution but rather was an office created by statute. Therefore the 1957 enactment was valid:

As a statutory office the office of surveyor general was subject to abolishment forthwith by the legislature. [Citations omitted.] It is uniformly held that the power to modify the nature or the duties of an office or to abolish it entirely or to consolidate it with another office is coincident with the legislative power to create the office in the first place. * * * The 1957 statutory abolishment of the office of surveyor general did not deprive [Ferrari], despite his election in 1954 to a four-year term, of either a contractual right or a property right.

Shamberger, supra, 73 Nev. at 208, 314 P.2d at 387. Thus the Nevada Supreme Court has held that the legislature has the power to modify the nature of an office it has created. Here the modification is the elimination of civil service protection from a formerly classified position. Just as the 1957 statutory modification validly affected Ferrari, we conclude that the legislature may remove a position from the classified service and place it within the unclassified service of the state without depriving an employee of a contractual or property right.

While *Shamberger, supra*, involved the abolishment of a position, the principles announced therein are directly applicable here. In *Shamberger* the court held that Ferrari was not deprived of a contractual right to continued state employment. He was not deprived of the same, because the relationship between a state and its employees is a relationship defined by statute, not by contract. *Boren v. State Personnel Board*, 234 P.2d 981 (Cal. 1951), *Miller v. State*, 557 P.2d 970 (Ca. 1977), *Kingston, supra*, *Gallas, supra*, *Baker, supra*, *Lanza v. Wagner*, 183 N.E.2d 670

(N.Y. 1962), Personnel Division of Executive Dep't v. St. Clair, 498 P.2d 809 (Ore.App. 1972) and Donaghy v. Macy, 45 N.E. 87 (Mass. 1896), an opinion authored by Justice Oliver Wendell Holmes:

It cannot be gainsaid that if the * * * Legislature had the power to include this position under the classified service, the * * * Legislature likewise had the power to remove it therefrom.

Shamberger v. Ferrari, [73 Nev. 201](#), 314 P.2d 384, 387 (1957). Bowman v. Maine State Emp. Appeals Bd., 408 A.2d 688, 691 (Me. 1979).

The analysis and conclusions reached herein are not inconsistent with Public Employee's Retirement Board v. Washoe Co., [96 Nev. 718](#), 615 P.2d 972 (1980). In this recent decision, the Nevada Supreme Court held that a statute which attempted to detrimentally alter the pension rights of an employee was invalid insofar as the employee was concerned because pension rights are contractual rights within the protection of Article 1, Section 10, *supra*. Pension rights decisions have been distinguished by those courts facing an issue similar to that here. See for example Bowman, *supra*. The reason was, perhaps, best enunciated by the California Supreme Court in Miller v. State, *supra*, at 973:

Plaintiff's reliance upon decisions concerning the pension rights of public employees is misplaced. This court has held, as will be explained hereafter, that pension rights involve "obligations which are protected by the contract clause of the Constitution."

(Kern v. City of Long Beach (1947) 29 Cal.2d 848, 179 P.2d 799, 802.)

The court, however distinguished decisions containing language, "to the general effect that public employment is not held by contract" because of the fact that "[t]hese cases involve the right to remain in an office or employment, or to the continuation of civil service status."

(*Id.*, at pp. 852-853, 179 P.2d at pp. 801-802.)

Pension rights, unlike tenure of civil service employment, are deferred compensation earned immediately upon the performance of services for a public employer "and cannot be destroyed * * * without impairing a contractual obligation. Thus the courts of this state have refused to hold, in the absence of special provision, that public employment establishes tenure rights, but have uniformly held that pension laws * * * establish contractual rights. ["]

In Attorney General's Opinion No. 221 (Nev.), dated June 1, 1961, this office was faced with substantially the same question in issue here. Prior to the enactment of Chapter 249, 1960 Statutes of Nevada, the position of State Welfare Director was in the classified service for all purposes. By Chapter 249, Section 4, the director was to "be in the classified service except for purposes of removal." The purpose of Chapter 249 was to provide that the director "shall serve at the pleasure of the * * * appointing authority. * * *" title of Chapter 249. Unclassified employees serve at the pleasure of their appointing authorities. Therefore, the intended effect of Chapter 249 was tantamount to placing the director in the unclassified service insofar as discharge was concerned.

In Attorney General's Opinion No. 221, at page 169, this office concluded "that the incumbent Director of the State Welfare Department, as a state employee in the classified service, has certain vested rights, [including] that she shall not be dismissed from her position as

Director * * * so long as such position exists, except for just cause, and then only after notice and hearing. * * *” Several reasons were stated in support of this conclusion. We now turn to an analysis of them.

The director was appointed in 1949 under the provisions of Section 8, Chapter 327, 1949 Statutes of Nevada, in accordance with the then existing merit system. (A permanent merit system employee may only be discharged for cause.) When the current merit system, see Chapter 284 of NRS, was enacted by Chapter 351, 1953 Statutes of Nevada, the director was grandfathered into it with permanent classified status by Section 58 of Chapter 351. This office concluded that because Chapter 351 was not repealed when Chapter 249, *supra*, was enacted the former controlled insofar as the status of the director was concerned. This is equivalent to saying that a later enacted specific statute does not control an earlier enacted general statute where the two are inconsistent. Such a conclusion does not conform with the ordinary rule of statutory construction that a subsequently enacted specific statute supersedes an earlier enacted general law. *Western Realty Co. v. City of Reno*, [63 Nev. 330](#), 172 P.2d 158 (1946) and *City of Reno v. Washoe Co.*, [94 Nev. 327](#), 580 P.2d 460 (1978).

In Attorney General’s Opinion 221, *supra*, this office stated there was a “common law” protection of both state and federal employees. “Their positions in government as public servants may be deemed ‘property’ within the 14th Amendment of the Constitution of the United States.” *Id.* at 172. Whatever force this argument may have had in 1961, it has been totally dissipated with the United States Supreme Court’s holding in *Board of Regents v. Roth*, as cited above. A property interest in employment is created by statute, not by the “common law.”

In light of the case law discussed above and because we do not believe that the analysis in Attorney General’s Opinion 221, *supra*, was sound, we hereby overrule Attorney General’s Opinion No. 221 (Nev.) dated June 1, 1961, to the extent it is inconsistent with the conclusion reached herein.

CONCLUSION

A State of Nevada classified employee having once attained permanent status in the position he is occupying does not have a vested property or contractual right to remain in the same position as a permanent classified employee subsequent to the effective date of a legislative enactment which places the position in the unclassified service.

Very truly yours,

RICHARD H. BRYAN, *Attorney General*

By ROBERT H. ULRICH, *Deputy Attorney General*

OPINION NO. 81-13 Nevada State Library, Division of Archives, Retention of State Records—Once a state agency submits records to the Division of Archives, the records may be reclaimed or returned upon demand of the agency only if the state librarian finds them to be without historical or permanent value.

CARSON CITY, December 8, 1981

JOSEPH J. ANDERSON, *Nevada State Librarian, Nevada State Library, Capitol Complex, Carson City, Nevada 89710*

DEAR MR. ANDERSON:

You have requested an opinion from this office concerning the retention of state records in the Division of Archives of the Nevada State Library (Archives). Specifically, your request concerns the extent to which a state agency has the right to reacquire possession of agency records once they have been deposited with the archives.

You have advised us that, traditionally, material deposited in the archives was thought to remain the property of the depositing agency. As a consequence of this view, agencies have been allowed to re-obtain records upon request. This practice has caused problems for the proper functioning of the archives in that the archives has been unable to publish guides to its holdings or organize the records for retrieval. You have also informed us that this practice is not in keeping with accepted standards of archival practice.

QUESTION PRESENTED

Must the Division of Archives of the Nevada State Library return records of a state agency deposited with the archives upon demand by the depositing agency?

ANALYSIS

Upon review of the relevant statutory provisions, it is apparent that no statute explicitly deals with the subject matter of your request. However, a number of statutes do indirectly concern your request.

Initially, it should be pointed out that while state agencies are apparently authorized to submit state records to the archives (see [NRS 239.090](#)) no statute has been found which requires any state agency to submit records to the archives.

The starting point for the analysis of the question presented must be the statement of legislative intent expressed in [NRS 378.230\(2\)](#), which establishes the Division of Archives in the Nevada State Library. That section provides that:

It is the intent of the legislature that the division, in carrying out its functions of preserving, maintaining, and coordinating state, county and municipal archival material, follow accepted standards of archival practice to assure maximum accessibility for the general public.

The stated purpose of legislation is a factor considered by the courts in interpreting a given statute. *Sheriff v. Smith*, [91 Nev. 729](#), 734, 542 P.2d 440 (1975). It is in light of the expressed intent that the statutory provisions which pertain to the archives must be interpreted.

[NRS 378.230\(2\)](#) states that the function of the archives is to preserve and maintain material. Furthermore, the archives is required to “follow accepted standards of archival practice to assure maximum accessibility for the general public.” This office has also been informed by way of discussion with yourself and Mr. Guy Rocha, State Archivist, that accepted standards of archival practice require, at a minimum, the ability to publish guides to the holdings of an archives and to organize the records in a manner that allows retrieval upon request.

These accepted standards appear to have been implicitly recognized by the legislature in that the state librarian is required by [NRS 378.240\(2\)](#) to employ persons to preserve, index and aid in the use of material deposited in the archives. Also, [NRS 378.240\(4\)](#) requires the state librarian to make material deposited in the archives readily available for use.

These statutory mandates would appear to be impossible to carry out if an agency can reacquire material upon demand. When there is a question as to the meaning of a statutory provision, the courts will avoid construing it in a manner which will lead to an unreasonable result. *School Trustees v. Bray*, [60 Nev. 345](#), 354-355, 109 P.2d 274 (1941).

[NRS 378.250\(1\)](#) authorizes the state librarian to receive into the archives any material from a state agency if he finds that it is of historical value. However, the only authority given to the state librarian to return material to state agencies is found in [NRS 378.250\(2\)](#) and [239.090\(3\)](#), which

authorize the return only if the material has no historical or permanent value. It is a well recognized principle of statutory construction that when the legislature enumerates certain instances in which an act or thing may be done, it is presumed the legislature names all that it contemplates. *Ex Parte Arascada*, [44 Nev. 30](#), 35, 189 Pac. 619 (1920). Thus, the authorization to engage in one type of action implies the negation of authority to engage in other types. Following this principle, one must conclude that the state librarian has the power to return material to a state agency only if he finds the material to have no historical or permanent value.

The intent of the legislature in this regard becomes even clearer when the statutory provisions for the receipt and return of local government records are compared with the provisions involving state records. While local government records may be submitted to the archives pursuant to [NRS 239.123](#), those records may be reclaimed under [NRS 239.090\(4\)](#) by the local government by serving written notice upon the archives and paying the cost of transportation for the return. If the legislature had intended to allow state agencies to reclaim material submitted to the archives, it would have been a simple matter to enact statutory provisions similar to those pertaining to local government.

The only other provision found which relates to the return of state records in the archives is [NRS 378.260](#). This section read in connection with [NRS 225.070](#) appears to allow the Secretary of State, by agreement with the state librarian, to keep certain material in the archives and reclaim it upon demand. [NRS 225.070](#) charges the Secretary of State with the custody and preservation of certain documents. This duty is also referred to in [NRS 378.260](#). No other provision has been found that allows the state librarian to enter into an agreement with a state official to “keep” state records regardless of their historical value.

Finally, it should be pointed out that while state records submitted to the archives may not be returned unless they are without historical or permanent value, the records remain available for review when kept in the archives. Furthermore, pursuant to [NRS 378.270](#), copies of records in the archives may be obtained and, if required, certified upon request.

CONCLUSION

Upon consideration of the relevant statutory provisions and the apparent legislative intent, it is our opinion that upon submission of state records to the Division of Archives of the Nevada State Library by a state agency, the state librarian may only return said records if he finds them to be without historical or permanent value. Thus, a state agency may not reclaim any record submitted to the archives by demanding its return once it has been determined that such a record has historic or permanent value.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DON CHRISTENSEN, *Deputy Attorney General*

OPINION NO. 81-14 Public Works, Interest on Retention Payments—Interest need be paid only on monies retained under public works contracts executed on and after July 1, 1981. The rate of interest is that earned on the general fund of the public body funding the project. Each public body is individually responsible for bookkeeping and interest calculation and payment to contractors with respect to the monies in its possession and control only.

CARSON CITY, December 22, 1981

STANTON B. COLTON, *State Treasurer of Nevada*, Capitol Complex, Carson City, Nevada 89710

DEAR MR. COLTON:

You have recently presented to this office several questions concerned with the application of the terms of Chapter 296, 1981 Statutes of Nevada, a law enacted by the 1981 Nevada Legislature to provide for payment to certain contractors of interest earned by a public body on monies withheld on progress payments. While we were researching the answers to your questions, we received inquiries from two other public entities which relate to the same subject. As a matter of convenience, we are setting forth our answers to all of the questions asked to date on Chapter 296 in this opinion to you, with copies to the other concerned public entities.

BACKGROUND

The 1979 legislature authorized an interim study of state public works contracts. The final report of the study committee, in part, addressed the issue of retained monies on state contracts, which monies are retained from progress payments to contractors pursuant to the provisions of [NRS 338.160](#). The report examined the possibility of paying contractors the interest which the state earned on these retained payments and concluded that the payment of such interest was justifiable. In addition, the report concluded that the payment of interest earned on such monies “could, in a small way, reduce construction costs.” “State Public Works,” Bulletin No. 81-2, Legislative Counsel Bureau, Oct., 1980, p. 30. It is also apparent that the legislative study committee was fully aware that new legislation would be required before such interest payments to contractors could be made and such legislation was recommended by the committee. However, nowhere in the committee’s report is there any reference to the issue of whether such payments should apply to existing contracts or to monies retained under existing contracts, either before or after the effective date of any new legislation.

The interim study committee’s recommendation found expression in S.B. 568, which was expanded to include all public works contracts and not just those of the State of Nevada. S.B. 568 was considered in public hearings by the government affairs committees of both the Nevada Senate and Assembly. The minutes of these hearings indicate the concern of both committees with what some people saw as the essential justice of such interest payments to contractors on monies already earned by them. The two legislative committees also expressed hope that such payments would result in somewhat lower bids on future contracts for public work projects within the State of Nevada. Significantly, again, no mention is found in the committee minutes of any intent that the new law should be applied retrospectively to existing contracts or the monies retained thereunder.

S.B. 568 was passed by the Nevada Legislature and approved by the governor on May 22, 1981, and became effective July 1, 1981. See [NRS 218.530](#) which provides: “Every law and joint resolution passed by the legislature shall take effect and be in force on July 1 following its passage, unless such law or joint resolution shall specifically prescribe a different effective date.” S.B. 568 is now officially known as Chapter 296, 1981 Statutes of Nevada.

QUESTION ONE

Does Chapter 296, 1981 Statutes of Nevada, apply to contracts executed before July 1, 1981, and to any payments retained under said contracts?

ANALYSIS

Section 2 of Chapter 296 amends [NRS 338.160](#) by adding thereto the following language:

3. The public body shall pay to the contractor at the end of each quarter the interest earned on the amount withheld under the contract during the quarter. The rate of interest

to be paid must be the same as that earned during the quarter from the investment of money in the general fund of the public body.

Nowhere in section 2 or anywhere else within Chapter 296 is there any expressed declaration of the intent of the Nevada Legislature to have section 2 apply to contracts executed before the effective date of the act or to any contract retentions made pursuant to such contracts, whether such retentions occur before or after the effective date of the act.

There exists in Nevada law an extremely strong presumption against the retrospective application of new legislation. This strict rule of statutory construction has been repeated and applied by the Nevada Supreme Court from as early as 1865 to the present time. In *State ex rel. Sparks v. State Bank and Trust Co.*, [43 Nev. 388](#), 187 P. 1002 (1920), the rule in favor of prospective application only of new laws was succinctly summarized as follows:

As a general rule, a statute will not be construed to operate upon past transactions, but in futuro only. It is a maxim, which is said to be as ancient as the law itself, that a law ought to be prospective, not retrospective, in its operation. Retrospective legislation is not favored, and, except when restored to in the enactment of curative laws, or such remedial acts as do not create rights or take away vested ones, is apt to result in injustice.

* * *

There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action only, that construction will be given it.

Also, in the very early case of *Milliken v. Sloat*, [1 Nev. 573](#) (1865) at 579, the Nevada Supreme Court quite plainly and unequivocally said:

We are of the opinion that when a statute is silent as to past time and events, courts are bound to apply it prospectively only.

This strict rule of statutory construction has been acknowledged time and again by our courts. See *Hunter v. Savage Consolidated Silver Mining Co.*, [4 Nev. 153](#) (1868), *Fitch v. Elko County*, [8 Nev. 271](#) (1873), *Nickel v. State*, [43 Nev. 12](#), 177 P. 409 (1919), *Virden v. Smith*, [46 Nev. 208](#), 210 P. 129 (1922), *State ex rel. Progress v. First Judicial District Court*, [53 Nev. 386](#), 2 P.2d 129 (1931), *Miller v. Ashurst*, [86 Nev. 241](#), 468 P.2d 357 (1957), *Holloway v. Barrett*, [87 Nev. 385](#), 487 P.2d 501 (1971), *Harrison v. Rice*, [89 Nev. 180](#), 510 P.2d 633 (1973), *Shepley v. Warden*, [90 Nev. 93](#), 518 P.2d 619 (1974), *Clark Co. School District v. Beebe*, [91 Nev. 165](#), 533 P.2d 161 (1975), *Rice v. Wadkins*, [92 Nev. 631](#), 555 P.2d 1232 (1976).

It cannot be denied that Chapter 296 is silent on the question of any retrospective application of the new requirement that public bodies pay interest to contractors on retained payments under public works contracts. Nor does the available legislative history relating to Chapter 296 indicate any clear expression that the legislature intended the new requirement to have a retrospective application to contracts executed before the new law's effective date or to payments retained under such contracts. Additionally, we find nothing in the language of Chapter 296 that is so clear, strong and imperative that no other meaning can be attached to it other than a prospective application of the new law in accordance with the above-cited rule of statutory construction. We likewise find nothing in the statute itself or in its legislative history which offers evidence of an unavoidable implication that the legislature intended the new law to be retrospectively applied by

those charged with its administration.

The intention of the Nevada Legislature in enacting Chapter 296, 1981 Statutes of Nevada, was to provide some incentive to contractors bidding on public works contracts to bid them somewhat lower than they had been doing in the past, since they could now take into account in preparing their bid the fact that they will receive interest on retained payments. Whether this result will actually occur remains to be seen, but obviously only bids on future contracts can relate to this legislative objective. Applying Chapter 296 retrospectively to existing contracts that have already been bid will do nothing to achieve the objective of lower future construction costs, so that a retrospective application of the new law, in our opinion, is not necessary to achieve the intent behind the statute.

Testimony was presented to the legislature as to the adverse fiscal impact this new law would have on local governments who, in the past, have generated considerable revenues from these retained payments and who as the result of other legislation then pending before the 1981 legislature were likely to be even more hard pressed for revenues in the future. Although the legislature decreed in Chapter 296 that local governments must now give up this revenue source, its failure to expressly mandate application of the new law to existing contracts can easily be viewed as a legislative recognition of the existing situation and is some further evidence that the law is to be applied prospectively only to contracts executed on and after July 1, 1981, and only to monies retained after that date under such contracts.

There are two exceptions to the rule of statutory construction which favors prospective over retrospective application of legislation. The first relates to curative laws, while the second is concerned with remedial acts which do not create new rights or take away vested ones. In our opinion Chapter 296 is neither a curative law nor a remedial act.

A curative law is defined in Black's Law Dictionary (5th ed.) 343 as a law which is designed to remedy some legal defect in previous transactions in order to correct some error or irregularity and to render valid and effective what otherwise would be invalid and ineffective. Nothing in Chapter 296 or its legislative history indicates the legislature was purporting to correct some defect, error or irregularity in a previous transaction so as to make valid and effective something that but for Chapter 296 would be invalid and ineffective, so that the nature of this statute is clearly not curative.

Likewise, a remedial act is defined in Black's Law Dictionary (5th ed.) 1163 as a statute which pertains to or affects a remedy or procedure as distinguished from one which creates, affects or modifies a substantive right. *Cf. Truckee River General Electric Co. v. Durham*, [38 Nev. 311](#), 149 P. 61 (1915). However, Chapter 296 does more than create or affect a new remedy or procedure for the redress of wrongs and grievances; it actually creates a new right in contractors and subcontractors to interest payments and imposes a new duty on public bodies and prime contractors to pay those interest payments, so that this statute is not one which would be properly classifiable as merely a remedial act.

It can also be argued that to the extent Chapter 296 retrospectively creates new rights and imposes new duties on the parties to an existing contract, said statute tends to impair the obligations of said contract. Statutes which impair the obligations of contract are violative of both the U.S. Constitution, Article I, Section 10 and the Nevada Constitution, Article I, Section 15. However, if the new statute is applied prospectively only, as our above analysis indicates it must, the potential constitutional violation is eliminated, with the law applying only to those contracts and payments retained thereunder which are executed on and after July 1, 1981. The possibility of impairing the obligations of existing contracts also furnishes support for our belief that Chapter 296 does not apply to any monies retained under existing contracts even though the retention occurs after July 1, 1981. *Cf. Attorney General's Opinion 187 (Nev.)*, dated 7-13-1925.

CONCLUSION

Chapter 296 was not intended to apply to contracts executed before July 1, 1981, or to

payments retained under such contracts. Under a long recognized rule of statutory construction the new law applies prospectively only to contracts executed on and after July 1, 1981, the effective date of its enactment, and only to payments retained under contracts executed on and after July 1, 1981. The law has no application to contracts executed before July 1, 1981, or to payments retained under said contracts, whether said retentions occur before or after July 1, 1981.

QUESTION TWO

What rate of interest must be paid on contract retentions due to public works contractors under Chapter 296?

ANALYSIS

Section 2 of Chapter 296, in part, provides as follows:

The rate of interest to be paid must be the same as that earned during the quarter from the investment of money in the general fund of the public body.

Since Chapter 296 relates to the public works contracts of all public bodies, which includes the state, counties, cities, towns, villages, school districts, etc. [see [NRS 338.010\(2\)](#)], the above-quoted section of the law means the rate of interest earned by the general fund of that particular public body. For instance, in the case of most state construction projects, this would be the rate of interest earned on the state general fund administered by the state treasurer, while on county or city projects the applicable rate of interest would be the rate of interest earned on the county or city's general fund. On those state construction projects where a particular agency, such as the Colorado River Commission, is allowed to, and does, maintain its own fund or funds outside of the state general fund, the rate of interest payable under Chapter 296 would be the rate earned on that agency's general fund.

In projects with funding from more than one source, where monies are retained from contractors by all the funding entities in separate accounts maintained by each entity, it would be entirely possible that the rate of interest paid on some retained monies may differ from that paid on others due to differences in the rate of return to the separate general funds of the various entities involved. There is nothing in Chapter 296 which requires the rate of interest to be paid to contractors on retention payments to be not less than that of the state general fund rate of return.

CONCLUSION

The rate of interest to be paid to contractors each quarter on retained monies must be the same as that earned by the public body which does the retention on its own general fund investments.

QUESTION THREE

Who is responsible for keeping the necessary records, making the interest calculations and paying the interest earned to the involved contractors?

ANALYSIS

We believe Chapter 296 contemplates that each public body through its treasurer or other appropriate fiscal officer is required to maintain all the necessary records required by the procedures established in Chapter 296 including the calculation of the interest earned and actual payment thereof to the involved contractors. However, each public body has this responsibility only with respect to those monies which are actually in its possession and under its control. Where two or more public bodies are jointly funding a public works project, each must perform the required bookkeeping and payment functions if each has kept its funds separate and if each is

retaining monies under [NRS 336.160](#) with respect to a particular project.

In your opinion request you indicated that it was the position of the State Public Works Board that the state treasurer should pay to contractors interest earned on all retained monies on state construction projects whether or not the monies were in his possession and control and without regard to whether or not he had actually invested them and earned interest on them. Reimbursement from another public body involved in a joint project with the Public Works Board would then be sought by the state treasurer.

In our opinion, such interest payments by the state treasurer would be unauthorized by present law and also would probably be contrary to the provisions of [NRS 356.087](#) which control how the state treasurer must allocate the interest earned on the monies in the state general fund. All such interest must be deposited in the state general fund, except as otherwise permitted or directed by law. Nothing in Chapter 296 empowers the state treasurer to divert interest earnings even temporarily to public works contractors for monies retained under [NRS 338.160](#) unless those monies were deposited with him and placed in the appropriate account in the state general fund. The state treasurer's responsibilities are limited solely to those monies in his possession and control which represent retained payments under public works construction contracts funded with state money, or other monies placed in his possession or control. If money is being provided for a project by another agency of state government from funds other than those in the state general fund, the state treasurer has no responsibility under Chapter 296 and the responsibility lies with the particular agency supplying the funds.

CONCLUSION

Each public body is individually responsible for keeping the necessary records, making the interest calculations and paying the interest earned to involved contractors under public works contracts subject to the provisions of Chapter 296, 1981 Statutes of Nevada. On jointly funded projects, each public body is individually responsible for carrying out the provisions of Chapter 296 with respect to all monies which are actually in its possession and under its control.

We trust that the above satisfactorily answers the questions which have been raised concerning implementation of Chapter 296. If we may be of any further assistance on this or other matters of mutual concern, please advise.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

By WILLIAM E. ISAEFF, *Chief Deputy Attorney
General, Civil Division*

OPINION NO. 81-A Open Meeting Law; Executive Sessions—Closure of open meetings for a closed session should be noted on agenda of meeting of a public body; Motion to go into executive session should be made in open meeting in a form comporting with generally accepted rules of parliamentary procedure; Minutes of a closed session should be kept; Attorney General can file a civil action to obtain a court order compelling compliance with procedural requirements of Open Meeting Law; Open Meeting Law allows a public body to consider in closed session the character, alleged misconduct, professional competence, or physical or mental health of a member of the public body conducting the meeting; and a criminal prosecution for violation of the Open Meeting Law may only be commenced where (1) action is taken in violation of the law and (2) the member of the public body had knowledge that the meeting was in violation of law.

CARSON CITY, February 23, 1981

MARY HAUSCH, *Managing Editor, Las Vegas Review-Journal*, P.O. Box 70, Las Vegas, Nevada 89101

Re: Open Meeting Law Complaint Against the Board of Regents Respecting Executive Sessions on January 12, 1981

DEAR MS. HAUSCH:

On January 16, 1981, this office received your written complaint alleging a possible violation of the Nevada Open Meeting Law by the members of the University of Nevada Board of Regents at their meeting in Las Vegas, Nevada, on January 12, 1981. An investigation by this office was commenced pursuant to [NRS 241.040](#)(4). The investigation included taking lengthy statements from all nine members of the board, from two newspaper reporters who had been present that day, and from two members of the board staff. Also, our investigator listened to portions of the tape recordings made that day during the open meeting segments of the board meeting. The following is a report on the results of this investigation.

I. Factual Background.

A. Events Concerning First Executive Session.

The meeting of the board of regents on January 12 began quite normally with the swearing in of new regents by Judge William Beko, approval of the minutes from previous meetings in December, 1980, and the announcement of the appointment of a new UNLV athletic director. Regent McBride then presented a report from the finance committee that had met earlier that morning. His report generated some strong remarks from Regent Buchanan. Regent Karamanos joined in with some statements relating to 34 unaccounted-for tickets, and then several other regents added to this discussion. The atmosphere in the room has been described as "tense" and "emotional." It was at this point that Regent Karamanos suddenly inquired of General Counsel Larry Lessly about having an immediate executive session of the board "to get rid of dissension on this Board." Mr. Lessly responded with a question of his own: "Do you want to talk about your own professional competence?" Regent Karamanos replied affirmatively, and Mr. Lessly simply replied: "Yes, you can do that."

None of the other eight regents indicated having any prior knowledge that a request for an executive session would be made by Regent Karamanos, and nothing appeared on the agenda or public notice of the meeting concerning this request.

The meeting room was then cleared by the chairman, on his own volition, except for the regents themselves.

Prior to leaving the room at the chairman's request, the secretary and clerk to the board of regents, Bonnie Smotony, placed a blank cassette tape in the tape recorder used to record the proceedings of the regents' meetings. She asked General Counsel Larry Lessly about taking minutes in the closed session, since she would not be in the room to perform that function; and he advised her that this task was the regents' problem. At no time were the regents advised to keep any record of the closed session, and none in fact was kept.

Our investigation has also disclosed that neither Regent Karamanos nor any other member of the board actually made an official motion to close the morning meeting in order to meet in executive session, although Regent Fong offered a second for the "motion" which all apparently understood Regent Karamanos to have intended as a result of his colloquy with General Counsel Lessly. Because no motion was made in a form which comported with customary rules of parliamentary procedure, the nature of the business to be considered upon closure of the meeting was never precisely identified in the open meeting, and no discussion or vote on the part of board

members occurred prior to the chairman's action of excusing members from the room. The end result was confusion and uncertainty on the part of all concerned, regarding the real purpose and subject matter of the closed meeting.

After the meeting was closed, the first regent to speak made a strong plea for unity and civility among the members of the board, old and new, now that the elections for chairman and vice-chairman were over. Although the actual elections earlier that day had taken place in a calm and orderly atmosphere, a considerable amount of intense politicking had apparently occurred in the days and weeks preceding the election. Many personal comments were exchanged among individual regents concerning this pre-election period, and several members of the board described this session as one where they vented their frustrations with and at each other.

This type of exchange consumed about half of the closed morning session. The second half shifted emphasis from remarks about the regents themselves to a discussion of the job performance of the Chancellor of the University System. Since there were two closed sessions on January 12, 1981, and since the chancellor was a subject of discussion in both of them, our office has been unable to precisely determine at which session certain statements and comments were made about the chancellor. Though all such discussions did involve the professional competence and personal effectiveness of the chancellor in carrying out assigned tasks on behalf of the University Board of Regents, there was no reference to the chancellor being a part of the nature of the business to be considered in either the morning or afternoon executive sessions on January 12, 1981. Furthermore, no one interviewed in the course of our investigation identified any circumstances constituting an "emergency" within the meaning of [NRS 241.020](#), requiring these discussions to take place at that time.

No further matters were considered at the morning executive session, and no action was taken.

B. Events Concerning Second Executive Session.

Chairman Robert Cashell takes responsibility for calling the second closed session in the afternoon of January 12, 1981. Although a motion was made and passed to close the meeting, it did not set forth what was to be the nature of the business to be considered in the executive session. As with the morning session, no minutes were kept of this afternoon session, although it dealt entirely with the chancellor and his job performance, past, present, and future. No action was taken during this afternoon meeting, and it apparently ended with a better degree of understanding between the chancellor and the various members of the board as to what was expected of the chancellor between that date and the effective date of his resignation.

II. Legal Analysis.

A. Procedural Violations.

With respect to the unscheduled executive sessions that occurred after the regents' meeting began on January 12, 1981, our office has determined that the following procedural violations occurred, which do not comply with the clear and express requirements of Nevada's Open Meeting Law:

1. Both executive sessions during the regents' meeting were not properly noticed on the agenda of the meeting, as required by [NRS 241.020\(2\)](#). Furthermore, our investigation has revealed no facts establishing the existence of an "emergency" or unforeseen circumstance requiring the closing of the meeting without prior notice, as provided in [NRS 241.020\(4\)](#). The matters which prompted the executive sessions, such as dissension on the board relating to the performance of certain individuals, were known for several months prior to January 12, 1981, and in the opinion of this office, there was ample time available to provide written public notice of the need for a closed executive session during a regular board meeting to discuss these subjects.

2. The board of regents did not properly close the meeting on January 12, 1981 "upon a motion which specifie[d] the nature of the business to be considered." See: [NRS 241.030\(2\)](#). At a

minimum, this statutory provision clearly requires a motion to be made in an open meeting in a form that comports with generally-accepted rules of parliamentary procedure. Not only must the maker of the motion identify the intended action as a motion to close the meeting but must also indicate the purpose for which the open meeting of the public body must be closed. This motion should be seconded, and members of the board should be given the opportunity to debate the motion before a formal vote is taken.

As revealed by the investigation of this office, no formal motion was ever made to close the meeting of the board prior to the first executive session on January 12, 1981. Furthermore, the general discussion prior to this closure of the meeting did not accurately specify the nature of the business to be discussed in the closed session. A motion was made, seconded, and passed prior to the second closed executive session, but there was no indication of the purpose for which this session was held.

In our opinion, without having a formal motion before the public body to close a meeting, specifying the subject matter to be discussed in the closed session, it is very difficult for board members to know the parameters of the subject matter that can be discussed in private, so as not to deviate from the strict requirements of the law concerning closed meetings. Another important reason for specifying the subject matter of an executive session in the motion closing the meeting is to provide notice to any person who is the subject of discussion at a closed meeting, so that person may exercise his or her statutory right to obtain a copy of the minutes of such meeting as provided in [NRS 241.035](#)(2). The practices of the board in this regard were inconsistent, unclear, and improperly executed.

3. No minutes were kept of the closed executive sessions, contrary to the provisions of [NRS 241.035](#)(1). Though minutes of meetings closed pursuant to [NRS 241.030](#) are confidential, unless the public body determines the matters discussed therein no longer require confidentiality, it is beyond question that the statute requires minutes of the meeting to be kept. That this was not done is an appalling oversight and indicates a careless disregard for the rights of the person or persons whose character, conduct, competence or health were discussed at the meeting and who, under the law, have an absolute right to a copy of the minutes.

In order to stop such procedural violations from reoccurring, I have this date notified the Chairman of the University of Nevada Board of Regents that if certain steps are not taken within 30 days to prevent further violations of the procedural requirements set forth in the Open Meeting Law respecting closed executive sessions, I shall file an appropriate civil action against the members of the board of regents, seeking an order compelling compliance with these requirements. A copy of my letter to Chairman Cashell is attached for your review.

B. Alleged Substantive Violations.

1. Subject Matter of Closed Meetings.

The stated purpose of the regents' closed morning session was the discussion of the professional competency of each other as a means of clearing the air and eliminating further dissension and disunity on the board.

Nevada's Open Meeting Law allows a public body to close a meeting "to consider the *character*, alleged misconduct, professional *competence*, or physical or mental health of a person." (Emphasis supplied.) [NRS 241.030](#)(1).

Though there are no statutory definitions of the terms "competence" and "character," commonly accepted definitions of these terms are found in Black's Law Dictionary.

a. "Competence" means: "Duly qualified; answering all requirements; having sufficient ability or authority; possessing the natural or legal qualifications; able; adequate; suitable; sufficient; capable; legally fit."

b. "Character" means: "That moral predisposition or habit, or aggregate of ethical qualities, which is believed to attach to a person on the strength of the common opinion and report concerning him. A person's fixed disposition or tendency, as evidenced to others by his habits of life, through the manifestation of which his general reputation for the possession of a character,

good or otherwise, is obtained.”

As best we were able to reconstruct the discussions of the regents during the morning executive session, the colloquy involved frank and candid exchanges between individual members of the board of regents, regarding reports and statements generally concerning the capabilities, abilities, personal qualities or tendencies, of some individual regents. All of these discussions could fairly be categorized as involving the “competence” or “character” of persons serving on the University Board of Regents as those terms are used in [NRS 241.030\(1\)](#) and commonly understood in light of the definitions set forth above.

The more troublesome question is whether the Nevada Open Meeting Law allows a public body to conduct an executive session to discuss the competence or character of a person serving on the public body itself rather than of a third party employee or some other person. As noted above, [NRS 241.030\(1\)](#) allows a public body to hold a closed meeting to consider the character or professional competence “of a person.”

We have carefully reviewed the legislative history of the 1977 amendments to the Open Meeting Law and have found that the use of the phrase “a person” in [NRS 241.030\(1\)](#) is without any modifiers or other language of restriction or limitation. Thus, the term must be given its usual and customary meaning, *i.e.*, “a living human being as distinguished from an animal or thing.” American Heritage Dictionary of the English Language.

It is interesting to note that nearly every regent interviewed in our investigation considered himself or herself to be “a person,” within the meaning of that phrase as used in [NRS 241.030\(1\)](#). As one of them put it, “I didn’t stop being a person when I was elected to the Board of Regents.”

The scope of this phrase now appearing in Nevada’s Open Meeting Law appears broader than the language contained in the pre-1977 law. The old [NRS 241.030](#) allowing closed meetings was expressly limited by its terms to consideration of:

* * * the appointment, employment or dismissal of a public officer or employee or to hear complaints or charges brought against such officer or employee by another public officer, person or employee. * * *

The lack of any reference to “officer or employee” in the current [NRS 241.030](#), together with the use of the broader and all-encompassing term “person” indicates to this office that the courts will interpret this statute in a manner that will allow a public body to directly consider in a closed meeting the character, alleged misconduct, professional competence or physical or mental health of any member of a public body and will not construe this statute to be limited to discussions involving only other persons.

Although I strongly disagree with this conclusion as a matter of policy, I am nonetheless constrained to reach this result because of the plain meaning of the term “person” as used by the legislature in the context of the language appearing in [NRS 241.030\(1\)](#). However, I shall recommend to the Nevada Legislature that this language in the Open Meeting Law be amended to prevent executive sessions by public bodies to discuss the competence and character of their members.

Thus, notwithstanding the failure of the board of regents to comply with the aforementioned procedural requirements in twice closing the meeting on January 12, 1981, the discussions occurring in both closed executive sessions were confined to subject matter (*i.e.*, competence or character) for which a meeting may be closed under the Open Meeting Law.

2. Matters to Which Criminal Sanctions Apply.

[NRS 241.040\(1\)](#) describes what acts by a public body may subject its members to criminal sanctions:

Each member of a public body who attends a meeting of that public body *where action is taken* in violation of any provision of this chapter *with knowledge* of the fact that

the meeting is in violation thereof, is guilty of a misdemeanor. (Emphasis supplied.)

In the opinion of this office, there are two requirements before a criminal prosecution may be commenced under the Open Meeting Law:

- a. Attendance of a member of a public body at a meeting of that body *where action is taken* in violation of any provision of Chapter 241 of NRS.
- b. *Knowledge by a member of a public body* that the meeting is in violation of the Open Meeting Law.

Thus, of critical importance in evaluating any complaint involving possible criminal prosecution for violation of the Open Meeting Law is the question of whether the public body actually took some action, *i.e.*, made a decision, on any matter over which it has supervision, control, jurisdiction or advisory power.

The legislature did not make procedural violations alone the subject of criminal prosecution. Its choice and limitation of words in the penalty section of the Open Meeting Law were confined to “where action is taken.”

Such limitation is consistent with the approach taken in many other criminal laws. In American jurisprudence, a person rarely is made criminally responsible for speaking. Rather, criminal liability traditionally is made to attach only to acts or action in furtherance of some unlawful objective. The Open Meeting Law clearly proscribes attending any meeting of a public body where *action is taken* in violation of the statutory provision. Conviction for such an offense would cause a vacancy in the public office in question. See: [NRS 283.040\(1\)\(d\)](#). Furthermore, in the legislative declaration and intent at the beginning of the Open Meeting Law found at [NRS 241.010](#), the last sentence reads:

It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

Thus the language in the statute indicates that the Nevada Legislature considered “actions” and “deliberations” to be separate elements in the conduct of the people’s business. By choosing to impose criminal sanctions in [NRS 241.040\(1\)](#) in instances where “action” is taken, the legislature has invoked the power of the criminal law and involuntary removal from office in cases involving secret action by public bodies in a closed meeting which should have been open to the public. With respect to procedural violations involving a meeting where no action is taken, civil remedies are made available to compel compliance or prevent such violations from occurring in the future. [NRS 241.040\(5\)](#) and (6). Nevertheless, I will recommend to the Nevada Legislature that the Open Meeting Law be amended to provide for the imposition of stiff civil penalties against any individual member of a public body who allows such procedural violations to occur.

As indicated above, a second requirement for a criminal prosecution of a violation of the Open Meeting Law is proof that the member of the public body in question had knowledge that the meeting was in violation of the law. As noted above, the General Counsel of the University of Nevada System advised the members of the board of regents that they could legally close the duly noticed meeting on January 12, 1981 to discuss each other’s professional competence. At no point were the members of the board of regents advised by the general counsel for the university that the procedures they followed in closing the meeting and their failure to keep minutes of the closed meeting were in violation of the requirements of the Open Meeting Law. In the opinion of this office, reliance on advice provided to the board of regents by its legal counsel in the context of the events described above does not indicate an intent to knowingly or willfully violate the law. Thus, though it is necessary to take strong corrective action to prevent any further violation of the Open Meeting Law by the board of regents, a criminal prosecution is not permissible.

In conclusion, I believe the investigation prompted by your complaint has led to a much

greater understanding by the board of regents of their responsibilities under the Nevada Open Meeting Law, and I fully anticipate future compliance by them both as to matters of substance and procedure. I invite your support in joining with me in asking the Nevada Legislature to strengthen the Nevada Open Meeting Law.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

* * * * *

EXHIBIT 1

CARSON CITY, February 23, 1981

ROBERT CASHELL, *Chairman, Board of Regents*, 405 Marsh Avenue, Reno, Nevada 89509

Re: Compliance with Nevada Open Meeting Law

DEAR CHAIRMAN CASHELL:

Pursuant to [NRS 241.040](#), the Attorney General's Office must investigate and prosecute any violation of Nevada's Open Meeting Law ([NRS 241.010](#) to [241.040](#)). On January 16, 1981, this office was requested to investigate an alleged violation of the Open Meeting Law on the part of members of the University of Nevada Board of Regents during two closed executive sessions held on January 12, 1981. Our office has now completed the investigation of this matter, and based on facts developed in the course of this investigation, I have concluded that while a criminal prosecution of members of the board would not be warranted, some corrective action is necessary to impress upon board members the importance of complying with all procedural provisions of the Open Meeting Law.

With respect to the unscheduled executive sessions that occurred after the regents' meeting began on January 12, 1981, I have determined that the following procedural irregularities occurred, which do not comply with the clear and express requirements of Nevada's Open Meeting Law.

1. Both executive sessions during the regents' meeting were not properly noticed on the agenda of the meeting, as required by [NRS 241.020\(2\)](#). Furthermore, our investigation has revealed no facts establishing the existence of an "emergency" or unforeseen circumstance requiring the closing of the meeting without prior notice, as provided in [NRS 241.020\(4\)](#). The matters which prompted the executive sessions, such as dissension on the board relating to the performance of certain individuals, were known for several months prior to January 12, 1981, and in the opinion of this office, there was ample time available to provide written public notice of the need for an executive session during a regular board meeting to discuss these subjects.

2. The board of regents did not properly close the meeting on January 12, 1981 "upon a motion which specifie[d] the nature of the business to be considered." See: [NRS 241.030\(2\)](#). At a minimum, this statutory provision clearly requires a motion to be made in an open meeting in a form that comports with generally-accepted rules of parliamentary procedure. Not only must the maker of the motion identify the intended action as a motion to close the meeting but must also indicate the purpose for which the open meeting of the public body must be closed. This motion should be seconded, and members of the board should be given the opportunity to debate the motion before a formal vote is taken.

As revealed by the investigation of this office, no formal motion was ever made to close the meeting of the board prior to the first executive session on January 12, 1981. Furthermore, the general discussion prior to this closure of the meeting did not accurately specify the nature of the

business to be discussed in the closed session. A motion was made, seconded, and passed prior to the second closed executive session, but there was no indication of the purpose for which this session was held. There are also indications that the board did not confine its discussions to the intended subject matter of the first closed meeting. In our opinion, without having a formal motion before the public body to close a meeting, specifying the subject matter to be discussed in the closed session, it is very difficult for board members to know the parameters of the subject matter that can be discussed in private, so as not to deviate from the strict requirements of the law concerning closed meetings. The current practices of the board in this regard are inconsistent, unclear, and improperly executed.

3. No minutes were kept of the closed executive sessions, contrary to the provisions of [NRS 241.035](#)(1). Though minutes of meetings closed pursuant to [NRS 241.030](#) are confidential, unless the public body determines the matters discussed therein no longer require confidentiality, it is beyond question that the statute requires minutes of the meeting to be kept. That this was not done is an appalling oversight and indicates a careless disregard for the rights of the person or persons whose character, conduct, competence or health were discussed at the meeting, who, under the law, have an absolute right to a copy of the minutes.

As indicated above, this office is prepared to take corrective action to stop any further procedural violations of the Open Meeting Law. Thus, I intend to file an appropriate civil action against the members of the University Board of Regents seeking an order to compel compliance with all provisions of the Open Meeting Law and to correct any deficiencies in the board's rules of procedure that allow violations of the sort described above to occur. However, prior to instituting such a lawsuit, this office is requesting the board of regents to correct these deficiencies on its own by taking some appropriate action that will assure compliance with the Open Meeting Law, especially in regard to executive sessions. Within 30 days from the date of this letter, please advise in writing if the following steps have been taken:

1. Adoption by appropriate action of a policy or rule of procedure, setting forth the guidelines that will be followed by members of the board of regents in noticing and conducting closed meetings in compliance with all requirements of the Open Meeting Law.
2. Establishment of guidelines setting forth (a) the steps that will be taken in giving notice of any motion to close an open and public meeting to conduct a closed executive session or (b) the procedures to be followed in specifying the existence of an "emergency" that requires a motion to close a meeting for the reasons set forth in [NRS 241.020](#)(4).
3. Clarification of the parliamentary rules of procedure that govern board meetings, including any motion to close a meeting to the public.
4. Identification of the board rule requiring that any motion to close an open meeting must set forth the subject matter or nature of the business to be considered at the closed meeting and further requiring that only the subject matter or business identified in the motion may be discussed in closed session.
5. Identification of the guidelines that will henceforth be followed in recording the proceedings of a closed meeting or an executive session and preparing minutes of such meeting, as required by [NRS 241.035](#).

6. With respect to the meeting of January 12, 1981, verification that minutes of the closed meetings that took place on that date have been reconstructed and are available for the use of the persons entitled to access to said minutes as provided by Nevada law. (Confirmation that said minutes have been reconstructed should be in the form of a letter of the secretary of the board of regents certifying that said minutes are on file with the other official records of the board.)

If this office is officially notified that the above items have been considered and favorably acted upon by the board of regents within 30 days from the date of this letter, no further action will be taken. However, if the board does not respond to this request, please be advised that an appropriate civil action will be commenced by this office, pursuant to the inherent power vested in the attorney general in [NRS 228.170](#) to protect and secure the interests of the State of Nevada

in assuring that public bodies in this state comply with all provisions of the state's Open Meeting Law, to seek the relief specified above. I or a member of my staff will be happy to answer any questions you may have on the foregoing matters.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

OPINION NO. 81-B Criminal Investigations on Premises of Nevada Mental Health Institute—Police officers do not need approval of staff prior to conducting a criminal investigation on premises of Nevada Mental Health Institute, though such access does not waive the constitutional rights of the clients being treated there. Searches at the institute of persons and areas where there is a reasonable expectation of privacy must comply with the Fourth Amendment to the U.S. Constitution, and any person who is identified as a suspect and becomes the subject of a criminal investigation must be informed of his MIRANDA rights.

CARSON CITY, March 18, 1981

JEROME GRIEPENTROG, *Administrator, Division of Mental Hygiene and Mental Retardation,*
Suite 244, 1937 N. Carson Street, Carson City, Nevada 89710

Re: Scope of Law Enforcement Investigations at Division Facilities

DEAR MR. GRIEPENTROG:

You have asked a number of questions regarding the scope of investigations law enforcement officials may properly conduct at division facilities.

STATEMENT OF FACTS

Recently, Sparks police were called to Sierra Developmental Center (SDC) at the request of that facility to investigate a reported sexual assault of a mentally retarded client. The incident had allegedly occurred on the Nevada Mental Health Institute (NMHI) campus adjacent to patient living quarters. The suspect was believed to be a client of NMHI.

As part of their investigation, the police requested that they be allowed to tour some of the living units with the alleged victim to determine if she could identify the suspect. The supervisory nurse in charge refused to allow the investigation to proceed. The Chief Medical Director overruled that decision and requested that the police take certain steps to minimize the level of intrusion.

A number of federal and state constitutional rights are potentially implicated by these questions. They include the Sixth Amendment right to counsel and confrontation of witnesses, the Fourteenth Amendment due process clause, the Fourth Amendment prohibition against unreasonable searches and seizures, and the Fifth Amendment privilege against self incrimination.

It must be stressed at the outset that the law presumes persons admitted to division facilities are competent to exercise all their rights unless specifically adjudicated incompetent. See [NRS 433A.460](#). Thus, clients without legal guardians have the same constitutional rights as any other person, and the same parallel ability to waive or forego any of these rights.

QUESTION ONE

Do police need to have the permission of NMHI administration to tour public areas of the Nevada Mental Health Institute campus?

ANALYSIS—QUESTION ONE

The police have a duty to preserve the peace, arrest and commit to jail all persons whom they reasonably believe have committed a crime. The police are empowered and obligated to follow up on information they receive regarding alleged criminal activity Nev. [Const. art. 4, § 32](#), and [NRS 248.090](#). The police do not need administration permission to conduct their investigation within permissible limits. There can be no question that the law enforcement agencies may have access to the institute campus to conduct investigations of reported criminal activity.

Administrative staff should point out clinical/medical factors of the respective client(s) which police methods may affect. But having done so, staff have satisfied their obligations and the police may proceed at their own risk. The medical director's request that the police take certain steps to minimize the level of their intrusion was entirely appropriate and in accord with this approach.

The following information outlines some basic criminal procedures which law enforcement agencies must consider in determining the scope of their identification investigations. It is important to keep in mind that if a client is arrested and charged with a crime it will be the responsibility of his or her defense attorney to attempt to suppress the identifications obtained in violation of the client's right. Division staff should not try to prejudge or limit police tactics except to offer a clinical perspective of the client's condition.

The touring of units to identify persons suspected of criminal conduct potentially implicates a person's Sixth Amendment right to counsel and Fourteenth Amendment due process rights. Formal post-indictment lineups require the appointment of counsel for criminal defendants. U.S. v. Wade, 388 U.S. 218 (1967), and Gilbert v. Calif., 388 U.S. 263 (1967). Such procedures I believe are beyond the scope of your question.

The situation presented here is one in which the police desire to "showup" a suspect to a witness or escort the witness to view a suspect on the institute campus or in the living quarters. There is no right to counsel in these less formal investigative procedures.

The case of Kirby v. Ill., 406 U.S. 682 (1972), held that the Wade/Gilbert rule applies only "at or after the initiation of adversary judicial criminal proceedings." A valid warrantless arrest (based upon probable cause) is generally agreed to be prior to the initiation of adversary judicial criminal proceedings. State v. Anderson, 505 P.2d 691 (Kan. 1973).

Once retained or appointed, defense counsel might raise due process considerations as a backup protection even if the client had no right to counsel at the informal "showup" investigations. If a defendant's identification was "so unnecessarily suggestive and conducive to irreparable mistaken identification" his due process is deemed to have been denied. Stovall v. Denno, 388 U.S. 293 (1967). The court recognized in this case that confrontations with a single suspect rather than a lineup have been widely condemned, and noted the potential for improper influence from "showup" confrontations.

Nonetheless, presentations of a single suspect for identification in showups promptly after the crime are allowed because of contravailing policy considerations of prompt accuracy and police efficiency. See, e.g., State v. Jordan, 506 S.W.2d 74 (Mo. 1974). The requirement of promptness is generally satisfied when showups are within several hours of the crime. And the courts do not generally find impermissible suggestion from the circumstances of prompt-after-crime identifications. See, e.g., U.S. v. Hines, 455 Fed.2d 1317 (D.C.Cir. 1972), cert. denied, 406 U.S. 969 (1972).

It is also permissible for the *witness* to be escorted to view the suspect. This has been done when the suspect is in a hospital. See, e.g., Jackson v. U.S., 412 Fed.2d 149 (D.C.Cir. 1969). As mentioned earlier, the prompt showups are not encouraged by the courts but permissible where emergency situations exist. The emergency may be either in the form of an injured victim or

suspect, perhaps on the verge of death, or where necessary, to preserve evidence.

CONCLUSION—QUESTION ONE

The police do not need administration or staff approval to conduct their investigation of criminal activities. The touring of campus and living units is limited by Art. 1, § 8, of the Nevada Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. Identifications obtained in excess of these limitations may be suppressed upon motion by the client's defense counsel.

QUESTION TWO

Under what circumstances and to what extent may the police properly search the Nevada Mental Health Institute campus, cottages, and living rooms of the residential clients?

ANALYSIS—QUESTION TWO

The Fourth Amendment to the United States Constitution protects the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The amendment is designed to protect persons and not necessarily specific places. The prime consideration is whether or not the government intrusion violates a justified expectation of privacy. *Katz v. U.S.*, 389 U.S. 347 (1967). There must be both an actual (subjective) expectation of privacy in the individual and an expectation that society is prepared to recognize as "reasonable."

It is not considered a search for an officer lawfully present at a certain location (*e.g.*, responding to information of criminal conduct) to detect something by one of his natural senses. *U.S. v. Fisch*, 474 F.2d 1071 (9th Cir. 1973). The officer may see something in plain view, or smell or hear something related to criminal conduct. Public areas on the Nevada Mental Health Institute campus—the administration building, canteen, library, sidewalks and grounds—would certainly be open to the investigative senses of law enforcement.

Further areas that the police may lawfully search and make arrests without violating the Fourth Amendment turn on a resolution of the expectation of privacy question. Does a division residential client have an actual and reasonable expectation of privacy in the common lounge or kitchen areas of a residential cottage? I suspect not since such areas are not under any one client's exclusive control. Under escort of the administration or staff, members of the public frequently view these common areas. Law enforcement agencies may properly command similar consideration.

Whether law enforcement agencies may validly search the individual or shared client living quarters is a more difficult question. [NRS 433.484\(2\)](#) indicates that clients have a right to wear their own clothing and to keep and use their own personal possessions. Clients may also have access to individual storage space for private use. [NRS 433.484\(3\)](#). It is not entirely clear whether the client's expectation of privacy extends to his or her living quarters. If the client has an expectation of privacy, law enforcement agencies will either have to (a) obtain a search warrant; (b) obtain the *client's* consent; or (c) establish emergency considerations.

The emergency or exigent circumstances which may justify such an intrusion include situations where: (1) the occupants were already aware of the presence of the police and their objective, *Matthews v. U.S.*, 335 A.2d 251 (D.C.App. 1975); (2) prompt action was required for the protection of the person within, *People v. Woodward*, 190 N.W. 721 (Mich. 1922); (3) unannounced entry was required to prevent the destruction of evidence, *Borum v. U.S.*, 318 A.2d 590 (D.C.App. 1974); or (4) by unannounced entry escape of the person to be arrested could be prevented, *People v. Solario*, 566 P.2d 627 (Col. 1977).

Unless the NMHI patient has been adjudicated incompetent, he and he alone can give the police consent to search his person and possessions. While the patient's living quarters are the property of the State of Nevada, the state has no right to consent to searches of these living

quarters and thereby waive the patient's Fourth Amendment rights. See, *Commonwealth v. Silo*, 389 A.2d 62 (Pa. 1978), cert. denied, 439 U.S. 1132 (1979), reh. denied, 440 U.S. 969 (1979), (nurse could not consent to search and seizure of hospital patient's clothing); but compare, *People v. Dolan*, 408 N.Y.S.2d 249 (1978), (hospital could consent to the seizure of blood samples where such samples were extracted for medical diagnosis by hospital personnel). To do so could subject the NMHI to civil liability and money damages pursuant to the Federal Civil Rights Act. 42 U.S.C. § 1983.

By the same token, division staff are not in a position to withhold consent to search. Division staff may offer to the police a clinical perspective of the client's ability to consent, but staff is not the client's guardian or "de facto" guardian capable of granting or withholding consent. The division's duty to maintain a safe environment and take reasonable measures to protect other clients from harm or attack (see *Romeo v. Youngberg*, No. 78-1892, 3d Cir.) works against any self-appointed advocacy for one client at the expense of another.

CONCLUSION—QUESTION TWO

The Fourth Amendment to the United States Constitution protects persons against unreasonable searches and seizures. Police may not search a person or area where there is a reasonable expectation of privacy unless they have a search warrant, the client's consent, or exigent circumstances. Division staff may not on behalf of a client give consent or withhold consent to a search.

QUESTION THREE

May the police interrogate a suspect on the Nevada Mental Health Institute campus? And if so, may a therapist be present?

ANALYSIS AND CONCLUSION

Once the police have identified a suspect and this person becomes the subject of their investigation, the person must be informed of his *Miranda* rights. These rights are the right to remain silent, the warning that anything said can be used against the suspect, the right to an attorney, and the right to an appointed attorney if the suspect cannot afford to hire his own. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The police have an affirmative obligation to inform the suspect of these rights. Any failure to do so will only cause the information elicited to be later suppressed. We conclude, however, there is no prohibition in conducting the interrogation on campus.

Additionally, there is no prohibition preventing a staff therapist from being present during any such interrogation. I suspect that most law enforcement agencies would welcome the therapist's perspective on the client's mental competency.

SUMMARY

Law enforcement agencies are empowered and obligated to investigate alleged criminal conduct. The law presumes persons admitted to division facilities to be competent unless specifically adjudicated incompetent. Consequently they have no greater or lesser rights than any other person reasonably suspected of criminal conduct.

Police investigations and identification procedures potentially implicate a number of a suspect's constitutional rights. Police activities must be conducted within permissible bounds or the information obtained may be suppressed prior to any trial.

The division has a duty to maintain a safe environment; to take reasonable measures to keep clients free from harm or attack. Hindering police investigations on an advocacy theory on behalf of a suspected client flies in the face of this duty. Division personnel may nonetheless make themselves available to law enforcement and provide a clinical perspective regarding the suspect's mental capacity so that the investigative agency may more properly gauge the

reasonableness of their procedures.

Sincerely yours,

RICHARD H. BRYAN, *Attorney General*

By SEAN T. MCGOWAN, *Deputy Attorney General*

OPINION NO. 81-C State Board of Pharmacy; [NRS 639.050](#)—A meeting held by the State Board of Pharmacy pursuant to [NRS 639.050](#) to deliberate toward a decision at the conclusion of the hearing concerning a proposed disciplinary action must be closed to the public.

CARSON CITY, June 25, 1981

MR. GEORGE R. TUCKER, *Executive Secretary, Nevada State Board of Pharmacy*, 1201 Terminal Way, Suite 212, Reno, Nevada 89502

Re: Deliberations by Board of Pharmacy to Consider a Decision After Completion of a Disciplinary Hearing

DEAR MR. TUCKER:

This is in response to your letter of June 4, 1981, in which you have asked an opinion of this office concerning the following:

QUESTION

May the Nevada State Board of Pharmacy conduct a closed meeting to deliberate on the decision of guilt or innocence of a board licensee, subsequent to completion of a public hearing at which evidence concerning the proposed disciplinary action was received?

ANALYSIS

The legal requirements concerning administrative actions of the Nevada State Board of Pharmacy are set forth in Chapter 639 of Nevada Revised Statutes. Three statutes in particular pertain to the question you have asked.

1. [NRS 639.050](#)(3) states in relevant part as follows:

Meetings of the board which are held to deliberate on the decision in an administrative action or to prepare, grade or administer examinations are closed to the public. (Emphasis supplied.)

Note: This statute was last amended in Chapter 671, Statutes of Nevada 1979, page 1684, which reenacted the language above quoted.

2. [NRS 639.247](#)(1) states as follows:

1. *Any hearing held for the purpose of suspending or revoking any certificate, certification, license or permit shall be conducted publicly by the board. The hearing shall be presided over by a member of the board or his designee and three members shall constitute a quorum. Any decision by the board shall require the concurrence of at least three members. The proceedings of all such hearings shall be reported or recorded by an*

official court reporter or other qualified person. (Emphasis supplied.)

Note: This statute was last amended by the Nevada Legislature in Chapter 533, Statutes of Nevada 1977, page 1282, which enacted the language above quoted.

3. [NRS 639.251](#), which also contains relevant language to the analysis of the question set forth above, states as follows:

*Upon conclusion of the hearing or as soon as practicable thereafter and, in any event, within 30 days, the board shall make, enter and file its decision and shall make, enter and file its order based thereon. * * * (Emphasis supplied.)*

As is evident from the statutory language set forth above, there are two phases or components to an administrative action involving a disciplinary proceeding of the board of pharmacy, to-wit: (1) “hearings” in connection with the suspension or revocation of any certificate, license or permit, which must be conducted publicly; and (2) “meetings” with respect to the deliberation preparatory to a decision at the completion of the evidentiary hearing in an administrative action, which must be closed to the public.

Generally, courts have indicated that the phase of an administrative proceeding in which members of the agency deliberate toward a decision is to be distinguished from an earlier phase involving the formal hearing at which evidence is taken and arguments are made in connection with the agency decision that must be made. This distinction was made in the case of *State v. Board of Appeals*, 21 Wis.2d 516, 124 N.W.2d 809 (1963), by the Wisconsin Supreme Court. At issue was the question whether or not a local zoning board of appeals in Milwaukee had committed prejudicial error by holding executive sessions to consider evidence presented at a prior formal appeal hearing concerning the revocation of a building permit, notwithstanding a Wisconsin statute which required all meetings of such boards to “be open to the public.” However, the Wisconsin Supreme Court noted the existence of another statute, containing language similar to [NRS 639.050](#)(3) quoted above, which stated that nothing in the open meeting law “shall prevent executive or closed sessions for purposes of: (a) deliberating after judicial or quasi-judicial trial or hearing.” *Cf.* Sec. 14.90, Statutes of Wisconsin, 1959. When the two Wisconsin statutes were construed together, the result announced by the Wisconsin Supreme Court was as follows: “* * * all meetings in the nature of hearings held on a pending appeal must be open to the public, but that closed executive sessions may then be held for the purpose of deliberating to determine what decision should be made.” *State v. Board of Appeals*, 124 N.W.2d at 820. In support of this ruling, the court quoted a “majority” rule that had been enunciated by the Maryland Court of Appeals in *Sullivan v. Northwest Garage, Inc.*, 223 Md. 544, 165 A.2d 881 (1960), and was stated as follows:

The weight of such authority as there is supports our conclusion that the hearings of the Board must be public but that the deliberations of the Board after the hearing is completed may be in private.

Id. at p. 884.

The Maryland court clearly noted that the public hearing at which evidence was presented and arguments were heard was a separate type of proceeding from one in which the members of an administrative board deliberated on the decision to be made in a contested case brought before such board. This distinction and the application of different rules to each segment of an administrative proceeding, *i.e.*, the evidentiary hearing phase and the deliberative phase, was recognized and further clarified in *DuPont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 364 A.2d 610 (D.C. Dist. Ct. of Appeals (1976)). In that case, the court cited with approval the rule stated in *Sullivan v. Northwest Garage and Storage Company*,

supra, and noted as follows:

The quasi-judicial function of an administrative agency differs completely from the nature of its other activities. The personal and property rights of the parties, at issue in such proceedings, can only be protected, under the American system, in a judicial atmosphere that assures freedom of expression to each deciding official and encourages a free discussion and exchange of views which is so essential to frank and impartial deliberation.

DuPont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment, *supra*, at pages 613-614.

In view of the statutory scheme set forth in Chapter 639 of Nevada Revised Statutes, which sets forth different rules for deliberative meetings as distinguished from evidentiary hearings of the Nevada State Board of Pharmacy, this office has concluded that evidentiary “hearings” and “meetings” to deliberate toward a decision are governed by different procedural requirements. [NRS 639.050](#) expressly provides that a meeting held to deliberate on a decision in an administrative action is closed to the public. On the contrary, any hearing held that relates to the suspension or revocation of a certificate, license or permit issued by the board must be conducted publicly.

CONCLUSION

Thus, it is the opinion of this office that at the conclusion of a hearing at which evidence has been taken and arguments made in connection with any proposed suspension or revocation of any certificate, license or permit issued by the board of pharmacy, a “meeting” by members of the board to deliberate toward a decision concerning proposed disciplinary action shall be closed to the public.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

By LARRY D. STRUVE, *Chief Deputy Attorney General*

OPINION NO. 81-D Child Abuse Reports ([NRS 200.502](#)); School Counselors as School Authority—School counselors defined in [NRS 49.290](#) are “school authorities” and must report suspected child abuse, as required by [NRS 200.502](#).

CARSON CITY, July 1, 1981

TED SANDERS, *Superintendent of Public Instruction*, Capitol Complex, Carson City, Nevada
89710

DEAR MR. SANDERS:

You have asked the opinion of this office regarding the following questions:

QUESTION ONE

Is a person who is regularly employed by a public or private school as a counselor, psychologist or psychological examiner for the purpose of counseling pupils a “school authority” within the meaning of [NRS 200.502](#), who is required to report cases of suspected child abuse?

ANALYSIS

[NRS 200.501](#) to [200.509](#), inclusive, governs the reporting, investigation and prosecution of child abuse. [NRS 200.502](#) requires that certain persons report suspected child abuse. The statute provides, in part, as follows:

1. A report shall be made promptly to the local office of the welfare division of the department of human resources, to any county agency authorized by the juvenile court to receive such reports, or to any police department or sheriff's office when there is reason to believe that a child under 18 years of age has been abused or neglected. * * *
2. Reports shall be made:
 - (a) By every physician, dentist, chiropractor, optometrist, resident and intern licensed in this state, examining, attending or treating an apparently abused or neglected child.
 - (b) By the superintendent, manager or other person in charge of a hospital or similar institution, upon notification, which shall be provided by every physician whose attendance with respect to an apparently abused or neglected child is pursuant to his performance of services as a member of the staff of the hospital or institution.
 - (c) By every professional or practical nurse, physician's assistant, psychologist and advanced emergency medical technician-ambulance licensed or certified to practice in this state, who examines, attends or treats an apparently abused or neglected child.
 - (d) By every attorney, clergyman, social worker, *school authority* and teacher.
 - (e) By every person who maintains or is employed by a licensed child care facility or children's camp.
3. A report may be made by any other person. (Emphasis added.)

Chapter 49 of Nevada Revised Statutes provides for certain privileges. [NRS 49.290](#) provides for a school counselor-pupil privilege as follows:

1. As used in this section, "counselor" means a person who is regularly employed by a public or private school in this state as a counselor, psychologist or psychological examiner for the purpose of counseling pupils, and who holds a valid certificate issued by the superintendent of public instruction authorizing the holder to engage in pupil counseling.
2. Except for communications relating to any criminal offense the punishment for which is death or life imprisonment, communications by a pupil to a counselor in the course of counseling or psychological examination are privileged communications, and a counselor shall not, without the consent of the pupil, be examined as a witness concerning any such communication in any civil or criminal action to which such pupil is a party.

You have asked whether the term "school authority" as used in [NRS 200.502](#) includes counselors as defined in [NRS 49.290](#).

"Authority" is defined in *Webster's New International Dictionary*, 186 (2nd ed. 1959), as "legal or rightful power; a right to command or to act; power exercised by a person in virtue of his office trust; dominion; jurisdiction; authorization; as, the authority of parents over children * * * a person or a board or commission, having quasi governmental power in a particular field * * * (chiefly in pl.) government, the persons or the body exercising power or command." It is defined in *Black's Law Dictionary*, 121 (5th ed. 1979), as "legal power; a right to command or to act."

The welfare division, through its district offices in the larger metropolitan areas of northern Nevada, has routinely considered school counselors to be a type of "school authority" in their interactions. Our office has been advised that the district office caseworkers have developed this attitude due to the amount and type of control or power the school counselors seem to exert over

the day-to-day school activities of the child. In fact, one caseworker felt the school counselor could fit the criteria developed to define the *loco parentis* position which teachers have historically occupied.

Administrators within the school districts have also consistently viewed school counselors as “school authorities,” without actually defining counselors as such. The school counselor is an active participant with the total staff of the school in the administration of certain school policies and regulations. A continual interaction between counselor and student involving critical elements of student control, specifically student placement, is observable during any given school week. This responsibility for student placement and implementation of school administrative policies is a function shared by all the staff which have traditionally been understood to be “school authorities.” Also, the counselor is viewed by both parents and students as exhibiting authoritative qualities which put them akin with teachers and principals. In fact, counselors have been traditionally grouped with other school district personnel such as teachers, principals, teacher’s aides, school nurses, and others as “school authorities.” The rationale for this overall view has been that these individuals are involved in student contact and make decisions which directly affect the student population on a day-to-day basis.

A presumption of fact can arise from a process of probable reasoning in the absence of actual certainty of truth or falsehood, or until such certainty can be ascertained. *See Black’s Law Dictionary*, 1349 (5th ed. 1979). This presumption is the natural explanation of facts and is to be discarded only upon a showing by competent proof that the existence of the presumed fact is not probable. *See 29 Am.Jur.2d, Evidence § 161 et seq.* (1967) for discussion of factual presumptions. In the opinion of this office a presumption has arisen in the context of the role performed by school counselors in their working environment in Nevada that such counselors function as “school authorities.” Not only is this presumption evidenced by the manner in which welfare division personnel have worked with school counselors in matters relating to the day-to-day school activities of children; but also by the manner in which school district officials have characterized the role performed by school counselors.

CONCLUSION

“School authority” within the meaning of [NRS 200.502](#) includes school counselors as defined in [NRS 49.290](#).

QUESTION TWO

If counselors are considered to be school authorities, do the provisions of [NRS 49.290](#) exempt them from the child abuse reporting requirements of [NRS 200.502](#) except where consent is granted by the pupil?

ANALYSIS

Chapter 49 of the Nevada Revised Statutes provides for certain privileges allowing persons to refuse to be a witness, refuse to disclose any matter, refuse to produce any object in writing or prevent another from being a witness or disclosing any matter of producing any object or writing. [NRS 49.015](#). [NRS 49.290](#) provides that “communications by a pupil or a counselor in the course of counseling or psychological examination are privileged communications” except where consent is granted by the pupil.

[NRS 200.506](#) specifically answers your question as follows:

In any proceeding resulting from a [child abuse] report made or action taken pursuant to the provisions of [NRS 200.502](#), [200.503](#) and [200.504](#) or in any proceeding where such report or the contents thereof is sought to be introduced in evidence, such report or contents or any other fact or facts related thereto or to the condition of the child who is the subject of the report shall not be excluded on the ground that the matter would

otherwise be privileged against disclosure under chapter 49 of NRS.

Since the contents of a report of child abuse cannot be excluded under any of the privileges set forth in chapter 49 of NRS, school counselors are not exempted from complying with the child abuse reporting requirements of [NRS 200.502](#), whether or not the pupil consents to the filing of a child abuse report.

CONCLUSION

School counselors must comply with the requirements of [NRS 200.502](#) by reporting suspected child abuse. Pupil consent is not required prior to making such report.

Sincerely,

RICHARD H. BRYAN, *Attorney General*
By EMMAGENE SANSING, *Deputy Attorney General*

OPINION NO. 81-E Real Estate Lotteries—A scheme involving a prize of real property distributed by chance among individuals who have paid some form of consideration is a lottery prohibited by Nevada law, which applies to charities and members of private clubs.

LAS VEGAS, October 12, 1981

ROBERT J. MILLER, *Clark County District Attorney, c/o S. MAHLON EDWARDS, Deputy District Attorney, Clark County Courthouse, 200 E. Carson, Las Vegas, Nevada 89101*

DEAR MR. MILLER:

You recently requested an opinion of this office which would address several questions regarding the permissibility or legality, under Nevada law, of the schemes described in the following two fact situations.

FACT SITUATION A

A local real estate agency has purchased a home. They have printed “donation” cards which sell for \$100 and entitle the holder thereof to a family portrait (allegedly worth \$100). The holder of the card is also entitled to be included in a “free” drawing for the home. The “donation” cards are sold by local retailers and the retailer selling the winning card receives a commission of \$6,000. From the proceeds of the sale of donation cards, the home will be paid for and the commission paid, with the excess funds received from the sale going to a charity.

FACT SITUATION B

The same facts as set forth above apply, with the exception that upon making the \$100 donation, the donor becomes a member of a club, and is entitled to the family portrait. Some time after the donation and membership drive is over, the club will have a “free” drawing for a home which the club owns.

The specific questions you ask are:

QUESTION ONE

“Under Fact Situation A and Fact Situation B, does a lottery, raffle or gift enterprise exist?”

ANALYSIS OF QUESTION ONE

At the outset, I would note that your office opined on September 16, 1981, that both Fact Situations A and B give rise to lotteries prohibited by the Nevada Constitution and the Nevada Revised Statutes. Article 4, § 24 of the Constitution of the State of Nevada provides: “No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed.”

The enforcement of this constitutional prohibition is found in [NRS Chapter 462](#), which, after providing a statutory definition for the term lottery, provides misdemeanor penalties for continuing, preparing, setting up or drawing a lottery and further penalizes the sale, transfer or assisting in the sale of lottery tickets by various means.

The definition of lottery found in [NRS 462.010](#) reads as follows:

A lottery is any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or any interest in such property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name the same may be known.

Under this definition, three basic elements must coexist to create a lottery: (1) A *prize* consisting of some form of property; (2) distributed by *chance*; (3) among individuals who have paid some form of *consideration*. There could be no serious dispute that in both Fact Situation A and B there is a prize (*i.e.*, the house) and the element of chance in its distribution (*i.e.*, the drawing). The element of consideration for the chance at receiving the prize is therefore the focal point for an analysis of question one.

The fact that everyone who pays the \$100.00 receives a family portrait, does not remove a scheme from the lottery prohibition assuming the other elements are present. *See, e.g.*, Ex parte Blanchard, [9 Nev. 101](#) (1874); State ex rel. Murphy v. Overton, [16 Nev. 136](#) (1881). The overwhelming weight of authority in the United States supports the view that where the purchase of an item or thing of value is a prerequisite to entitlement to a chance at winning other property, the consideration element has been satisfied. *See, e.g.*, Dennis v. Weaver, 121 S.E.2d 190 (1961), *aff'd*, 122 S.E.2d 571; State v. Cox, 349 P.2d 104 (Mont. 1960); Settle v. State, 83 P.2d 561 (Okla. 1938); Smith v. State, 127 S.W.2d 297 (Tex. 1939).

In light of the overwhelming weight of authority that the requirement of any purchase is sufficient to establish consideration, it matters not whether the “family portraits” are actually worth \$100.00. Lucky Calendar Co. v. Cohen, 117 A.2d 487 (N.J. 1955); State v. Cox, *supra*.

The fact that the payments received are described as “donations” does not alter their character as consideration. The word “donation” has been defined by law as “an act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another *without any consideration*.” (Emphasis added.) Chouteau v. City of Saint Louis, 56 S.W.2d 1050, 1051 (Mo. 1932); See also State v. Southern Pine Co., 38 So.2d 442 (Miss. 1949); State Highway Department of Georgia v. Bass, 29 S.E.2d 161 (Ga. 1944); Sundstrom v. Village of Oak Park, 30 N.E.2d 58 (Ill. 1940). Where something of value is received in return for the transfer of money or property, the transaction will not be deemed a donation. Quinette v. Delhommer, 146 So.2d 491 (La.App. 1962); Allardice v. Adams County, 476 P.2d 982 (Colo. 1970); Dixon v. Turner, 364 So.2d 146 (La.App. 1978); Blue Cross Ass’n v. United States, 474 F.2d 654 (Ct.Cl. 1973). In both fact situations, therefore, consideration flows in both directions. The portrait and the chance at winning the home are consideration for the \$100.00 payment which is in turn consideration for the portrait and the chance at the home.

CONCLUSION TO QUESTION ONE

The three elements of a lottery exist in both fact situations and the drawing fits within the

constitutional and statutory prohibition against lotteries.

QUESTION TWO

“Does the fact that the proceeds (after payment of the home) go to a charity exempt a lottery from prosecution under [NRS Chapter 462](#)?”

ANALYSIS OF QUESTION TWO

Neither the constitutional or statutory prohibition of lotteries contain any type of exception for charities. Indeed, the absence of such an exception from the constitutional provision would render any statutorily created exception for charities unconstitutional. Ex parte Blanchard, *supra*; State ex rel. Murphy v. Overton, *supra*. In both of the cases cited above, the Nevada Supreme Court held unconstitutional an act passed by the Nevada Legislature authorizing the Nevada Benevolent Association to finance the construction of an insane asylum by selling tickets to public concerts or entertainments at which drawings were held to distribute prizes among the ticket holders. Both Ex parte Blanchard, *supra* and State ex rel. Murphy v. Overton, *supra*, specifically hold that charities are not exempted from the constitutional ban against lotteries and both cases remain the law of this state.

It should be noted that in response to the foregoing authorities, the 1981 Nevada Legislature passed Assembly Joint Resolution No. 24 which would amend Article 4, § 24 of the Nevada Constitution to read as follows:

The legislature may authorize only persons engaged in charitable activities or other activities not for profit *to conduct lotteries on their own behalf if the net proceeds are used for charitable purposes or for an activity conducted in this state not for profit* and may provide by law for the regulation of these lotteries. The state and its political subdivision [*sic*] shall not conduct a lottery. (Emphasis added.)

File Number 129, 1981 Statutes of Nevada at 2149.

Pursuant to Article 16, § 1 of the Nevada Constitution, however, the proposed constitutional amendment must again be passed by the legislature in the 1983 legislative session and thereafter be approved by a majority of the voters at a subsequent general election before the amendment can take effect.

Even in the event the constitution were successfully amended by the process described above, the three following caveats should be noted with regard to the present analysis.

First, it should be noted that the language of the proposed amendment is permissive only. It would be necessary for the legislature to pass statutes authorizing charitable lotteries. Unless and until such constitutional amendment and subsequent legislation becomes effective, charities remain prohibited from conducting lotteries.

Second, the proposed constitutional amendment would limit the legislature to authorize only persons engaged in charities or nonprofit activities themselves to operate the lottery. This is not the case in Fact Situations A or B herein.

Third, under the proposed constitutional amendment, the legislature could only authorize a lottery where the entire net proceeds (after expenses incurred in operating the lottery itself) were used for a charitable purpose or a nonprofit activity. Therefore, the real estate company and the retail merchants in both fact situations could derive no profit from the proceeds of the lottery, even if a charity or nonprofit activity were duly authorized to conduct it.

CONCLUSION TO QUESTION TWO

Under current law, the constitutional and statutory ban against lotteries applies to charities.

QUESTION THREE

“Is a private drawing among members of a ‘club’ considered a raffle or lottery under [NRS Chapter 462](#)?”

ANALYSIS OF QUESTION THREE

The formation of a club under an arrangement for the distribution of real estate where each member pays a certain sum each week and weekly drawings are held to determine which member shall receive a lot has been judicially determined to be a prohibited lottery. *Branham v. Stallings*, 40 P. 396 (Colo. 1895).

Similarly, it has been held that, where retail clothiers or tailors form a “club” in which members pay a fixed sum each week for the chance of winning a free suit, an illegal lottery has taken place even though a member is entitled to a suit equal in value to the total amount of his payments if he has been unsuccessful in the weekly drawings after a certain number of weeks. *Billis v. People*, 157 P.2d 139 (Colo. 1946); *People v. McPhee*, 103 N.W. 174 (Mich. 1905). See also cases collected in 29 A.L.R.3d 888, § 15 “Suit Clubs and Similar Schemes.”

CONCLUSION TO QUESTION THREE

A private drawing among members of a “club” is not exempted from the constitutional and statutory prohibition against lotteries, and such a scheme is therefore unlawful.

QUESTION FOUR

If such raffles are not in violation of Nevada Constitution Article 4, Section 24, and [NRS Chapter 462](#), which agency or board has the responsibility to regulate and license such raffles to ensure that the prize is actually given as promised and ensure refunds if sufficient memberships, or tickets, are not sold?

ANALYSIS OF QUESTION FOUR

The Nevada Supreme Court long ago held that the legislature had the power to distinguish between lotteries and other forms of gambling in choosing to legalize the latter. In the Matter of Pierotti, [43 Nev. 243](#), 184 P. 209 (1919). As long as the constitutional ban against lotteries remains in effect, this distinction must be recognized in Nevada, and that which is clearly a lottery cannot be sanctioned or regulated in this state as a form of gambling, nor can it be permitted as a non-gambling activity as long as the elements of prize, consideration and chance are the predominant elements of the activity.

CONCLUSION TO QUESTION FOUR

In light of the opinion reached herein that both Fact Situations A and B represent prohibited lotteries, and that this prohibition is unaltered by either the receipt of some of the proceeds by a charity or by the fact that the drawing is only among members of a private club, the necessary predicate for an answer to question four is not present.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

By NIKOLAS L. MASTRANGELO, *Deputy Attorney General,*
Gaming Division

OPINION NO. 81-F Real Estate Timesharing, Chapter 119 of NRS—A right-to-use, vacation license, or club membership is an interest in real property or security and falls

within the purview of Chapter 119 of NRS.

CARSON CITY, December 7, 1981

R. LYNN LUMAN, *Administrator, Real Estate Division*, 201 S. Fall Street, Nye Building, Room 129, Carson City, Nevada 89710

DEAR MR. LUMAN:

This letter responds to your recent inquiry regarding the applicability of Chapter 119 of NRS to sales of certain types of timesharing arrangements. You have asked the following:

QUESTION

Does a right-to-use, vacation license or club membership fall within the purview of Chapter 119 of NRS?

ANALYSIS

In your memorandum requesting this opinion, you indicate that to date the division's response to questions from industry and others regarding the applicability of Chapter 119 to a right-to-use, a vacation license, or similar type of timesharing arrangement is as follows: "Due to the Carriage House decision, we, at this time, are not regulating it." Because the division has significantly relied on a case which is unusually vague, you have requested an analysis of the above question to determine whether the *Carriage House* opinion discussed below is truly dispositive of the extent to which your division may regulate certain timesharing interests involving real property.

The *Carriage House* decision, *State Dept. of Commerce v. Carriage House*, [94 Nev. 707](#), 585 P.2d 1337 (1978), attempted to classify the interest created by the contract in issue in that case rather than to determine whether that interest was in fact an interest in real property. The court ruled out classifying the interest as a license, because the interest created was irrevocable and assignable. The court ruled out the interest as being a lease, because the interest created was not definite as to its duration or description of the property involved.

Our research of the *Carriage House* case, including district court and supreme court briefs, reflects that the only real property interests discussed in the case were license and lease. Interests such as "contract rights," "easements" and "securities" were not raised and thus, technically, were not in issue before the court. It is significant, therefore, that the Nevada Supreme Court did not discuss or otherwise address other real property interests which might have been created as a result of contractual arrangement such as that discussed in the *Carriage House* opinion.

In *Carriage House*, the interest created extended for the useful life of the building (40-60 years). Further, a purchaser was not entitled to use a specific unit within the project on a specific date. These elements were distinguished by the California court in *Cal-Am. Corp. v. Dept. of Real Estate*, 103 Cal.App.3d 453 (1980).

We do not find persuasive the holding of the Nevada Supreme Court in *State Department of Commerce, Division of Real Estate v. Carriage House Associates* (1978) 585 P.2d 1337, wherein that court found, on facts very similar to those in the case at bar, that a membership interest in a resort condominium constitutes neither a license nor a lease. (*Id.* at p. 1339.) The court held that there was no leasehold interest in the property because the lease was not definite as to its duration or description of the property involved.

One who buys exclusive occupancy, even for only a portion of each year, in a condominium, occupies a special position with relation to a portion of the condominium premises. Regardless of the term used to describe the purchaser's rights of exclusive

occupancy, it is an estate or interest or possessory interest in the property itself. “It is unnecessary to assign a name to the interest thus created.”

(Estate of Pitts (1933) 218 Cal. 184, 191, 22 P.2d 694, 697.) The case cited by the Nevada Supreme Court in *Carriage House* to support the non-lease argument, *Beckett v. City of Paris Dry Goods Co.*, 96 P.2d 122 (Cal. 1939), was used by the California court in *Cal-Am. Corp.*, *supra*, to support the lease argument.

[3] *Beckett v. City of Paris Dry Goods Co.* (1939) 14 Ca.2d 633, 96 P.2d 122, cited by the Nevada court as authority for the definition of a lease, involved an optometrist who entered into an agreement with a local department store to run an optical department for three years out of a space to be designated by the store. Upon early removal of the optometrist from defendant’s store, he sued for breach of contract, alleging unlawful eviction. Defendant asserted that it had granted a mere license to use any space which it chose to designate, and that it could withdraw that license at any time. The California Supreme Court found that the requirement of specificity, both as to duration and description of the property involved, was met in *Beckett*. That the defendant could freely move the optometrist to any place in the store that it chose was insufficient to render the lease void for lack of specificity. (*Id.* at p. 635, 96 P.2d 122.) Likewise, the fact that RHAC members are assigned to particular units on a year by year basis does not negative the specificity of the property involved. Members have the right to occupy one of 154 substantially identical one-bedroom condominium units in the Royal Kuhio Building, Kuhio Avenue, Honolulu, Hawaii. The right is defined and specific. That the particular unit to be occupied during the annual period is not designated until shortly before the annual period is unimportant in determining whether there is a right to use one of the condominiums in that building for a period certain each year until and including the year 2041.

The language used by the Nevada Court in *Carriage House*, 94 Nev. at 709, “Under these circumstances, we are constrained to agree * * *” indicates that the decision should not be extended to include all right-to-use, vacation license or club membership concepts, but rather should be limited strictly to the facts of *Carriage House*. “Constrained” is defined by Webster to mean “compelled; forced; obliged.” If the court was in fact compelled or forced to agree with the district court decision “under these circumstances,” then arguably under different circumstances the court could or would reach a different conclusion, particularly if all possible real property interest are raised and placed in issue before the court.

Chapter 119 of the Nevada Revised Statutes provides for a comprehensive and detailed scheme for the regulation of the “offer” or “sale” of “subdivisions” or “subdivided lands” by any person, not only real estate brokers. For the purposes of said chapter, “subdivision” is defined as:

“Subdivision” means *any land* or tract of *land* in another state, in this state, or in a foreign country from which a sale is attempted, which is divided or proposed to be *divided* over any period *into 35 or more* lots, parcels, units or *interests*, including but not limited to undivided interests, which are offered, known, designated or advertised as a common unit by a common name or as a part of a common promotional plan of advertising and sale. (Emphasis added.)

“Sale” is defined as meaning and including:

“Sale” means *any sale*, exchange, lease, assignment or other transaction designed to convey an *interest in any portion* of a subdivision when undertaken for profit. (Emphasis

added.)

Unfortunately, Chapter 119 does not define the term “land.” However, “subdivision” means *any* land, and a sale is effectuated whenever the transaction is “designed to convey an interest *in any portion* of a subdivision.”

In order to determine the scope and applicability of Chapter 119 to right-to-use, the division should first arrive at a definition for the term “land,” and as soon thereafter as possible, incorporate the definition into the regulations promulgated pursuant to Chapter 119. [NRS 119.240](#) directs the division to “promulgate such regulations as *it* deems necessary for the carrying out and enforcement of the provisions of this chapter.” See also [NRS 119.114\(1\)](#) which authorizes the division to “do *all* things necessary and convenient for carrying into effect the provisions of this chapter.” In this regard, it should be pointed out that an agency charged with the duty of administering an act is impliedly clothed with the power to construe the act as a necessary precedent to administration, and when so construed, great deference should be given to the agency’s interpretation when it is within the language of the statute. See *Clark County School District v. Local Government*, [90 Nev. 442](#), 530 P.2d 114 (1974).

It would seem reasonable for the division to adopt for the purposes of defining “land” as used in Chapter 119 the definition of “real estate” contained in Chapter 645, which establishes the regulatory scheme pertaining to real estate brokers and salesmen.

[NRS 645.020](#) provides:

As used in this chapter, “real estate” means *every interest* or estate in real property including but not limited to freeholds, leaseholds and interests in condominiums, townhouses or planned unit developments, whether *corporeal or incorporeal*, and whether the real property is situated in this state or elsewhere. (Emphasis added.)

Carriage House is the controlling law in the State of Nevada, at least as that decision applies to the peculiar facts of *Carriage House*. Nevertheless, the division may construe and give meaning to the term “land” as that term is used in Chapter 119, if necessary for the enforcement of the provisions of said chapter. Our office would note that Chapter 119 of NRS is intended to prevent fraud and deception of the public in transactions involving subdivided lands and reflects a legislative concern that promotional sales be free of unethical or fraudulent practices. Indeed, in the Senate Committee on Federal, State and Local Governments hearing held on April 12, 1971, to consider A.B. 782 (Chapter 119 of NRS), concern was expressed regarding false advertising and improper sales methods being utilized by the land sales industry. The hearing disclosed a consensus that all persons selling subdivided lands should be required to comply with the rules and regulations governing real estate brokers.

At the Senate Commerce Committee hearing held on April 11, 1973, to consider S.B. 259 (which regulated certain enterprises engaging in the sale of real estate), discussion was had concerning the continued ability of subdivided land salesmen to defraud purchasers, continuing abuses in advertising, arm-twisting sales tactics and failure to live up to land improvement guarantees. Also, S.B. 259 required licensing under Chapter 645 of NRS of all salesmen.

It is clear from the foregoing that Chapter 119 of the Nevada Revised Statutes is intended to be a remedial statute, and as such should be given a liberal interpretation in order to effectuate its remedial purposes. See *73 Am.Jur.2d*, Statutes, Sec. 278, 279 and 281.

Using Chapter 645’s definition of real estate, the right-to-use interest actually created in timesharing arrangements and sold to consumers falls within one of the following four categories.

1. *Contract Right*

The United States Supreme Court, in interpreting the treaty by which Louisiana was acquired, stated that “the term ‘property’ as applied to lands, comprehends every species of title, inchoate

or complete. It is supposed to embrace those rights which lie in contract—those which are executory as well as those which are executed.” *Soulard v. U.S.*, 29 U.S. (4 Peters) 511 (1830). This language was cited in *Leese v. Clark*, 20 Cal. 387 (1862); *Estate of Pitts*, 218 Cal. 184 (1933); and most recently in *State By Kobayashi v. Zimring*, 566 P.2d 725, Hawaii (1977).

In *Brown v. Sweet*, 95 Cal.App. 117, 272 P. 614, the California court stated:

It may be regarded as elementary that the word “land” may and does include an estate or interest in the land. Indeed, as stated in *Fish v. Fowlie*, 58 Cal. 373, it “embraces all titles, legal or equitable, perfect or imperfect (*Leese v. Clark*, 20 Cal. 387) including such rights as lie in contract—those which are executory as well as those which are executed.”

In *Austin v. American Security Company of New York*, 118 Cal.App. 68, 4 P.2d 577 (1931), the California court held that an equitable contract right is an interest in real property.

[1, 2] It is at first insisted that appellant’s liability under its realtor’s bond was confined to sales of real estate only, that “real estate” as defined by the common law consists exclusively of “lands, tenements and hereditaments,” and hence that respondent’s equity in the property sold by McKee was not legally the subject of a transaction embraced within the provisions of the broker’s bond. Such an equity represents a share or interest commensurate with the amount paid upon the whole purchase price which one holds. An equitable interest is an interest in land. *McIllvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295. An equitable estate is the interest which a man has in lands, tenements and hereditaments. *Avery’s Lessee v. Dufrees*, 9 Ohio, 145; *In re Qualifications of Electors*, 19 R.I. 387; 35 A. 213; *Rainey v. McQueen*, 121 Ala. 191, 25 So. 920; *Pogue v. Simon*, 47 Or. 6, 81 P. 566, 114 Am.St.Rep. 903, 8 Ann. Cas. 474. The term “real property” embraces such an interest in realty, or lands, legal or equitable, as may lie in contracts, executory or executed.

118 Cal.App. at 70.

In *Carriage House*, the court noted “that a ‘vacation license’ is a mere contractual right which fails to achieve the status of an interest in real property.” 94 Nev. at 709. As discussed previously, the issue of whether and under what circumstances a “contract right” is an interest in real property was not raised before the court and was thus never in issue.

A court of equity will always look to substance over form and will determine the rights of parties according to broad principles of justice and fair dealing, and not by technical and refined distinctions of law. *Schroeder v. Gemeinder*, [10 Nev. 355](#) (1875). Further, in Nevada, equity will enforce a “license” when it appears one has expended money or labor in reliance on the license. *Lee v. McLeod*, [12 Nev. 280](#) (1877); *Gooch v. Sullivan*, [13 Nev. 78](#) (1878); *Lee v. McLeod*, [15 Nev. 158](#) (1880); *Sheehan v. Kasper*, [41 Nev. 27](#) (1917).

It is clear that the “vacation license” purchased by consumers in *Carriage House* created a “contract right” in the consumers to use the facilities of the resort complex. The right-to-use was actual and express, not merely claimed or implied. As such a court in Nevada would have the authority, based on principles of equity, to enjoin any infringement of the right: *Lake v. Virginia & Truckee R.R.*, [7 Nev. 294](#) (1872). Thus, even though the “contract right” acquired by purchasers in *Carriage House* did not achieve the status of license or lease, the right acquired by the vacation license holder could presumably have been equitably enforced against the operators of the resort complex. Under different circumstances, holders of a contract right to use the property of another coupled with the right to enforce such right through an equitable remedy such as specific performance may very well have an “interest” in the land.

From the foregoing analysis, it is the opinion of this office that to the extent a “contract right”

creates an equitable interest in land which involves the use of land and which can be equitably enforced (*i.e.*, through specific performance), such right is an interest in land and would thus fall within the purview of Chapter 119.

2. License

A license in the true sense of the word is nothing more than an authority to do an act on the land of another. 53 *C.J.S.*, Licenses, Sec. 79. In essence, a license makes legal that which would otherwise be an unlawful trespass. It is a mere personal privilege to do certain acts of a temporary character. Formal language is not necessary to create a license and it requires no supporting consideration, 53 *C.J.S.*, Licenses, Sec. 80. And, a true license may be freely revoked at the will of the grantor.

To the best of our knowledge, all right-to-use agreements create an interest which is both irrevocable and assignable. Consequently, right-to-use is not a license in the true sense of the word. See *Carriage House, supra*. Nevertheless, even a license in the true sense of the word has been defined as an interest in real property. See Restatement of Property, Sec. 512, Comment "c," at 3116 (1944); 3 R. Powell, Real Property, Sec. 428 at 526.64 (1970); 2 A Casner (ed.), American Law of Property, Sec. 8.118 (1952); *Wilderness Society v. Morton*, 479 F.2d 842 (C.A.D.C. 1973). Additionally, even though in some senses a license does not create or vest in the licensee an interest in land, a license which is a privilege to use land and which may be protected in equity constitutes an interest in land. *Eureka Real Estate & Inv. Co. v. Southern Real Estate & Financial Co., Mo.*, 200 S.W.2d 328 (1947).

From the foregoing, our office is of the opinion that a true license is not created by any right-to-use contract, and therefore the question of whether a true license is or isn't an interest in real property is irrelevant.

3. Easement

The *Restatement of Law*, Property, defines easement as follows:

Sec. 450 Easement

An easement is an interest in land in the possession of another which

- (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
- (b) entitles him to protection as against third persons from interference in such use or enjoyment;
- (c) is not subject to the will of the possessor of the land;
- (d) is not a normal incident of the possession of any land possessed [possessed] by the owner of the interest, and
- (e) is capable of creation by conveyance.

The distinction between a license and an easement is often very subtle and difficult to discern.

If the instrument or agreement in terms grants an interest in or right to use the land, even though it is called a license therein, it will, according to the purpose and terms of the agreement, constitute an easement, and not a license. On the other hand, if the instrument or agreement merely confers permission to do an act or series of acts on the real property of the one conferring the privilege, it is a mere license and not an easement.

28 *C.J.S.*, Sec. 2.

A license coupled with an interest exists where the licensee in acquiring a license to do a particular thing acquires a right to do it also. The right or authority thus obtained amounts to a grant and not merely a permission. Where it is so construed it partakes of

the qualities of a right in the land itself.

Thompson on Real Property, 1980 Supp., Licenses Affecting Real Property, Sec. 225.

The distinction between such an easement and a license privilege lies primarily in the fact that the licensee has a privilege and nothing more, while the holder of an easement has not only a privilege but also rights against the members of the community in general, including the owner of the land, that they refrain from interference with the exercise or enjoyment of the privilege.

Tiffany, *Real Property*, 3d ed., Vol. 3, Licenses, Sec. 829.

A license is an interest in land which includes the privilege of use of the land in which it is an interest. It is a privilege to use land in the possession of another. It resembles in this respect an easement, which is likewise a privilege to use land in the possession of one other than the one entitled to the benefit of the easement. The most significant difference between the two interests is that a license is, in general, subject to termination at the will of the possessor of the land subject to the privilege of use while an easement is not.

American Law of Property, Vol. 2, Licenses, Sec. 8.110.

Whether a license or some interest or estate has been created in a particular case is often difficult to determine, and, where the parties have reduced their agreement to writing, depends on a proper interpretation of the particular instrument. If the instrument or agreement in terms grants an interest in or a right to use and occupy the land it may not be construed as a mere license, notwithstanding it is called a "license" by the parties.

53 *C.J.S.*, Licenses, Sec. 79.

It is generally held that a license coupled with a grant or interest is irrevocable as long as the interest continues. It is said, in this connection, that a license coupled with an interest exists where the party obtaining a license to do a thing also acquires a right to do it. In such case the authority conferred is not merely a permission; it amounts to a grant, or an easement, and where it is so construed it takes, as such, the qualities of a right in the land itself.

25 *Am.Jur.*2d Easement & Licenses, Sec. 129.

That relationship may have *begun* with a revocable permission, but if that permission has been followed by events which have eliminated its revocability, it is submitted that the *existing* irrevocable relationship should no longer be called a license, but rather an easement, as it truly is.

Powell, *Real Property*, Sec. 427.

An easement is property or an interest in land. See 25 *Am.Jur.*2d, Easements and Licenses, Sec. 2; Meredith v. Washoe Co. Sch. Dist., [84 Nev. 15](#), 435 P.2d 750 (1968).

Under the definition of an easement given in the *Restatement of Property*, five factors are stressed, (1) the content of the interest as a "limited use or enjoyment of the land in which the interest exists"; (2) the availability of protection of the interest as against interference by third persons; (3) the absence of terminability at the will of the possessor of the land; (4) the fact that it

is not a normal incident of a possessory land interest, and (5) the fact that it is “capable of creation by conveyance.”

In *Carriage House*, the interest granted was certainly a “limited use or enjoyment of the land.” The use rights granted were for an aggregate of seven days each year for the useful life of the building. The agreement granted the purchaser the right to occupy one of the units, thus giving the purchaser a special position with relation to a portion of the project as to all persons. The rights granted were not revocable at the will of AIV. The right granted was not a possessory right, but rather a right-to-use. The right was certainly capable of creation by conveyance. Ex., fee simple timesharing.

Based on the foregoing, it can readily be seen that the interest created in *Carriage House* could have been characterized as an easement and therefore as an interest in real property. Unfortunately the court only considered the concept of lease v. license, a pitfall Powell warns against.

It is common practice to draw a line between the “licensee” and the “tenant for years” in terms of the absence or presence of a right of exclusive possession of a defined physical area. This leads to no bad results so long as one is concerned only with the presence or absence of the consequences attributable to the existence of an estate for years. It is an unfortunate terminology when one is further concerned with the kind of relationship created in cases where it is found that no estate for years exists. The nonestate-for-years may be either a revocable relationship (properly called a license) or an irrevocable relationship, which should be called an easement.

The alternative antithesis of “licenses” and “leases” tends to cause a court to feel bound to label the transaction before it one or the other of the two, rather than to realize it has three choices, namely, lease, license or easement.

Powell, *Real Property*, Sec. 430.

In analyzing an easement’s applicability to a particular timeshare project, the division must first analyze precisely what rights are being sold by the project; *i.e.*, the division must analyze timeshare projects on a case-by-case basis. The right sold (incidents of ownership) must be broken down into elements. If the elements of ownership fall within the elements contained in the definition of “easement,” then it may safely be assumed that the timeshare project is selling an interest in real property. If it is ultimately determined that the interest being sold is an easement, then the interest sold is an interest in real property and properly falls within the purview of Chapter 119.

4. Lease

The distinguishing characteristic of a lease is that it carries a present interest in the land for a specified period. If right-to-possession is not conferred, the interest is an easement or license.

The general essentials of a lease are the parties (lessor and lessee), the real estate demised, the term of the lease, and the consideration or rent.

49 *Am.Jur.*2d, Landlord and Tenant, Sec. 25; *Reno Club v. Young Investment Co.*, [64 Nev. 312](#), 182 P.2d 1011 (1947).

By definition, a leasehold is an interest in real property. [NRS 645.020](#).

In construing the interest created in *Cal-Am. Corp.*, *supra*, to be a lease, the California court reasoned:

[1, 2] The membership interests sold by appellant constitute interests in real property. While it is unnecessary for purposes of this appeal to classify the interest in real property thus created, the nature of the interest is that of a lease. The test for determining

whether an agreement for the use of real property is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license. (Von Goerlitz v. Turner (1944) 65 Cal.App.2d 425, 429, 150 P.2d 278.) Membership in RHAC grants the right to exclusively possess a resort condominium unit during the member's annual period. Despite appellant's contentions, the fact that RHAC retains the right to specify which unit will be occupied and to provide maintenance and maid services to each unit does not derogate the exclusive possessory interests of the members during their annual periods of one to four weeks. The membership agreement itself guarantees to members the right to occupy, during their annual periods, one of the club's condominiums. One who buys exclusive occupancy, even for only a portion of each year, in a condominium, occupies a special position with relation to a portion of the condominium premises. Regardless of the term used to describe the purchaser's rights of exclusive occupancy, it is an estate or interest or possessory interest in the property itself. "It is unnecessary to assign a name to the interest thus created." (Estate of Pitts (1933) 218 Cal. 184, 191, 22 P.2d 694, 697.)

Carriage House is distinguishable from this case in the element of specificity of time—members in that case held their interest only for the useful life of the building, estimated as being between 40 and 60 years. Members of the Royal Hawaiian Adventure Club hold their interests until precisely December 31, 2041.

Any contract creating a right-to-use interest should be analyzed to determine if the incidents of ownership are similar to those described in *Cal-Am*. If the elements are the same, it is our opinion that a lease exists and therefore falls within the purview of Chapter 119.

Although this concludes the discussion of the potential interests in real property which might be created in the usual right-to-use timeshare project, one other issue should be considered before the division decides that a particular timeshare project should or should not be regulated under Chapter 119.

[NRS 119.120](#) provides in relevant part:

1. The provisions of this chapter do not apply *unless the method of disposition is adopted for the purpose of the evasion of the provisions of this chapter* or the provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. Sec. 1701 to 1720, inclusive, upon notification to the division by the person electing to be exempt under this subsection, to the making of any offer or disposition of any subdivision or lot, parcel, unit or interest therein:

(i) *To securities* or units of interest issued by an investment trust regulated under the laws of this state, except where the division finds that the enforcement of this chapter with respect to such securities or units of interest is necessary in the public interest and for the protection of purchasers. (Emphasis added.)

By including securities in the list of exemptions, the legislature at least implicitly recognized that some subdivision units might be marketed in the form of securities. This is corroborated by the legislature's use of the language, "enforcement of this chapter with respect to such securities." Note, however, that the exemption applies only to securities "regulated under the laws of this state." This obviates the necessity of double regulation. But, even if a security is "regulated under the laws of this state," the division can still regulate under Chapter 119 if "the division finds that enforcement of this chapter with respect to such securities or units of interest is necessary in the public interest and for the protection of purchasers."

In Attorney General's Opinion 186 (Nev.), dated March 18, 1975, a four-factor test was

described for use in determining whether an investment contract is a security within the meaning of [NRS 90.090](#). The opinion noted that an investment contract is created whenever:

1. An offeree furnishes initial value to an offeror;
2. A portion of this initial value is subjected to the risks of the enterprise;
3. The furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise; and
4. The offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

Applying this test to the typical right-to-use marketing scheme, it becomes clear that an investment contract (security) is created.

1. Does an offeree furnish an initial value to an offeror?

Yes. Normally a timeshare purchaser expends from \$4,000 to \$7,000 for a timeshare unit.

2. Is a portion of this initial value subjected to the risk of the enterprise?

Yes. In most right-to-use projects, the entire value is subject to the risk of the enterprise. If the timeshare project fails, the purchaser will lose all of his invested capital. A good example of this factor is the recent bankruptcy of the Four Seasons right-to-use project at Lake Tahoe.

3. Is the furnishing of the initial value induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise?

Yes. Most timeshare projects are marketed on the basis that a purchaser guarantees for himself a hedge against the inflationary spiral of future vacation facilities.

4. Does the offeree receive the right to exercise practical and actual control over the managerial decisions of the enterprise?

No. Generally, a purchaser has no control over the enterprise once he has paid for his unit.

If the division should determine that a particular right-to-use timeshare project is not selling an interest in real property, it should determine whether an investment contract (security) is being offered before deciding whether or not the project marketing scheme falls within the purview of Chapter 119.

CONCLUSION

It is the opinion of this office, based on the above discussion and our understanding of right-to-use, that a right-to-use, vacation license or club membership is an interest in real property or security and does fall within the purview of Chapter 119 of NRS.

Sincerely,

RICHARD H. BRYAN, *Attorney General*

By FRANKLIN C. HOOVER, *Deputy Attorney General*