

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1984

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**OPINION NO. 84-1 Labor Commissioner—Private Employment Agencies: An employment agency may calculate its placement fee pursuant to [NRS 611.220](#) from the date the employee begins working for wages. The employment agency may collect a placement fee at the time an applicant is hired.**

CARSON CITY, January 4, 1984

FRANK T. MACDONALD, *Labor Commissioner*, Capitol Complex, Carson City, Nevada 89710

DEAR MR. MACDONALD:

You have requested an opinion by this office interpreting [NRS 611.220](#) as to the proper period from which an employment agency may calculate its placement fee to be paid by an applicant who is placed in a job by the employment agency.

FACTS

The statute in question is [NRS 611.220](#), which reads as follows:

No person licensed pursuant to the terms of [NRS 611.020](#) to [611.320](#), inclusive, may charge, accept or collect from any applicant for employment as a fee for securing the employment any sum or sums of money *in excess of 55 percent of the first month's gross cash wage received or paid for the employment*, except babysitting. The fee for a placement for babysitting must not be in excess of 15 percent of the gross cash wage received or paid for the placement. [Emphasis added]

An employment agency has questioned the Labor Commissioner's policy of measuring the applicant's first month's gross income from the time the applicant is hired for a job. The facts are that the agency placed an applicant in a job on August 11, 1983, and collected a placement fee of \$550.00 from the applicant at that time. However, the applicant had a week or two of training before that applicant actually began to earn wages. The agency calculated the placement fee of \$550.00 based on measuring the first month's gross income from August 26, 1983, to September 25, 1983, the days that the employee actually received wages. The applicant contests the amount of the fee because he claims it should be calculated from August 11th until September 10. If this is the case, then the fee collected would be smaller since the applicant earned less during this earlier period.

This office has previously sent to your office two opinions which you indicate appear contradictory. Op. Att'y Gen. No. 671 (July 2, 1970) appears to you to indicate that a fee is to be charged only after the applicant is paid or receives the first month's wages. An informal attorney general's opinion dated February 3, 1976, indicates in your opinion that the fee can be charged at the time the job is accepted by the applicant.

QUESTION I

From what date may an employment agency calculate its placement fee pursuant to [NRS 611.220](#): the date of acceptance of the job and hire or the date the employee begins working for wages?

#### ANALYSIS

The pertinent language in [NRS 611.220](#) is the phrase “the first month’s gross cash wage received or paid for the employment.” This language has been subject to some dispute in the past as to the basis upon which one may calculate the placement fee.

By virtue of the fact that the first month’s income is defined as that which is “paid or received for the employment,” this phrase may be interpreted to mean that the first month of employment is the period when a person actually receives pay for work on the job. *Webster’s Seventh New Collegiate Dictionary* defines “employment” as synonymous with “work.” In addition, it defines employment as “an activity in which one engages.” Therefore, the term “employment” connotes work for which a person is being paid.

The fact that a job may be accepted on a certain date does not necessarily mean that the employee will begin working on that date. Therefore, the day the person begins being paid for his work would be the time from which to calculate the placement fee. This conclusion is not only reasonable, but is also in keeping with the language of the statute which denotes the first month’s gross income as that which is paid to the employee for the work done.

Therefore, it would be proper for an employment agency to calculate the placement fee based on the applicant’s first month of employment in which he is paid for work done.

#### CONCLUSION

The employment agency may calculate its placement fee pursuant to [NRS 611.220](#) from the date the employee begins working for wages.

#### QUESTION II

May an employment agency collect placement fee at the time an applicant is hired or must the agency wait until the applicant receives the first month’s pay?

#### ANALYSIS

[NRS 611.250](#) states that if after paying a fee the applicant either fails to obtain employment or the employment lasts less than seven days, the employment agency shall repay the amount of the fee to the applicant. This section implies that the agency need not wait until the applicant who is hired is actually paid or receives the first month’s gross income prior to demanding its fee. Since [NRS 611.250](#) states that the fee is to be repaid to the applicant if the employment lasts less than seven days, the statute contemplates that the fee may have already been paid to the agency upon hire.

The language of [NRS 611.250](#) allows payment of a placement fee at the time of acceptance of a job. This same assessment was made in an informal opinion dated February 3, 1976, in which it was held that a fee could be collected only after the agency had received a specific and firm order for employment from an employer and, it is assumed, has placed the applicant accordingly.

The formal attorney general’s opinion dated July 2, 1970, referred to above, did not specifically address the issue of when the employment agency may collect a placement fee. The issue discussed in Op. Att’y Gen. 671 (July 2, 1970) was how to calculate a placement fee if a person worked less than one month. This was later resolved by a 1975 amendment to [NRS](#)

[611.260](#). Therefore, the analysis in Op. Att’y Gen. 671 (July 2, 1970) is not applicable to the question addressed here.

#### CONCLUSION

An employment agency may collect a placement fee at the time an applicant is hired.

Sincerely,

BRIAN MCKAY, *Attorney General*

By PAMELA M. BUGGE, *Deputy Attorney General*

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**OPINION NO. 84-2 Employment Discrimination—Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, et seq. prohibits gender-based discrimination in hiring practices for the position of cook at the Nevada Girls Training Center in Caliente. Sex does not constitute a bona fide occupational qualification for that position under the exception to the general prohibition against such discrimination found in section 703(e)(1) of the Act. [NRS 210.590](#) does not prohibit the employment of a male cook at the Nevada Girls Training Center in Caliente.**

CARSON CITY, January 12, 1984

DOROTHY HUFFEY, *Chairman*, Personnel Commission, Department of Personnel, Blasdel Building, 209 E. Musser Street, Carson City, Nevada 89710

DEAR CHAIRMAN HUFFEY:

You have asked this office for guidance as to whether hiring for the position of cook at the Nevada Girls Training Center in Caliente may legally be restricted to females, excluding all potential male applicants solely on the basis of their sex.

#### QUESTION ONE

Is the sex of an applicant a bona fide occupational qualification for the position of cook at the Nevada Girls Training Center in Caliente so that only female applicants may be considered for hiring?

#### ANALYSIS

The Girls Training Center (“Center”) provides educational and vocational programs for court-committed delinquent female juveniles. [NRS 210.580](#). According to information provided this office by the Department of Personnel, the gender-based hiring requirement is desired by the hiring authority, the Department of Human Resources, primarily on the grounds that a male in the position of cook would be more susceptible to charges by the inmates of molestation or would be more likely to commit sexual assault than would a female in the same position.

Federal law was enacted in 1964 which prohibits gender-based discrimination. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e *et seq.*, declares:

It shall be unlawful employment practice for an employer to fail or refuse to hire or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

An exception to this rule is stated in Section 703(e)(1):

Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national original in those certain instances where religion, sex, or national original is a *bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise*. (emphasis added)

There is no doubt that the proposed classification would deny potential male applicants an opportunity for employment and that such denial would be solely based on their gender. The question is whether such a sex-based classification is a bona fide occupational qualification (BFOQ) which is reasonably necessary to the normal operation of the Center.

Perhaps the premier case defining the limits of the BFOQ exception is the oft-cited case of *Dothard v. Rawlinson*, 433 U.S. 321 (1977). In that case the United States Supreme Court considered an Alabama statute which required that an applicant for the position of correctional officer in the Alabama prison system meet certain height and weight requirements. Further, a regulation adopted by the Alabama Board of Corrections, Regulation 204, provided that "contact positions," which required continual close physical proximity to inmates, could only be filled by a person of the same gender as the inmates. The undisputed evidence before the Court demonstrated that the minimum height and weight requirements combined would exclude a far greater proportion of females than males, *Id.* at 329, and that for those female applicants that did meet those initial screening tests, only about 25% of the correctional counselor positions in the Alabama prison system would be available because of Regulation 204. *Id.* at 327, 328. The employer relied on the affirmative defense that the sex-based discrimination of Regulation 204 was a BFOQ within the meaning of the Title VII exception. In considering that defense the Court stated:

[T]he bfoq exception was in fact meant to be an *extremely narrow* exception to the general prohibition of discrimination based on sex. (emphasis added)

*Id.* at 334. The court did find that the BFOQ exception was properly applied and limited the finding to the extreme facts of that unique case. The facts which persuaded the Court included the fact that the Alabama prison system's conditions had previously been held to be unconstitutional because of frequent violence and the further fact that the estimated 20% of male prisoners who were sex offenders were intermingled with the general prison population. The Court reasoned that since committed sex offenders could be expected to criminally assault a woman again if provided the opportunity, the mere presence of a female in a contact position in such a maximum security prison would undermine the essence of the nature of the correctional officer position, i.e., to provide security for both staff and inmates. In the Court's words:

The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. *There is a basis in fact* for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established in the prison.

(emphasis added)

*Id.* at 335.

The facts in *Dothard* were considered extreme and that holding cannot, we believe, be read to apply to all prisons or other incarceration situations. In *Gunther v. Iowa State Men's Reformatory*, 462 F.Supp. 952 (N.D. Iowa 1979), the court discussed the facts of *Dothard* in comparison to the facts at the State Men's Reformatory in Anamosa, Iowa, stating:

The Supreme Court painstakingly limited its decision upholding a male bfoq in the Alabama penitentiaries to that "peculiarly inhospitable" environment. Anamosa is no rose garden; neither is it the stygian spectre which faced the Supreme Court in *Dothard*.

*Id.* at 955, *aff'd*. 612 F.2d 1079 (8th Cir. 1980); *cert. denied* 466 U.S. 966 (1980). Upon review by the United States court of Appeals, Eighth Circuit, of the District Court's finding that the compelling security reasons enunciated in *Dothard* which allowed BFOQ exception in that case were not present in the *Gunther* case, the court observed:

We agree with . . . the district court's holding that, concerning the security issue, unlike *Dothard*, here the scales weigh in favor of plaintiff's rights.

*Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir. 1980); *cert. denied*, 446 U.S. 966 (1980).

The facts surrounding the job classification at the Center do not compare with the compelling facts in the *Dothard* case. First, except for factually unfounded stereotypes, there is no support for the proposition that the sex of a cook goes to the "essence" of his or her job, food preparation, or that the purpose of the Center would be undermined if a male was hired as the cook for the Center. Second, one of the hiring authority's reasons for gender-based discrimination, that a male is more likely to commit a sexual assault, does not meet the extreme facts in *Dothard*, where 20% of the male inmates had in fact been imprisoned for sexual assault. There is no "basis in fact," as required by *Dothard*, to support the proposition that a male cook, without a related criminal history, would be more likely to commit a sexual assault on a female inmate. A reasonable background investigation would disclose any such propensities of any applicant for the cook's position, thereby reducing the speculative risk set forth. Third, the fear that a female inmate *might* choose to file a false report also fails to meet the *Dothard* standard in that there is no "basis in fact" to believe that such reports would be made. In a correctional institution, kitchen work is often highly valued by the inmates as a benefit or privilege. It seems unlikely that an inmate who has been rewarded with such a privilege would risk that privilege by making a false accusation. The small risk of a false accusation by an inmate could be further reduced by staff-screening of the backgrounds of the inmates who will work in the kitchen.

Finally, an analogous situation was addressed by a New York court. In the case of *State Div. of Human Rights v. New York*, 401 N.Y.S.2d 619 (1978), a female applied for the position of cook at an all-male minimum security prison. The rationale given by the prison officials to support the prison's policy of hiring only male cooks was that a female would be more subject to sexual attack than a man. The court held that sexual identity was not a BFOQ for the position of cook, stating:

[T]he claimed "bona fide occupational qualification" here is based solely on assumed general characteristics of women being more subject to sexual attack by men. Such a basis violates the accepted rule that: "Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of *individual incapacity*." (emphasis added, citation omitted)

*Id.* at 622.

It is the opinion of this office that the facts surrounding the position of cook at the Center do not rise to the level of facts in *Dothard*, which provided one of the extremely rare BFOQ exceptions to the Title VII prohibition against gender-based hiring discrimination. Rather, the facts of *State Div. of Human Rights, etc. v. New York, supra*, are more analogous and the reasoning in that case would prohibit the sex-based selective certification proposed here by the Department of Human Resources.

## CONCLUSION

Hiring for the position of cook at the Nevada Girls Training Center in Caliente may not legally be restricted to female applicants since the sex of an applicant is not a bona fide occupational qualification under Section 703(e)(1) of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, *et seq.*

## QUESTION TWO

Does [NRS 210.590](#) prohibit the employment of a male cook at the Nevada Girls Training Center in Caliente?

## ANALYSIS

[NRS 210.590](#) provides:

All female minor persons committed to the school [Center] shall be dealt with, so far as possible, by or in the presence of a female attendant, and during periods of transportation shall be in the care and custody of a female attendant.

A question has been raised as to whether [NRS 210.590](#) would prohibit the employment of a male cook at the Center. Presumably this question stems from reading the subject statute to prohibit inmates being in the presence of the male cook without a female staff member being present, therefore being violative of the anti-discrimination purpose of Title VII in that only females could be hired for the position.

We begin our analysis by reference to the time-honored principle that a statute is presumed valid and must be upheld absent clear violation of constitutional provisions. *List v. Whisler*, [99 Nev. 133](#), 660 P.2d 104 (1983). Where reasonably possible, an act must be construed so as to avoid conflict with the Constitution. *State ex. rel. Copeland v. Woodbury*, [17 Nev. 337](#), 30 Pac. 1006 (1883); *Anaya v. State*, [96 Nev. 119](#), 606 P.2d 156 (1980). Applying these general principles to the suggested conflict between [NRS 210.590](#) and Title VII, we do not see a conflict in the two provisions. Title VII concerns *hiring* practices of an employer, whereas [NRS 210.590](#) primarily concerns *supervision* of inmates. The two provisions can be reconciled by an adjustment in staffing so that a female instructor or group supervisor is present in the kitchen when inmates are performing kitchen duties. Such an accommodation between possibly competing Title VII rights and other rights or duties has been required by courts. See, for example, *Gunther v. Iowa State Men's Reformatory, supra*, 1087.

Another reason for seeing no conflict between [NRS 210.590](#) and Title VII is the fact that the state statute is not mandatory, but only directory. The presence of a female attendant is required only "so far as possible."

Finally, even if the two statutes are viewed as being in conflict, under the Supremacy Clause

of the Constitution the federal law prevails and must be followed.

## CONCLUSION

[NRS 210.590](#) does not prohibit the employment of a male cook at the Nevada Girls Training Center in Caliente.

### *Title VII and Positions Closely Related to an Inmate's or a Client's Right of Privacy*

There are various positions within the Department of Human Resources which require intimate contact with clients of the Department's Division of Mental Hygiene and Mental Retardation. Questions as to the legality of sex-based selective certification have been informally raised, but since none of those positions has as yet been scheduled for review on the Personnel Commission's agenda and since the facts in support of such a selective certification for each position have not yet been provided the commission, this opinion should not be read as support for or against sex-based selective certification for those positions. Each of the classes or positions would have to be addressed individually, on a case-by-case basis, after consultation with legal counsel, to ascertain whether the facts of that particular case would warrant a sex-based BFOQ. However, we feel it may be of some use to the Personnel Commission to set forth at this time some general guidelines showing, through case authority, instances where Title VII requirements have conflicted with an individual's right to privacy and the reasoning of various courts when confronted with those conflicts.

In *Fesel v. Masonic Home of Del., Inc.*, 447 F.Supp. 1346 (D.Del. 1978), *affd.* 591 F.2d 1334 (3rd Cir. 1979) a male nurse had been denied employment at a residential retirement home as a nurse's aide. The facts presented by the defendant showed that 22 of the Home's 30 guests were female and that many of the guests were unable to care for themselves in such personal matters as dressing and bathing.

The court found as a fact that many of the female guests would object to being attended in personal matters by a male nurse's aide. After further discussion the court found at page 1353 that:

[T]he hiring of male nurse's aides would directly undermine the essence of the Home's business and its belief to that effect in 1973 had a factual basis. (footnote cite to *Dothard v. Rawlinson*, *supra*, p. 334 to 336.)

Even though the *Dothard* standards apparently were met, the court went a step further to inquire whether or not such positions could nonetheless be filled with males, but with staff assignments which would allow attendance to the Masonic Home's guests by an aide of the same sex as the individual guest. This approach, termed by courts "accommodation," was found to be inappropriate in *Fesel*. Referring to the very small staff size and the undue scheduling and financial hardship on the Masonic Home in having to hire an extra person to assure accommodation of the guest's privacy rights, the court held:

*Under these narrow circumstances*, I conclude that Masonic Home has met its burden of proof and has successfully established a bfoq defense based upon the privacy interests of its guests. (emphasis added)

*Id.* at 1354.

Remembering that the *Fesel* case was decided based on the "narrow circumstances" of a private retirement home with a small number of guests and staff, a case perhaps more analogous to facilities under the control of the Division of Mental Health and Mental Retardation is found in *Gunther v. Iowa State Men's Reformatory*, *supra*.

In *Gunther*, the plaintiff, who was denied certain promotional opportunities because of her sex, was successful in showing that the conditions at the reformatory were not as harsh as in the prison in *Dothard*. But the plaintiff acknowledged that the performance by her of strip searches and surveillance of reformatory showers and toilets might be a violation of inmate privacy. Defendant reformatory maintained that it could not allow plaintiff to occupy one of the promotional positions, which required the “contact” duties, for fear of the violation of the inmates’ privacy rights.

Considering the positions of the reformatory and the plaintiff, the court held:

In addition to showing that the hiring of women at Anamosa would undermine the essence of the prison administration, *Anamosa must also demonstrate it could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of the inmates, and the nondiscrimination principle of Title VII.* (emphasis added, citations omitted)

*Gunther v. Iowa State Men’s Reformatory, supra*, p. 1086.

And when considering the scheduling difficulty which the reformatory might be subjected to in accommodating both Title VII principles and the privacy rights of inmates, the court stated:

There is little reason to suggest that scheduling to avoid the invasion of inmate privacy rights by female officers would give rise to undue hardship on the prison administration. *Administrative inconvenience cannot justify discrimination.* (emphasis added, citations omitted)

*Id.* at 1087.

See also, *Bowling v. Enomoto*, 514 F.Supp. 201 (N.D.Cal. 1981), state prison ordered to create procedure to accommodate privacy rights of inmates; *Reynolds v. Wise*, 375 F.Supp. 145 (N.D.Tex. 1974), state prison ordered to initiate selective work responsibilities, removing female correctional officers from shake-down and frisk duties on male prisoners, but allowing females full promotional opportunities through accommodation.

In summary, the burden placed on an employer to uphold a sex-based employment practice is a burden that is very hard to overcome. Even in those circumstances where the stringent *Dothard* standards are met, if a client’s or inmate’s privacy rights are at issue, the employer then has the additional burden of demonstrating that there is no reasonable alternative practice available which will accommodate both the requirements of Title VII and the privacy interests of the clients or inmates. The case law suggests that where a public employer is involved the burden of showing the inability to accommodate is greater than for private employers with lesser resources.

Respectfully submitted,

BRIAN MCKAY, *Attorney General*

By JAMES T. SPENCER, *Deputy Attorney General*

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**OPINION NO. 84-3 District Attorneys: D. A. not required to provide defense to county public officer whose removal from office is sought under [NRS 283.440](#).**

CARSON CITY, January 23, 1984

THE HONORABLE HY FORGERON, *Lander County District Attorney*, P.O. Box 1179, Battle Mountain, Nevada 89820

DEAR MR. FORGERON:

You have recently sought the opinion of this office as to the following:

#### QUESTION

Is the district attorney required to provide a defense for a county public officer against whom proceedings for removal from office for malfeasance or nonfeasance have been filed pursuant to [NRS 283.440](#)?

#### ANALYSIS

The general duties of a district attorney in Nevada are set forth at [NRS 252.110](#). Nothing in that statute, however, requires a district attorney to defend a county officer charged with malfeasance or nonfeasance in office. To the contrary, from an examination of the provisions of [NRS 283.330](#)-283.430 which set forth the removal by accusation provisions and make the district attorney the chief prosecutor, it seems more appropriate to think the district attorney has no role to play whatsoever where the removal proceedings are by some other authorized procedure. Certainly, he is not mentioned in [NRS 283.440](#).

Since 1979, district attorneys have been statutorily required to provide for the defense of any officer of their county against whom a civil action is brought based on any alleged act or omission relating to the officer's public duties which was performed or omitted in good faith. [NRS 41.0339](#). At first blush, this statute appears to require defense in malfeasance and nonfeasance proceedings, since such proceedings have been characterized in the past as noncriminal or civil in nature. See concurring opinions of Justice McCarran in *Gay v. District Court*, [41 Nev. 330](#), 346, 171 P. 156 (1918), and *Ex Parte Jones and Gregory*, [41 Nev. 523](#), 530, 173 P. 885 (1918). Cf. *Jones v. District Court*, [67 Nev. 404](#), 219 P.2d 1055 (1950), wherein our Supreme-Court noted that summary statutory removal proceedings are highly penal in nature and suggested "proof beyond a reasonable doubt" as the standard for such cases. Upon further examination, however, it seems clear that the provisions of [NRS 41.0338](#)-41.039 are inapplicable to the type of proceedings contemplated by the summary removal statute. The civil actions for which a defense must be provided under chapter 41 of NRS appear to be those sounding in tort, contract and equity, and where the wrong complained of relates more to certain individuals than to the public at large.

We also would note that the grounds for removal under [NRS 283.440](#) are nonfeasance (i.e., a substantial failure to perform a required legal duty) and malfeasance (i.e., the commission of a wrongful or unlawful act). Particularly with respect to malfeasance, there may exist grounds for an additional criminal charge for which the district attorney would have primary prosecutorial responsibility. Even nonfeasance is sometimes made punishable under our law as a crime. See, e.g., [NRS 250.090](#) and [252.190](#). As the chief prosecutor of crimes, it would be most unreasonable to think the legislature contemplated the district attorney as the defender of an individual whose removal from office is sought for the commission of a crime. Cf. *Hawkins v. District Court*, [67 Nev. 248](#), 216 P.2d 601 (1950) where an attorney was held properly excluded from appearing on behalf of a public officer in an ouster action because he had previously represented the grand jury in investigating matters some of which led to the filing of the ouster action. Additionally, [NRS 7.105](#), which prohibits the district attorney from defending any person charged with the violation of any ordinance or any law of the state, is some authority for our opinion that a district attorney is not intended to be the defense counsel in proceedings brought

under [NRS 283.440](#).

Finally, our examination of the relevant opinions from the Supreme Court of Nevada interpreting [NRS 283.440](#) and its predecessors has failed to show any instance in which a district attorney ever acted as defense counsel in such a proceeding. Thus, there is not even any historical precedent for the district attorney to play such a role in summary removal cases.

#### CONCLUSION

The district attorney is not required to provide a defense for a county public officer against whom summary removal proceedings have been filed under the provisions of [NRS 283.440](#), nor would it be proper for him to attempt to do so.

Sincerely,

BRIAN MCKAY, *Attorney General*

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

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**OPINION NO. 84-4 Elections: The office of an elected county officer who resigns after the close of filing for declarations or acceptances of candidacy must appear on the ballot of the next ensuing biennial election. Candidates are to be designated in accord with the procedures contained in Nev. Rev. Stat. § 293.165.**

CARSON CITY, February 6, 1984

WILLIAM D. SWACKHAMER, *Secretary of State*, Capitol Building, Carson City, Nevada 89710

DEAR MR. SWACKHAMER:

You have requested our opinion whether the resignation of an elected county officer after the closing date for filing declarations of candidacy precludes that office from appearing on the general election ballot.

#### QUESTIONS

If an elected county officer resigns after July 3, 1984, does that office appear on the ballot of the 1984 general election to fill the unexpired two-year portion of the term? If the office must appear on the ballot of the 1984 general election, what is the procedure for choosing the candidates for that office that are to appear on the ballot?

#### ANALYSIS

Nev. Rev. Stat. § 293.177(1) specifies in part that no candidate's name may be printed on the ballot unless the candidate has filed a declaration or acceptance of candidacy prior to 5:00 p.m. of the first Wednesday in July in the year the election is to be held. Since the first Wednesday in July of 1984 is a legal holiday, Nev. Rev. Stat. § 293.1275 requires that the filing be performed prior to 5:00 p.m. on July 3, 1984. You have received information which indicates that two elected county officers in one of the counties may resign from their offices after July 3, 1984. These offices would then be filled by appointment. However, your concern is do the appointments merely extend until the 1st Monday of January after the next ensuing biennial

election or do the appointees serve out the entire unexpired term of the officer who resigned?

When a vacancy occurs in any county office, except the offices of district judge and county commissioner, the board of county commissioners shall appoint a suitable person to fill the vacancy "until the 1st Monday of January after the next ensuing biennial election." Nev. Rev. Stat. § 245.170. Any vacancy in the office of district judge is filled through appointment made by the governor which expires at the next general election and qualification of the elected successor. The elected successor serves the balance of the unexpired term. Nev. Rev. Stat. § 3.080. Any vacancy in the office of county commissioner is filled through appointment made by the governor which extends to "12 p.m. the day preceding the 1st Monday of January next following the next general election." Nev. Rev. Stat. § 244.040. This concept of appointment until the next ensuing biennial election received a thorough analysis in Op. Att'y Gen. No. 179 (September 20, 1960).

In the opinion just cited, we reasoned that statutes like those just cited in the preceding paragraph have as their purpose furnishing to the electorate the opportunity to fill a vacated county office at the earliest convenient time. Therefore, in that opinion, we concluded that the appointment filling the vacancy then existing in the office of district attorney extended only to the next biennial election, at which time the voters would determine who shall fill the unexpired term of that office. This conclusion was based on a set of facts in which the former district attorney resigned before the actual holding of the primary election but after the last day permitted for filing. The factual circumstance in that opinion is the same as your present inquiry.

In Op. Att'y Gen. No. 179 (September 20, 1960), we concluded that the resignation of the incumbent district attorney before the conduct of the primary election but after the last day permitted for filing was the legal equivalent of a vacancy in party nomination after the holding of the primary election. This situation required the application of Nev. Rev. Stat. § 294.300 which basically provided that a vacancy in a party nomination occurring after the holding of any primary was to be filled by the appropriate central committee of the nominee's political party. Nev. Rev. Stat. § 294.300 has since been repealed and replaced by Nev. Rev. Stat. § 293.165 which provides the same candidate designation procedure.

#### CONCLUSIONS

If an elected county officer resigns after July 3, 1984, that office must appear on the ballot of the 1984 general election to fill the unexpired two-year portion of the term.

Candidates for that office who are to appear on the ballot are to be designated in accord with the procedures contained in Nev. Rev. Stat. § 293.165.

Sincerely,

BRIAN MCKAY, *Attorney General*

By SCOTT W. DOYLE, *Deputy Attorney General*

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**OPINION NO. 84-5—School Districts: A district employee, represented by a bargaining agent who has commenced negotiations pursuant to [NRS 288.180](#) on the employee's behalf, does not establish a contract of employment between the district and the employee upon the employee's execution of the notification of intent to accept reemployment required by [NRS 391.3196\(4\)](#).**

CARSON CITY, March 7, 1984

DONALD LATTIN, ESQ., *Hale, Lane, Peek, Dennison & Howard*, P.O. Box 3237, Reno, Nevada 89505

DEAR MR. LATTIN:

The former legal counsel for the district sought an opinion from this office on behalf of the Churchill County School District Board of Trustees interpreting the provisions of [NRS 391.3196](#) and [391.350](#). Due to the fact the attorney general may issue opinions only to certain designated public officials pursuant to [NRS 288.150\(1\)](#), we requested and received endorsement of this opinion request from the district attorney of Churchill County.

### FACTS

The circumstances underlying your opinion request, as provided to us by you, are as follows: Certificated employees of the Churchill County School District are represented by a recognized employee organization, the Churchill County Education Association. Each year prior to April 1, the school administration sends a written notice of reemployment to each of its certificated employees. The form of the notice requests that the employee sign and return the document to signify acceptance of employment for the following school year. The document indicates that the terms and conditions of employment will be modified to reflect any changes in the existing bargaining agreement between the District and the Association as a result of any pending negotiations.

Staffing problems, you explain, have arisen as a result of conflicting interpretations given the Intent to Accept Reemployment document by the District and the Association. The District has taken the position that a teacher becomes contractually bound by signing the letter of intent. The Association, on the other hand, has contended that signature and return of the notice of intent to accept reemployment does not create a contract binding on the teacher.

### QUESTIONS

1. Does the statutory procedure for automatic reemployment contained in [NRS 391.3196](#), when fully complied with by a school district and its employee, establish a contract of employment binding upon *both* parties for the ensuing school year. subject only to subsequent negotiated modifications?
2. If a school district receives written notice of intent to accept reemployment under either paragraph 3 or 4 of [NRS 391.3196](#), may it thereafter refuse to accept the employee's resignation and require the teacher to fulfill his or her contract for the ensuing school year?
3. If a teacher, either directly or through a recognized employee organization, gives written notice of intent to accept reemployment, is it a violation of [NRS 391.350](#) for that employee to thereafter sign an employment contract with another school district without prior written consent or acceptance of resignation from the school district at which he or she is currently employed? Does such a violation occur only when it is subsequent to the execution of a formal written contract of employment with the district first employing the teacher?

### ANALYSIS

Before addressing your specific questions, some preliminary remarks regarding [NRS 391.3196](#) and the context within which your inquiry will be considered are appropriate.

One of the primary rules of statutory construction is that words are to be given their plain, ordinary meaning. The general relationship between school authorities and teachers is created by contract (see [NRS 391.120\(1\)](#)) and governed by general principles of contract law; those

principles must be applied to give effect to the language of [NRS 391.3196](#). A contract, in its most basic terms, requires an offer, an acceptance of the offer and a mutual acceptance and understanding between the offeror and offeree as to the terms of the obligation. Application of these concepts to [NRS 391.3196](#) reveals that contract formation regarding reemployment of postprobationary certificated employees proceeds on two very different levels depending on the situation in which an employee finds himself in a given year.

[NRS 391.3196](#)(1) through (3) provide as follows:

1. On or before April 1 of each year, the *board* of trustees shall notify *postprobationary employees* in their employ, in writing, by certified mail or by delivery of the employee's contract, *concerning their reemployment* for the ensuing year. If the board, or the person designated by it, fails to notify a postprobationary employee who has been employed by a school district of his status for the ensuing year, the employee shall be deemed to be reemployed for the ensuing year under the same terms and conditions under which he is employed for the current year.

2. This section does not apply to any certificated employee who has been recommended to be demoted, dismissed or not reemployed if such proceedings have commenced and no final decision has been made by the board. A certificated employee may be demoted or dismissed for grounds set forth in [NRS 391.312](#) after he has been notified that he is to be reemployed for the ensuing year.

3. Any certificated employee who is reemployed pursuant to subsection 1 shall by April 10 notify the board of trustees in writing of his *acceptance of employment*. Failure on the part of the employee to notify the board of acceptance within the specified time limit is conclusive evidence of the employee's rejection of the contract. (Emphasis added.)

The notification of employment status that the board of trustees is required to make by April 1 under [NRS 391.3196](#)(1) is clearly an offer of reemployment. (See also [NRS 391.120](#)(1).) Failure on the part of the board to give the statutorily required notice constitutes an offer by operation of law. Pursuant to [NRS 391.3196](#)(3), an employee who receives an offer of employment must notify the board of his "acceptance" by April 10. Failure of the employee to notify the board of his acceptance within the specified time is deemed rejection of the "contract." It is unmistakable that acceptance of an offer of reemployment, pursuant to [NRS 391.3196](#)(3), creates a contract of employment.

An entirely different procedure is required, however, for reemployment of postprobationary certificated employees who are represented by an employee organization. [NRS 391.3196](#)(4) provides as follows:

4. If the certificated employees are represented by a recognized employee organization *and* negotiation has been commenced pursuant to [NRS 288.180](#), then the provisions of subsections 1, 2 and 3 do not apply except for nonreemployment, demotion or dismissal procedures and before April 10 of each year the *employees shall notify the board* in writing, on forms provided by the board, *of their intention to accept reemployment*. Any agreement negotiated by the recognized employee organization and the board becomes a part of the contract of employment between the board and the employee. The *board of trustees shall mail contracts*, by certified mail with return receipts requested, to each employee to be reemployed at his last-known address *or shall deliver the contract* in person to each employee, obtaining a receipt therefor. *Failure on the part of the employee to notify the board of acceptance within 10 days after receipt of the contract is conclusive evidence of the employee's rejection of the contract*. (Emphasis added.)

Subsection (4) was added to [NRS 391.3196](#) in 1971 as part of an act amending the Local Government Employee Management Relations Act, Chapter 288 of the Nevada Revised Statutes. The purpose of the act was to establish a procedure to stay submission of factfinding in disputes between parties to negotiation in years when the legislature meets and to provide complementary procedures with respect to the reemployment of teachers represented by employee organizations. The language of subsection (4) has remained substantially the same since its adoption.

It specifically provides that if an employee is represented by a recognized employee organization *and* negotiations have commenced pursuant to [NRS 288.180](#), subsections (1), (2) and (3) of [NRS 391.3196](#) do not apply.<sup>1</sup> The only exceptions to this limitation are the demotion, dismissal and nonreemployment provisions of subsection (2) and a requirement that the employee notify the board of trustees by April 10 of his “*intention* to accept reemployment.” (Emphasis added.) There is no

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<sup>1</sup>Presumably, if the employee is represented by an employee organization but negotiations have not commenced pursuant to [NRS 288.180](#), subsections (1), (2) and (3) would apply.

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requirement that the board notify the employee of his reemployment status by April 1 as provided by subsection (1). Nor is the employee considered reemployed under the terms and conditions of his existing contract upon failure of the board to send a reemployment notice to the employee. (See subsection (1).) Most importantly, the employee is not required to notify the board of “acceptance of employment” by April 10, as required by subsection (3). Rather, he must merely inform the board by April 10 of his *intention* to accept reemployment.

The intention to accept reemployment required by [NRS 391.3196](#)(4) is not by its own terms an “acceptance” of employment. Rather, it is an expression by the employee of a desire, plan or expectation to return to his employment situation with the school district the following school year. It also serves as an indication to the board of the number of employees it can expect to return. Formation of a contract of employment requires that additional steps be taken by both the board of trustees and the employee. The board is required to send an actual contract, containing any agreement negotiated between the employee organization and the board, to an employee who is to be reemployed. The employee is required to signify his acceptance of the contract by notifying the board of such acceptance within 10 days of receipt of the contract. Failure to notify the board within the specified time is deemed a rejection of the contract.

With the above analysis in mind, we will proceed to address each of your specific questions.

#### QUESTION NO. 1

Does the statutory procedure for automatic reemployment contained in [NRS 391.3196](#), when fully complied with by a school district and its employee, establish a contract of employment binding upon *both* parties for the ensuing school year, subject only to subsequent negotiated modifications?

#### CONCLUSION

Hopefully, this question has already been answered in analyzing above the two situations contemplated by [NRS 391.3196](#). In situations where the employee is represented by a recognized employee organization and negotiations have been commenced pursuant to [NRS 288.180](#), the

signature by the employee on a letter of intention to accept reemployment does not establish a contract of employment for the ensuing school year. Neither the employee nor the board of trustees is under any obligation as a result of such a notice. A contract of employment is only established when the board issues a contract and the employee accepts it as required by [NRS 391.3196\(4\)](#).

Where the employee is not represented by an employee organization and negotiations have not commenced, acceptance by the employee of the offer of reemployment by the board (either as a result of notice or failure to notice by the specified time) as required by [NRS 391.3196\(3\)](#) creates a contract binding on both parties.

## QUESTION NO. 2

If a school district receives written notice of intent to accept reemployment under either paragraph 3 or 4 of [NRS 391.3196](#), may it thereafter refuse to accept the employee's resignation and require the teacher to fulfill his or her contract for the ensuing school year?

## CONCLUSION

Your question presumes that under both subsections (3) and (4) of [NRS 391.3196](#) an employee manifests and "intention" to accept reemployment. That is not the case. Under the procedure outlines in subsections (1) through (3), the board makes an actual offer of reemployment to the employee which the employee must in fact accept by April 10. A contract is formed by this acceptance. Under subsection (4), however, the employee need only notify the board by April 10 of his "intention" to accept reemployment. There has been no offer tendered by the board nor acceptance given by the employee.

If a teacher accepts reemployment under subsection (3), he is contractually bound under the terms of the contract. Resignation of the teacher prior to the start of a school year would constitute an anticipatory breach and the ordinary remedies for breach of contract would apply. A school district has no contractual remedies, however, against a teacher who resigns after signing only a letter of intention to accept reemployment pursuant to [NRS 391.3196\(4\)](#).

## QUESTION NO. 3

If a teacher, either directly or through a recognized employee organization, gives written notice of intent to accept reemployment, is it a violation of [NRS 391.350](#) for that employee to thereafter sign an employment contract with another school district without prior written consent or acceptance of resignation from the school district at which he or she is currently employed? Does such a violation occur only when it is subsequent to the execution of a formal written contract of employment with the district first employing the teacher?

## CONCLUSION

Your question again presumes that both subsections (3) and (4) of [NRS 391.3196](#) contemplate only an "intention to accept reemployment." As explained above, that is not the case. If an employee accepts reemployment as provided in subsection (3), a contract has been formed. According to [NRS 391.350\(1\)](#), and employee who is employed for a specified time who fails to comply with the terms of his contract without the written consent of the board of trustees employing him is guilty of unprofessional conduct. Such failure to comply may result from executing a second contract with another board of trustees without the written consent of the board first employing him.

In response to your question, then, an employee who has *accepted* employment with a school

district for a specified time would violate [NRS 391.350](#) by executing a contract with another school district without the written consent of the board currently employing him. An employee who merely indicates an intention to accept reemployment with a particular school district is under no contractual obligation to that district and would, therefore, not violate [NRS 391.350](#) by executing an employment contract with another school district.

If we can be of any further assistance in this area, please do not hesitate to contact us.

Sincerely,

BRIAN MCKAY, *Attorney General*

By SCOTT W. DOYLE., *Chief Deputy Attorney General,*  
*Civil Division*

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**OPINION NO. 84-6 Planning and Zoning: Amendment of land use element of master plan does not require immediate amendment of pre-existing zoning ordinances that are not in strict compliance with amended master plan.**

LAS VEGAS, April 11, 1984

THE HONORABLE ROBERT L. VAN WAGONER, *City Attorney, City of Reno*, Post Office Box 1900,  
Reno, Nevada 89505

DEAR MR. VAN WAGONER:

This is in response to your March 12, 1984 request for advice on behalf of your client, the Reno City Council, concerning several provisions of Chapter 278 of the Nevada Revised Statutes. You have asked several questions regarding the same issue, and we believe they may all be answered by a response to the following:

QUESTION

Does an amendment of the Reno City Land-Use Plan map invalidate existing zoning ordinances that are in conflict with the amendment or, alternatively, require the Reno City Council to amend any existing zoning ordinances not in strict conformity with the newly-adopted map?

ANALYSIS

The Nevada Legislature has enacted a comprehensive statutory scheme authorizing cities and counties to plan and zone land use in their respective jurisdictions for the purpose of promoting health, safety, morals and the general welfare of the community. [NRS 278.020](#). As noted by our Supreme Court:

The State of Nevada has delegated comprehensive powers to cities and towns in the area of zoning regulation. The legislative body of a city or of a county of at least 15,000 people must, under Chapter 278, create a planning commission which in turn must adopt a long-term plan of physical development. [NRS 278.030](#), [278.150](#). Elements of the plan include community design, conservation, economics, housing, land use, public buildings, public services and facilities, recreation, streets and highways, transit and transportation.

[NRS 278.160](#). The commission may adopt the plan in whole or in part after prescribed notice and public hearing and by a two-thirds vote. [NRS 278.170](#), [278.210](#). The legislative body may adopt all or any part of this plan after giving prescribed notice and holding a public hearing; any change or addition must be referred to the commission. [NRS 278.220](#).

Pursuant to this legislative directive the City of Reno adopted a comprehensive land-use program embodied in Title 16 of the Reno Municipal Code.

*Forman v. Eagle Thrifty Drugs and Markets*, [89 Nev. 533](#), 538, 516 P.2d 1234 (1973).

You have informed us that the Reno City Council is presently considering adoption of an amended map which is to become part of the “land-use plan” element of the Reno City Master Plan. The starting point for an attempt to determine the legal effect of such an amended map must, as always, be with the intent of the legislature in enacting the provisions of Chapter 278. *Acklin v. McCarthy*, [96 Nev. 520](#), 612 P.2d 219 (1980); *Thomas v. State*, [88 Nev. 382](#), 498 P.2d 1314 (1972); *Ex parte Iratacable*, [55 Nev. 263](#), 30 P.2d 284 (1934). Additionally, the Nevada Supreme Court has delineated the guidelines for such an inquiry.

Our prime concern is to ascertain the intent of the legislature. The court must, if possible, and if consistent with the intention of the legislature, give effect to all the statutory provisions in controversy, and to every part of them. It is our duty, so far as practicable, to reconcile the various provisions so as to make them consistent and harmonious. The court, in interpreting these provisions, must also have in mind the purposes sought to be accomplished and the benefits intended to be attained.

*School Trustees v. Bray*, [60 Nev. 345](#), 353-4, 109 P.2d 274 (1941).

With these requirements of statutory construction in mind, we turn now to consider the pertinent provisions of Chapter 278.

As noted above, [NRS 278.020](#) provides a statement of the purpose of the legislature in enacting Chapter 278 and giving authority to regulate land-use control to the local government entities. Under the Nevada statutory scheme, once a “Master Plan” has been adopted by a planning commission and that plan or any part thereof has been adopted by the governing body, there is a duty for the local government entity to determine the means of putting the plan into effect. [NRS 278.230](#) provides:

1. Whenever the governing body of any city or county shall have adopted a master plan or part thereof for the city or county, or for any major section or district thereof, the governing body shall, upon recommendation of the planning commission, *determine upon reasonable and practical means for putting into effect the master plan or part thereof, in order that the same will serve as a pattern and guide for the kind of orderly physical growth and development of the city or county which will cause the least amount of natural resource impairment* and will conform to the adopted population plan where required, and as a basis for the efficient expenditure of funds thereof relating to the subjects of the master plan.

2. The governing body may adopt and use such procedure as may be necessary for this purpose. (Emphasis supplied.)

Aside from this general grant of authority to implement the master plan as a pattern and guide, the legislature has also provided specific power to local government entities to create zoning districts and enact zoning regulations. [NRS 278.250](#) provides, in pertinent part:

1. For the purposes of [NRS 278.010](#) to [278.630](#), inclusive, the governing body

may divide the city, county or region into zoning districts of such number, shape and area as are best suited to carry out the purposes of [NRS 278.010](#) to [278.630](#), inclusive. Within the zoning district it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land.

2. The zoning *regulations shall be adopted in accordance with the master plan for land use* and shall be designed:

3. The zoning regulations shall be adopted with reasonable consideration, among other things, to the character of the area and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city, county or region. (Emphasis supplied.)

In attempting to construe these two statutory provisions ([NRS 278.230](#) and [278.250](#)) with an eye towards harmonizing them, we are also required to give the language used by the legislature a reasonable and common sense construction.

In construing statutes, the court must consider sections together and place upon language the interpretation which will give to each section of an act its proper effect, and which at least will make it compatible with common sense and plain dictates of justice.

*Gruber v. Baker*, [20 Nev. 453](#), 467-8, 23 P. 858 (1890).

It has always been the rule in Nevada that when language is plain and unambiguous in a statute there is no room for construction. *Brown v. Davis*, [1 Nev. 346](#) (1865); *Lynip v. Buckner*, [22 Nev. 426](#), 41 P. 762 (1895); *Seaborn v. District Court*, [55 Nev. 206](#), 29 P.2d 500 (1934).

[NRS 278.230](#) provides that the master plan shall be a “pattern and guide” for the development of cities, counties or regions. “Pattern” is defined by *Webster’s New World Dictionary*, p. 1042 (2d ed. 1980), as:

1. a person or thing considered worthy of imitation or copying;
2. a model or plan used as a guide in making things; . . .

“Guide” has been defined, in relation to the question presented here, as “applied to various contrivances intended to direct or keep to a fixed course or motion.” *Webster’s Encyclopedic Dictionary*, p. 867 (1967).

[NRS 278.250](#) provides that zoning regulations be adopted “in accordance with the master plan for land use.” “Accordance” has been defined as “agreement, harmony, conformity.” *Webster’s New World Dictionary*, p. 9 (2d ed. 1976). We believe the above-cited language is clear and unambiguous and requires a local government entity to adopt zoning regulations that are in substantial agreement or conformity with the principles, directions and general provisions of the adopted master plan for land use. It should be noted, however, that the agreement or conformity is not required to be strict or absolute.

Moreover, a zoning ordinance must be pursuant to, and in *substantial conformity with, the zoning or enabling act authorizing it*. 8 McQuillan, *Municipal Corporations*, Sec. 25.58. The legislature has delegated the power to zone to the legislative bodies of cities and towns, *so that the need for a comprehensive plan might be met*, and has provided means for the protection of private property through notice and public hearing. (Emphasis supplied.)

*Forman, supra*, at 539.

In 1977 the Nevada Legislature expressly declared its intention that zoning ordinances take precedence over provisions contained in a master plan. 1977 Nev. Stat. Ch. 580, §§ 4-10, at 1496-1500. This recent enactment buttresses our conclusion that the Nevada Legislature has

always intended local zoning ordinances to control over general statements or provisions of a master plan. This express declaration is contained in the statutory requirements for approval of a tentative subdivision map contained in chapter 278 of the Nevada Revised Statutes. Pursuant to these provisions any person wishing to subdivide land in Nevada is required to take specified steps and prepare various maps for approval by the local government entities. [NRS 278.349](#) sets out the procedure for action by a local governing body on a tentative map submitted by any person wishing to subdivide. The pertinent language of [NRS 278.349](#) provides:

1. Except as provided in subsection 2, the governing body shall, by a majority vote of the members present, approve, conditionally approve, or disapprove a tentative map filed with it pursuant to [NRS 278.330](#) within 30 days after receipt of the planning commission's recommendations.

....

3. The governing body shall consider:

....

(e) *General conformity with the zoning ordinances and master plan, except that if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence;*

....

(Emphasis supplied.)

A further rule of statutory construction requires that statutes are to be construed and harmonized so as to avoid absurd results. Thus, the language of this statute must also be given meaning and effect. *School Trustees v. Bray*, *supra*; *Lynip v. Buckner*, [22 Nev. 426](#), 41 P. 762 (1895); *Corbett v. Bradley*, [7 Nev. 106](#) (1871). We, therefore, view the statutory provision of [NRS 278.349](#)(3)(e) as providing that local zoning ordinances enacted pursuant to the “guide” of a master plan take precedence until modified or amended in a particular zoning or rezoning case. To interpret the statutory scheme in any other manner would be to leave this statutory provision devoid of any meaning.

We are aware of the recent Supreme Court decisions of the State of Oregon which judicially construed their statutes as requiring strict compliance of zoning ordinances with a comprehensive plan, even to the extent of requiring amendment of local zoning ordinances in light of the later adoption of a plan or an amendment to a plan *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Ore. 1973); *Baker v. City of Milwaukie*, 533 P.2d 772 (Ore. 1975). We are also aware of a trend amongst a minority of states to legislatively require strict compliance of local zoning regulations with a comprehensive plan. (See generally J. Sullivan and L. Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 Urban L. Ann. 33 (1975); D. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 Mich.L.Rev. 899 (1976); Note—*Developments in Zoning*, 91 Harv.L.Rev. 1548-1550 (1978). However, in our opinion, the Nevada Supreme Court would not undertake such judicial activism without first recognizing a clear legislative initiative to modify our existing statutory framework.

The Nevada Supreme Court has long recognized that zoning is a matter properly within the province of the legislature and that the judiciary should not interfere unless it is proven to be clearly necessary. *Henderson v. Henderson Auto*, [77 Nev. 118](#), 359 P.2d 743 (1961), (judicial interference justified to correct a manifest abuse of discretion); *McKenzie v. Shelly*, [77 Nev. 237](#), 362 P.2d 268 (1961), (judiciary must not interfere with board's determination to recognize desirability of commercial growth within a zoning district); *Coronet Homes, Inc. v. McKenzie*, [84 Nev. 250](#), 439 P.2d 219 (1968), (judiciary must not interfere with the zoning power unless clearly necessary); *Eagle Thrifty v. Hunter Lake P.T.A.*, [85 Nev. 162](#), 451 P.2d 713 (1969), (it is not the business of the judiciary to write a new city zoning ordinance, overruling the court's opinion in *Eagle Thrifty v. Hunter Lake P.T.A.*, [84 Nev. 466](#), 443 P.2d 608 (1968)); *Forman v. Eagle Thrifty Drugs and Markets*, [89 Nev. 533](#), 516 P.2d 1234 (1973), (statutes guide the zoning

process and the means of implementation until amended, repealed, referred or changed through initiative); *State ex rel. Johns v. Gragson*, [89 Nev. 478](#), 515 P.2d 65 (1973), (court will interfere where administrative decision is arbitrary, oppressive or accompanied by manifest abuse). As stated by the court:

Zoning is a legislative matter, and the legislature has acted. *Eagle Thrifty v. Hunter Lake P.T.A.*, [85 Nev. 162](#), 451 P.2d 713 (1969). It has authorized ‘the governing body’ to provide for zoning districts and to establish the administrative machinery to amend, supplement and change zoning districts. [NRS 278.260](#). *As a general proposition, the zoning powers should not be subjected to judicial interference unless clearly necessary.* *Coronet Homes, Inc. v. McKenzie*, [84 Nev. 250](#), 439 P.2d 219 (1968). (Emphasis supplied.)

*Board of Commissioners v. Dayton Dev. Co.*, [91 Nev. 71](#), 530 P.2d 1187 (1975).

In view of the above-described history of judicial restraint, it is our opinion that the Nevada Supreme Court would more likely adopt the judicial reasoning of the Supreme Courts sitting in the States of Washington, Colorado and Montana which have recently considered this exact question.

It may be argued that the purpose of the act assuring the highest standards of environment for living—is defeated when the plan is not strictly followed. However, since planning agency reports and recommendations on proposed projects and controls—which must indicate conformity or nonconformity with the comprehensive plan—are ‘advisory only’ (RCW 36.70.650 and RCW 36.70.540), it is evident the legislature intended that nonconformance with the plan should not necessarily block a project. *South Hills Sewer District v. Pierce Co.*, 22 Wash.App. 738, 745-46, 591 P.2d 877 (1979). *This is confirmed by the admonition that the comprehensive plan shall not be considered other than a guide to development and adoption of official controls.* RCW 36.70.340.

Appellants argue that the court should follow Oregon by holding that the plan should be given preference over conflicting ordinances. But Oregon’s statutory scheme substantially differs from Washington’s. (Emphasis supplied.)

*Barrie v. Kitsap County*, 613 P.2d 1148 (Wash. 1980).

At least one of the differences between the Oregon statutory scheme and that of Nevada is the former’s requirement that a master plan can only be adopted by a planning commission which then recommends zoning ordinances to be enacted by the governing body of a county to carry out the objectives of the plan. *Fasano, supra*, at 27. In Nevada, however, statutes give the local governing body the discretion to adopt or not adopt all or part of a master plan that has previously been adopted by a planning commission. [NRS 278.220](#). Only after adopting all or part of a master plan is a governing body required to adopt regulations to implement it as a pattern and guide for development. [NRS 278.230](#).

The Colorado Supreme Court addressed the issue of requiring strict compliance of zoning ordinances to the master plan in *Theobald v. Board of County Commissioners*, 644 P.2d 942 (Colo. 1982), and determined:

The master plan is the planning commission’s recommendation of the most desirable use of land (citations omitted). *Conceptually, a master plan is a guide to development rather than an instrument to control land use.* *R. Anderson, American Law of Zoning*, §§ 21.15, 22.12 (2d ed.); *E. McQuillan, Municipal Corporations, Zoning*, § 25.08 (3d ed., 1976 Repl. Vol.).

The general rule is that zoning should be enacted in conformance with the comprehensive plan for development of an area, *Fasano, supra*; *Harr, In Accordance*

*with the Comprehensive Plan*, 68 Harv.L.Rev. 1154 (1955); 1 E. Yokely, *Zoning Law Practice*, § 2-1 (4th ed. 1978). However, the Master Plan itself is only one source of comprehensive planning and is generally held to be advisory only and not the equivalent of zoning, nor binding upon the zoning discretion of the legislative body. 1 & 2a. Rathkopf, *Law of Zoning and Planning*, § 12.01, et seq., § 30.02 (4th ed.); *State ex rel. Rochester Ass'n of Neighborhoods v. City of Rochester*, 268 N.W.2d 885 (Minn. 1978); *Holmgren v. City of Lincoln*, 199 Neb. 178, 256 N.W.2d 686 (1977); *Todrin v. Board of Supervisors*, 27 Pa.Cmwlt. 583, 367 A.2d 332 (1976); *Coughlin v. City of Topeka*, 206 Kan. 552, 480 P.2d 91 (1971); *Sharninghouse v. City of Bellingham*, 4 Wash.App. 198, 480 P.2d 233 (1971).

This rule is embodied in our statute. While the statute provides for master planning on a county level, the board of county commissioners is specifically empowered, by majority vote, to disregard the recommendations of the planning commission as set forth in the master plan. (Citations omitted.) (Emphasis supplied.)

*Id.* at 948-949.

It should be noted that a local governing body in Nevada may also disregard the recommendations of a planning commission as set forth in a master plan. [NRS 278.220-278.240](#).

The court went on to consider what standard of review was appropriate when confronted with an amendment to a master plan.

The Barries third argument that the council acted arbitrarily and capriciously presents this question: Does a comprehensive plan amendment require a showing of changed circumstances and, if so, has this showing been made? *A comprehensive plan amendment, the Barries argue, affects landowners' property rights so a showing that conditions have changed is necessary. This court, however, has only required this showing where a municipality rezones property.* (Citations omitted.) (Emphasis supplied.)

*Theobald, supra*, at 1154.

In reviewing the statutory scheme for planning and zoning in the State of Montana, their Supreme Court determined that substantial conformity to a master plan was required of zoning ordinances but strict compliance was unnecessary and unworkable.

The first phrase of section 76-2-304, sets the tone for all that comes after it. It states that *'the zoning regulations shall be made in accordance with a comprehensive development plan . . .'* (emphasis in original). We assume here that the term 'zoning regulations' is also meant to cover the term 'zoning districts.' We cannot ignore the mandatory language ('shall') of this statute.

.....  
The vital role given the planning board by these statutes cannot be undercut by giving the governing body the freedom to ignore the product of these boards—the master plan. We hold that the governmental unit, when zoning, must substantially adhere to the master plan.

*To require strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities. The master plan is, after all, a plan. On the other hand, to require no compliance at all would defeat the whole idea of planning. Why have a plan if the local government units are free to ignore it at any time? The statutes are clear enough to send the message that in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan).*

This standard is flexible enough so that the master plan would not have to be undergoing constant change. Yet, this standard is sufficiently definite so that those charged with adhering to it will know when there is an acceptable deviation, and when there is an unacceptable deviation from the master plan.

....  
*We are aware that changes in the master plan may well be dictated by changed circumstances occurring after the adoption of the plan. If this is so, the correct procedure is to amend the master plan rather than to erode the master plan by simply refusing to adhere to its guidelines. If the local governing bodies cannot cooperate to this end, the only alternative is to ask the Legislature to change the statutes governing planning and zoning. (Emphasis supplied.)*

*Little v. Board of County Commissioners*, 631 P.2d 1282 (Mont. 1981).

These courts' opinions have been well reasoned and reflect the majority view. We find no reason to believe that the Nevada courts would take any different position.

### CONCLUSION

An amendment of a land-use map, which is part of a Master Plan as that term is defined in [NRS 278.150](#) and [NRS 278.160](#), does not require immediate amendment of all local zoning ordinances which are not in strict conformity with the map as amended. Additionally, all ordinances that exist at the time of a land-use map amendment remain in effect until modified or amended by the local governing body.

BRIAN MCKAY, *Attorney General*

By: MICHAEL D. RUMBOLZ, *Chief Deputy Attorney General*

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**OPINION NO. 84-7 County Clerks; Elections; Initiative and Referendum; Secretary of State: Nev. Admin. Code § 295.010 is not in conflict with constitutional and statutory provisions relating to the filing of statewide petitions for initiative and referendum. County clerks should not accept submission of any statewide petition for initiative or referendum which is not presented within the time limits established by Nev. Admin. Code § 295.010.**

CARSON CITY, April 16, 1984

ROBERT J. MILLER, *Clark County District Attorney*, Clark County Courthouse, Las Vegas, Nevada 89155

ATTENTION: CHARLES K. HAUSER, *Deputy District Attorney*

DEAR MR. MILLER:

You have sought our opinion concerning the validity of Nev. Admin. Code § 295.010.

### QUESTION

Does Nev. Admin. Code § 295.010 conflict with Nev. [Const. art. 19, § 2](#), or Nev. Rev. Stat. §§ 295.025(1), 295.035(1), 295.045(2), 295.056, 295.057, 295.058 and 295.059?

## ANALYSIS

Nev. Admin. Code § 295.010 provides:

1. If an initiative petition proposes a statute or an amendment to a statute, the petition must be presented to the county clerks at least 95 days before the next regular session of the legislature for verification of signatures.
2. If an initiative petition proposes an amendment to the constitution, it must be presented to the county clerks at least 155 days before the next succeeding general election for verification of signatures.
3. A referendum petition must be presented to the county clerks at least 185 days before the next succeeding general election for verification of signatures.

In contrast, Nev. [Const. art. 19, § 2](#)(3) provides in pertinent part that a statewide initiative petition proposing a statute or an amendment to a statute shall be filed with the secretary of state “not less than 30 days prior to any regular session of the legislature.” Furthermore, Nev. [Const. art. 19, § 2](#)(4) provides in pertinent part that a statewide initiative petition proposing an amendment to the constitution shall be filed with the secretary of state “not less than 90 days before any regular general election at which the question or approval or disapproval of such amendment may be voted upon by the voters of the entire state.” A referendum petition requesting that any statute or resolution enacted by the legislature be submitted to a vote of the people is subject to the same requirements as to form as an initiative petition proposing a statute or an amendment to a statute. *See* Nev. [Const. art. 19, § 1](#)(1). These constitutional provisions are self-executing but “the legislature may by law provide for procedures to facilitate the operation thereof.” *See* Nev. [Const. art. 19, § 5](#).

These constitutional provisions pertaining to the time limitations within which a statewide initiative petition proposing a statute or an amendment to a statute or the constitution are to be filed with the secretary of state are repeated in the Nevada Revised Statutes. *See* NRS §§ 295.025(1) and 295.035(1). It is important to note that all of the constitutional and statutory provisions just discussed contemplate the filing of a legally sufficient statewide initiative petition with the secretary of state. The Nevada Administrative Code provision which forms the basis of your opinion request pertains to an entirely different subject, specifically, the time limitations within which a statewide initiative petition must be presented to a county clerk for a determination or verification of the petition signatures. Furthermore, the time limitation in Nev. Admin. Code § 295.010(3) pertaining to signature verification for referendum petitions covers a different subject than the time limitation by which a legally sufficient referendum petition must be filed with the secretary of state as specified in Nev. Rev. Stat. § 295.045(2).

Nev. Rev. Stat. §§ 295.056, 295.057, 295.058 and 295.059 establish a statutory procedure by which the sufficiency of a statewide initiative or referendum petition is to be determined by the secretary of state acting in conjunction with the county clerks of this state. These sections were enacted by the 1983 session of the Nevada Legislature as 1983 Nev. Stat. ch. 384 at 923 *et seq.* Two important points need to be made concerning these four newly enacted sections of the Nevada Revised Statutes. First, Nev. Rev. Stat. § 295.056(1) requires that a petition for initiative or referendum or the pertinent parts thereof must be submitted to *each* county clerk *prior* to the petition being filed with the secretary of state. Second, Nev. Rev. Stat. §§ 295.058(2) and 295.059(4) both provide that a petition for initiative or referendum shall be deemed by the secretary of state to qualify or be deemed filed with that office *as of the date that the statutorily required certificates or amended certificates are received by the secretary of state from the respective county clerks.* This means that all of the procedures provided in Nev. Rev. Stat. §§

295.056 through 295.059, inclusive, must be completed *prior* to the time limitations established in either Nev. [Const. art. 19, § 2](#)(3) and (4) or Nev. Rev. Stat. §§ 295.025(1), 295.035(1) and 295.045(2).

There are three levels of petition verification provided in Nev. Rev. Stat. §§ 295.056 through 295.059, inclusive. At least one and possibly all three types of statutorily prescribed petition verification may be used on each statewide petition for initiative or referendum.

The first level or type of petition verification is the numerical determination of the total number of signatures affixed to a petition which is to be performed by the county clerks within 5 days (exclusive of Saturdays, Sundays and holidays) of their receipt of the petition as specified in Nev. Rev. Stat. § 295.056. All statewide petitions for initiative or referendum are subject to this type of verification.

The second level or type of petition verification that all statewide petitions for initiative or referendum, meeting the requirements of Nev. Rev. Stat. § 295.057(1), are subject to is the “random signature verification” provided in Nev. Rev. Stat. § 295.057(2), (3), and (4). The county clerks are to complete this type of signature verification within 15 days after notification by the secretary of state. *See* Nev. Rev. Stat. § 295.057(1). All statewide petitions for initiative or referendum meeting the requirements of Nev. Rev. Stat. § 295.058(2) are deemed to qualify for filing with the secretary of state as of the date that the secretary of state receives all of the certificates described in that provision.

All statewide petitions for initiative or referendum meeting the requirements of Nev. Rev. Stat. § 295.059(1) are to have every signature affixed to them examined by the county clerks of this state. This third level or type of verification conducted by the county clerks is to be completed within 30 days after their receipt of an order from the secretary of state to verify petition signatures in this manner. Any statewide petition for initiative or referendum subjected to all three levels or types of examination prescribed in Nev. Rev. Stat. §§ 295.056 through 295.059 will be under verification and review for a period of at least 50 days prior to the petition’s qualification or date of filing with the secretary of state. This 50-day period does *not* include any Saturdays, Sundays or holidays which may fall within the period of the first level or type of verification prescribed by Nev. Rev. Stat. § 295.056.

If the statutorily prescribed review period embodied in Nev. Rev. Stat. §§ 295.056 through 295.059, inclusive, is added to each of the three constitutionally and statutorily prescribed time limitations for filing with the secretary of state of legally sufficient statewide petitions for initiative or referendum, the sum of these respective periods equals the time periods established in Nev. Admin. Code § 295.010 less 15 days.

A statewide initiative petition proposing a statute or amending a statute must be filed with the secretary of state not less than 30 days prior to any regular session of the legislature. *See* Nev. [Const. art. 19, § 2](#)(3) and Nev. Rev. Stat. § 295.025(1). Add to this period the 50-day review period embodied in Nev. Rev. Stat. §§ 295.056 through 295.059, inclusive, and the sum of these two periods is 80 days prior to the next regular session of the legislature which is 15 days less than the time limitation for the initial submission of this type of statewide initiative petition to the county clerks prescribed in Nev. Admin. Code § 295.010(1).

A statewide initiative petition proposing an amendment to the constitution must be filed with the secretary of state not less than 90 days prior to any regular general election. *See* Nev. [Const. art. 19, § 2](#)(4) and Nev. Rev. Stat. § 295.035(1). Add to this period the 50-day review period embodied in Nev. Rev. Stat. §§ 295.056 through 295.059, inclusive, and the sum of these two periods is 140 days prior to the next succeeding general election which is 15 days less than the time limitation for the initial submission of this type of statewide initiative petition to the county clerks prescribed in Nev. Admin. Code § 295.010(2).

A statewide referendum petition must be filed with the secretary of state not less than 120

days prior to the date of the next succeeding general election. *See* Nev. Rev. Stat. § 295.045(2). Add to this period the 50-day review period embodied in Nev. Rev. Stat. §§ 295.056 through 295.059, inclusive, and the sum of these two periods is 170 days which is 15 days less than the time limitation for the initial submission of this type of statewide referendum petition to the county clerks prescribed in Nev. Admin. Code § 295.010(3).

This 15-day differential prescribed by the Nevada Administrative Code provision and discussed in the preceding four paragraphs of this opinion can be justified for at least two reasons. First, the first level or type of petition verification prescribed in Nev. Rev. Stat. § 295.056 excludes Saturdays, Sundays and holidays falling within that initial 5-day review period. Some allowance for this statutory exclusion of nonjudicial days is partial justification for the 15-day differential contained in the administrative regulation, given the fact that the Nevada Administrative Code provision establishes an absolute submission date which does not allow for exclusion of these nonjudicial days. Second, the review process contained in Nev. Rev. Stat. §§ 295.056 through 295.059, inclusive, requires several exchanges of written notices, orders and certifications between the secretary of state and the county clerks of this state. The notice to commence “random signature verification” pursuant to Nev. Rev. Stat. § 295.057(2), (3) and (4) does not become operative until after it is given. *See* Nev. Rev. Stat. § 295.057(1). The order to commence verification of every signature affixed to a petition in accord with Nev. Rev. Stat. 295.059 does not become effective until “after receipt of such an order.” *See* Nev. Rev. Stat. § 295.059(2). The time required for these two transmittals plus the transmittal time for the notification required by Nev. Rev. Stat. § 295.056(2), the certification required by Nev. Rev. Stat. § 295.057(4) and the amended certification required by Nev. Rev. Stat. § 295.059(3) also provide additional justification for 15 extra days being provided in each of the three circumstances addressed in Nev. Admin. Code § 295.010.

Nev. Admin. Code § 295.010 was adopted pursuant to Nev. Rev. Stat. § 295.057(5). Furthermore, the regulation was promulgated pursuant to the rulemaking provisions of the Nevada Administrative Procedure Act. *See* Nev. Rev. Stat. § 233B.040 *et seq.* Additionally, the inclusion of this regulation in the Nevada Administrative Code required compliance with Nev. Rev. Stat. § 233B.062 *et seq.* Regulations adopted and filed in this manner have the force of law. *See* Nev. Rev. Stat. § 233B.040(1).

The construction and interpretation to be given to administrative rules adopted pursuant to legislative authority is to be developed through the use of the same principles that govern the interpretation of statutes. *See Pottawattamie County v. Iowa Dept. of Environmental Quality, Air Quality Commission*, 272 N.W.2d 448 (Iowa 1978) and *Washington State Liquor Control Board v. Washington State Personnel Board*, 561 P.2d 195 (Wash. 1977). It is a well-settled rule of statutory construction in this state that where two statutes address the same subject, the two provisions should be construed harmoniously if it is reasonably possible to do so. *See State ex rel. Abel v. Eggers*, 36 Nev. 372, 381, 136 P. 100 (1913). *Cf. Laird v. State of Nev. Pub. Emp. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 559 (1982).

The discussion set forth in the first part of this analysis clearly establishes that a statewide petition for initiative or referendum cannot be considered to be properly filed with the secretary of state until the verification procedures contained in Nev. Rev. Stat. §§ 295.056 through 295.059, inclusive, have been satisfied and the petition has been certified pursuant to either Nev. Rev. Stat. §§ 295.058(2) or 295.059(4). Therefore, our interpretation that the verification time contemplated by Nev. Rev. Stat. §§ 295.056 through 295.059, inclusive, is to be “tacked” onto the time limitations established in Nev. [Const. art. 19, § 2](#)(3) and (4) and Nev. Rev. Stat. §§ 295.025(1), 295.035(2) and 295.045(2) harmonizes all of the constitutional, statutory and regulatory provisions which pertain to the filing or submission of statewide petitions for initiative or referendum. Our interpretation gives effect to each of these provisions. This construction complies with the appropriate rules of interpretation and gives Nev. Admin. Code § 295.010 the legal effect required by Nev. Rev. Stat. § 233B.040(1).

## CONCLUSION

Nev. Admin. Code § 295.010 is *not* in conflict with Nev. [Const. art. 19, § 2](#) or Nev. Rev. Stat. §§ 295.025(1), 295.035(1), 295.045(2), 295.056, 295.057, 295.058 and 295.059. The registrar of voters or county clerk should not accept the submission of any statewide petition for initiative or referendum which is not presented in accord with the time limits established by Nev. Admin. Code § 295.010.

Sincerely,

BRIAN MCKAY, *Attorney General*

By SCOTT W. DOYLE, *Chief Deputy Attorney General,*  
*Civil Division*

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**OPINION NO. 84-8 Elections: Candidates for county office of public administrator are required to pay \$40.00 filing fee. Op. Att’y Gen. No. 132 (July 25, 1922) is overruled.**

CARSON CITY, April 19, 1984

THE HONORABLE WILLIAM D. SWACKHAMER, *Secretary of State*, Capitol Building, Carson City, Nevada 89710

DEAR MR. SWACKHAMER:

You have requested our opinion concerning filing fees for candidates for public office.

## QUESTION

Is a filing fee required under Nev. Rev. Stat. § 293.193 for the county office of public administrator? In responding to your inquiry you have asked us to limit our response by excluding from our analysis the county public administrator offices subject to the provisions of Nev. Rev. Stat. §§ 253.010(3), 253.041, 253.043 and 253.050(2).

## ANALYSIS

Nev. Rev. Stat. § 293.193(2) provides:

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

You indicate that the office of public administrator in Churchill County will appear on the primary and general election ballots of 1984 due to the resignation of the office holder elected in 1982. Historically, Churchill County has not required a filing fee for the office of public administrator. Apparently this practice stems from the fact that in Churchill County the public administrator is compensated pursuant to Nev. Rev. Stat. § 253.050(1). This statutory provision provides that public administrators are entitled to be paid as other administrators or executors are paid for the administration of the estates of deceased persons. The only exceptions to this rule are those public administrators compensated pursuant to Nev. Rev. Stat. §§ 253.043 and

253.050(2).

In addition, you indicate that Op. Att’y Gen. No. 132 (July 25, 1922) is supportive of the county’s practice of not charging a filing fee to candidates for this office. In that opinion we stated that the holder of the county office of public administrator receives no compensation whatever as public administrator. The office merely qualifies him to become administrator of certain estates, and for his services as administrator of such estates he is compensated under general law on a parity with other administrators—not as public administrator, but as administrator of such estates. Therefore, we concluded that the office holder in this circumstance was not compensated for holding the office and should not be required to pay a filing fee pursuant to a prior statutory exemption similar to Nev. Rev. Stat. § 293.193(2). The interrelationship of Nev. Rev. Stat. §§ 253.050(1) and 293.193(2), when coupled with the interpretation contained in Op. Att’y Gen. No. 132 (July 25, 1922), is the basis for Churchill County’s practice of not requiring a filing fee from candidates for the office of public administrator.

Nev. Rev. Stat. § 293.193(1) provides in pertinent part that the filing fee for the filing of a declaration or acceptance of candidacy for any county office is \$40.00. You indicate that in Washoe County, candidates for the office of public administrator are required to pay the \$40.00 filing fee specified in Nev. Rev. Stat. § 293.193(1). The requirement of paying the filing fee is imposed despite the fact that the office holder will be compensated pursuant to Nev. Rev. Stat. § 253.050(1). This is the same method of compensation used for the public administrator in Churchill County. You have sought our advice as to which county’s interpretation is correct.

In most instances, the compensation of public officers takes the form of a salary. A salary is generally characterized as a fixed compensation for services payable for a specified period of time. However, salary is not the only method by which public officers may be compensated. In addition to salary, public officers may be compensated by their receipt of fees, perquisites or commissions. All forms of compensation for public officers just discussed must find their authorization in some legal authority such as a constitutional or statutory provision. *See State of Nevada ex rel. Beck v. Washoe County*, [14 Nev. 67](#), 70 (1879).

Although our research indicates no direct holding by the Supreme Court of the State of Nevada that fees are a form of compensation for public officers, the concept of compensating public officers in this manner is discussed in at least three different opinions by our state supreme court which are contemporaneous to our 1922 opinion and characterize an officer’s receipt of fees as being compensation.

In *State ex rel. Jennett v. Stevens*, [34 Nev. 128](#), 116 P. 601 (1911), the court was concerned with the issue of a district judge collecting fees in his capacity as a townsite trustee, which fees were characterized by the court as being compensation, in addition to the compensation received as a district judge. The court pointed out that the duties of a townsite trustee were imposed on the judge by virtue of his holding the office of district judge. Since the duties of trustee were separate from this individual’s duties as judge, the district judge was entitled to receive the statutorily prescribed fees as compensation for services rendered in his capacity as trustee. *State ex rel. Jennett v. Stevens, supra*, [34 Nev. at 143](#).

In *Wolf v. Humboldt County*, [36 Nev. 26](#), 131 P. 964 (1913), the court was concerned with the issue of whether a constable’s acceptance of partial payment on his claim for fees constituted an accord and satisfaction which barred his subsequent lawsuit against the county for the remaining unpaid fees. In deciding this issue, the court took notice of the concept that a fee payable to a public officer is remuneration to that official for performance of the specific official act for which the fee is claimed. *Wolf v. Humboldt County, supra*, [36 Nev. at 33](#).

In *Clover Valley Land & Stock Co. v. Lamb*, [43 Nev. 375](#), 187 P. 723 (1920), the court decided the question of whether a county sheriff was entitled to a commission pursuant to the sheriff’s fee act for the sale of realty pursuant to a court order of foreclosure or whether the statutory commission is payable only when the sale is pursuant to a levy and execution. The

court decided that the commission was payable in the latter circumstance only. The rationale for this decision was that an officer acting under court order incurs no liability if the order is strictly obeyed. On the other hand, the same officer is liable for the consequences of an illegal levy. The court concluded that the legislature probably recognized this distinction and chose to make a commission payable to the sheriff on account of the liability to which the sheriff is exposed when realty is sold by that official pursuant to levy and sale. *Clover Valley Land & Stock Co. v. Lamb*, *supra*, 43 Nev. at 383-384. It must be noted that in this third opinion, like the preceding two, at least part of the court's rationale in reaching its decision is premised on its recognition that the receipt of fees by a public officer is to be treated as a method of compensating that official for the performance of official duties.

Nev. [Const. art. 4, § 32](#) characterizes the county office of public administrator as being one for which the legislature is required to fix their compensation. The legislature has done that through the enactment of Nev. Rev. Stat. §§ 253.043 and 253.050.

Consequently, we believe the better reasoned approach is to recognize that the concept of compensation for public officers is not limited to their receipt of fixed salaries, but can include payment by their retention of fees, perquisites or commissions. Therefore, the fact that a particular county public administrator receives fees pursuant to Nev. Rev. Stat. § 253.050(1) rather than a fixed salary pursuant to Nev. Rev. Stat. § 253.043 does not make that office one for which no compensation is received. The public administrator may receive fees from individual estates pursuant to Nev. Rev. Stat. § 253.050(1). However, these fees are received for the discharge of the official duties specified in Nev. Rev. Stat. § 253.040. To the extent that Op. Att'y Gen. No. 132 (July 25, 1922) opines that the county office of public administrator is an uncompensated office and entitled to be exempted from the filing fee requirement contained in a statute similar to Nev. Rev. Stat. § 293.193(1) it is incorrect and is overruled.

#### CONCLUSION

A \$40.00 filing fee payable pursuant to Nev. Rev. Stat. § 293.193(1) is required from any candidate for the county office of public administrator where the officer is to be compensated in accord with Nev. Rev. Stat. § 253.050(1). To the extent of Op. Att'y Gen. No. 132 (July 25, 1922) is inconsistent with this opinion, it is overruled.

Sincerely,

Brian McKay, *Attorney General*

By Scott W. Doyle, *Chief Deputy Attorney General*,  
*Civil Division*

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**OPINION NO. 84-9 Constitutional Law—Evidence—Criminal Procedure: Evidentiary rule permitting recoupment of costs for expert testimony from convicted offender is constitutional. The Nevada rules of evidence may constitutionally permit the courts to impose the costs of expert testimony at a hearing or trial where the nonindigent convicted defendant objects to admission of the expert witness' affidavit regarding intoxicant analysis in driving under influence prosecutions. Nev. Rev. Stat. § 50.325 (1983).**

CARSON CITY, April 23, 1984

THE HONORABLE JAMES E. WILSON, JR., *District Attorney of Elko County*, Elko County

Courthouse, Elko, Nevada 89801

Attention: JOHN S. MCGIMSEY, ESQUIRE, *Deputy District Attorney*

DEAR MR. WILSON:

In your recent correspondence an opinion of this office was requested regarding the constitutionality of the Nevada statute governing the admissibility at a hearing or trial of an expert's affidavit analyzing certain substances of evidentiary value. *See Nev. Rev. Stat. § 50.325*. Apparently, the primary concern posited by your opinion request is related to the validity of imposing expert witness expenses upon a convicted criminal defendant.

#### QUESTION

Does the federal constitution prohibit the State of Nevada from enforcing a statute requiring a convicted criminal defendant to pay the costs for the attendance of an expert witness at a hearing or trial where the defendant opposed the admission of the expert's affidavit analyzing a particular substance of evidentiary value and demanded the expert's testimony in person?

#### ANALYSIS

The Nevada evidence code provides in relevant part that:

Whenever a person is charged with an offense punishable under chapters 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a controlled substance as defined in chapter 453 of the NRS, or a chemical, poison or organic solvent, and it is necessary to prove the existence of any alcohol or the existence or identity of a controlled substance, chemical, poison or organic solvent, the prosecuting attorney may request that the affidavit of an expert or other person described in [NRS 50.315](#) be admitted in evidence at the trial or hearing concerning the offense.

.....  
If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for trial or hearing that the presence of the expert or other person is demanded, the affidavit must not be admitted. *A defendant who demands the presence of the expert or other person and is convicted of violating [NRS 484.379](#) or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or hearing.*

Nev. Rev. Stat. § 50.325(1) and (3) (1983). (Emphasis added.)

In the absence of a statutory authorization such as Section 50.325, an affidavit is not competent evidence. *See, e.g., Vannier v. Superior Court of Los Angeles County*, 650 P.2d 302, 306 (Cal. 1982); *Holton v. Laucomer*, 504 P.2d 872, 874 (Haw. 1972); *Audit Services v. Kraus Constr. Inc.*, 615 P.2d 183, 188 (Mont. 1980); *In re Marriage of Morrison*, 613 P.2d 557, 560 n. 2 (Wash.App. 1980). Obviously, the statute was enacted to provide a streamlined procedure for presenting expert analysis of blood or urine examinations or confirmation of the nature of controlled substances without the expense and burden of presenting live testimony. Where these issues of fact are not in question, the Section 50.325 procedure can be utilized by the courts to expedite criminal matters. Conversely, when these factual questions must be litigated, the statute permits the full exercise of a criminal defendant's constitutional rights to cross-examination and confrontation of adverse witnesses. *See* 1971 Nev. Stat. ch. 477, *as codified by Nev. Rev. Stat. § 50.325(3)* (1983) (headnote indicates legislative intent to preserve right of cross-examination).

This statutory exception is, however, subject to two major limitations. First, the prosecution must provide the prescribed notice of the intention to utilize the evidentiary exception to the defendant and the defense attorney. Nev. Rev. Stat. § 50.325(2). Second, the prosecuting attorney may not utilize this evidentiary exception if the defendant and his counsel object to the nonappearance of an otherwise necessary state witness. Nev. Rev. Stat. § 50.325(3).

In 1983, the Nevada Legislature amended Section 50.325(3) to add the proscription that “[a] defendant who demands the presence of the expert . . . and is convicted of violating [NRS 484.379](#) or a provision of chapter 484 of NRS for which a driver’s license may be revoked shall pay the fees and expenses of that witness at the trial or hearing.” Nev. Rev. Stat. § 50.325(3), *as added by* 1983 Nev. Stat. ch. 26, § 9; 1983 Nev. Stat. ch. 426, § 27; 1983 Nev. Stat. ch. 597, § 9.

A review of the legislative history of this amendment demonstrates that a primary concern of the lawmakers was the costs attendant in the prosecution of routine offenses related to the operation of motor vehicles while intoxicated. *See, e. g.*, Minutes of the Nevada State Legislature, Assembly Committees on Judiciary and Transportation 4 (Feb. 26, 1983); *id.*, Assembly Committee on Judiciary 2 (Mar. 17, 1983).

Many state and federal courts have confirmed the validity of statutory schemes utilized for imposition of litigation costs incurred in a criminal prosecution upon the defendant. Generally, costs are not available in criminal cases unless a statute permits recovery of these expenses. *See United States v. Pommerening*, 500 F.2d 92, 101 (10th Cir. 1974); *Bernard v. State*, 652 P.2d 982 (Wyo. 1982). Where statutory authority exists, a criminal conviction is a prerequisite to the taxing of costs upon the defendant. *See, e. g.*, *Olson v. James*, 603 F.2d 150, 155 (10th Cir. 1979); *People v. Chapman*, 392 N.E.2d 389, 391 (Ill.App.Ct. 1979); *Commonwealth v. Hower*, 406 A.2d 754, 758 (Pa.Super.Ct. 1979).

Additionally, these costs may not be charged against an indigent defendant even though the accused has been convicted. Imposition of such expenses irrespective of financial position would present a serious question regarding the abridgement of an accused’s fourteenth amendment equal protection guarantee. Nevertheless, an indigent defendant can be made to reimburse these costs where he subsequently acquires the means to bear the costs of his legal defense. *See Fuller v. Oregon*, 417 U.S. 40, 47-55 (1974); *United States v. Chavez*, 627 F.2d 953, 957-958 (9th Cir. 1980); *United States v. American Theater Corp.*, 526 F.2d 48, 51 (8th Cir. 1975); *State v. Weinberger*, 665 P.2d 202, 217 (Mont. 1983); *Commonwealth v. Hower*, 406 A.2d 754, 757 (Pa.Super.Ct. 1979).

Other constitutional challenges to statutes permitting assessment of costs upon an accused’s conviction have been likewise unsuccessful. Accordingly, courts have decided that costs recoupment from a convicted criminal defendant does not have an unconstitutional chilling effect on the accused’s exercise of his constitutional rights to a fair jury trial, to confront witnesses and of compulsory process, as well as the privilege against self-incrimination. *See, e. g.*, *United States v. Chavez*, 627 F.2d 953, 957-958 (9th Cir. 1980); *United States v. Glover*, 588 F.2d 876, 878-879 (2d Cir. 1978); *United States v. American Theater Corp.*, 526 F.2d 48, 50-51 (8th Cir. 1975); *People v. Estate of Scott*, 363 N.E.2d 823, 825 (Ill. 1977); *Commonwealth v. Hower*, 406 A.2d 754, 757-758 (Pa.Super.Ct. 1979). In this regard, courts have held that the costs of prosecution witnesses and preparation may be an expenditure which is taxable upon a convicted criminal under appropriate circumstances. *See United States v. Burchinal*, 657 F.2d 985, 997-998 (8th Cir. 1981); *United States v. Pommerening*, 500 F.2d 92, 102 (10th Cir. 1974); *State v. Washburn*, 616 P.2d 554-555 (Ore.Ct.App. 1980); *Commonwealth v. Hower*, 406 A.2d 754, 756-758 (Pa.Super.Ct. 1979).

The only subject where the decisional law appears to be in conflict is on the question of whether recoupment statutes may be mandatory as compared to discretionary upon the courts. Provided a mandatory cost of prosecution statute is governed by judicial discretion where the convicted defendant is an indigent, the legislative scheme is not offensive. *See United States v. Chavez*, 627 F.2d 953, 954-958 (9th Cir. 1980); *People v. Keaghine*, 396 N.E.2d 1341, 1347

(Ill.App.Ct. 1979); *People v. Nichols*, 359 N.E.2d 1095, 1103-1104 (Ill.App. 1977). See also *United States v. Glover*, 588 F.2d 876, 878-879 (2d Cir. 1978). But see *Olson v. James*, 603 F.2d 150, 155 (10th Cir. 1979). Where the express provisions of a statute do not provide this discretion in the area of imposing costs upon an indigent, the courts will interpret the legislative enactment to include this factor necessary for constitutional validity. See, e.g., *United States v. Chavez*, 627 F.2d 953, 957-58 (9th Cir. 1980); *United States v. American Theater Corp.*, 526 F.2d 48, 51 (8th Cir. 1975). This proposition is consistent with a fundamental precept of Nevada law that every legislative enactment is presumed constitutionally valid and statutes must be construed in a manner supportive of this presumption. See, e.g., *Allen v. State of Nevada*, 100 Nev. ...., 676 P.2d 792, 100 Nev. Adv. Op. 20, at 2 (1984). The discussions before the Nevada Legislature on this issue provide support for the proposition that the costs recoupment mandates of Section 50.325 were not intended for application against an indigent defendant. See, e.g., Minutes of the Nevada Legislature, Assembly Committee on Judiciary 2 (Mar. 17, 1983).

A final constitutional concern with regard to Section 50.325 is the application of the recoupment provisions solely to criminal defendants convicted of driving under the influence offenses. The legislative history surrounding the 1983 amendment to Section 50.325 demonstrates the attention given to the peculiar difficulties involved in obtaining expert testimony at proceedings for these types of offenses. See e.g., Minutes of the Nevada State Legislature, Assembly Committees on Judiciary and Transportation 4-5 (Feb. 26, 1983); *id.*, Assembly Committee on Judiciary 2 (Mar. 17, 1983).

In the case of *United States v. Chavez*, 627 F.2d 953 (9th Cir. 1980), the court recognized that costs recoupment statutes are supported by legitimate governmental objectives which “include the recovery of expenditures to compensate the government and the imposition of additional punishment.” *Id.* at 956. Undoubtedly, the special concern of the Nevada Legislature regarding the costs of enforcement and the problem of attendance of routine witnesses in drunk driving prosecutions is an objectively rational basis for making the distinction in Section 50.325. Obviously the legislature may establish reasonable procedures in order to insure the enforceability of regulatory schemes. This classification is wholly noninvidious. Cf. *Fuller v. Oregon*, 417 U.S. 40, 49-51 (1974) (classification between convicted and unconvicted defendants).

## CONCLUSION

Section 50.325 contains a statutory scheme for the recoupment of the costs for the attendance of expert witnesses at a trial or hearing where the defendant objects to the admissibility of an affidavit of the expert analyzing a particular substance of evidentiary value. A predicate to recoupment of these costs is that the defendant be convicted of a criminal offense related to driving under the influence of intoxicants. This statute provides a legislative scheme to expedite these criminal matters, reduce the costs of such prosecutions and to insure availability of the testimonial evidence necessary for prosecution.

Where the legislature provides an express statutory system for recoupment of litigation costs from a convicted defendant, the courts will generally enforce these provisions despite constitutional challenges. An implicit condition for the imposition of costs upon the convicted offender is that only nonindigent persons can be the subject of recoupment measures.

These statutes do not have a chilling effect on the exercise of other constitutional rights under the fifth and sixth amendments. Section 50.325 is not a legislative enactment which has “no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them.” *Fuller v. Oregon*, 417 U.S. 40, 55 (1974). By contrast, Section 50.325 merely deprives a financially able defendant of available funds which in fairness should be remitted to the public for curtailment of the costs for his successful prosecution. See, e.g., *United States v. Glover*, 588 F.2d 876, 879 (2d Cir. 1978). Under these circumstances and given the

presumption of constitutionality enjoyed by all statutes, the attorney general cannot conclude that Section 50.325 is constitutionally offensive.

Respectfully submitted,

Brian McKay, *Attorney General*

By: Dan R. Reaser, *Deputy Attorney General*  
*Criminal Division*

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**OPINION NO. 84-10 Adoption: An attorney or physician who undertakes to place a child, arranges placement or assists in placement for adoption, other than provision of legal or medical services, violates Chapter 127 of NRS.**

LAS VEGAS, May 15, 1984

SHARON P. MURPHY, *Administrator*, Department of Human Resources, State Welfare Division,  
251 Jeanell Drive, Carson City, Nevada 89710

DEAR MS. MURPHY:

This office is in receipt of your correspondence which requested an opinion of the Attorney General regarding the roles of attorneys and physicians in specific adoption cases and their respective limitations in such cases.

QUESTION

What roles may attorneys and physicians play in specific adoption cases and what limitations are placed on these two professions in participating in placement or arranging the placement of children?

ANALYSIS

The most common problem arises when a child is placed with potential adoptive parents before a home investigation, as required by statute, is completed. Sometimes attorneys and physicians take an active role in this placement. [NRS 127.057\(1\)](#) states:

Any person to whom a consent to adoption executed in this state or executed outside this state for use in this state is delivered shall, within 48 hours after receipt of such executed consent to adoption, furnish a true copy thereof to the welfare division of the department of human resources, together with a report of the permanent address of the person or persons in whose favor such consent was executed.

This provision does *not* authorize an attorney or a doctor to actually place a child in the prospective adoptive home. Submission of a true copy of a properly executed adoption consent to the Nevada State Welfare Division within 48 hours of execution has nothing to do with actually placing a child in any home, especially a prospective adoptive home.

The Nevada Legislature has specifically addressed the issue of placing a child in a potential adoptive home. [NRS 127.280](#), clearly and unequivocally, controls this issue, not [NRS 127.057\(1\)](#).

[NRS 127.280](#)(1) and (4) state:

1. *No child may be placed in the home of prospective adoptive parents for the 30-day residence in that home which is required before the filing of a petition for adoption, except where a child and one of the prospective adoptive parents are related within the third degree of consanguinity, unless the welfare division of the department of human resources first receives written notice of the proposed placement from:*

- (a) The prospective adoptive parents of the child;
- (b) The person recommending the placement; or
- (c) A licensed child-placing agency, *and the investigation required by the provisions of this section has been completed.*

....  
4. *Pending completion of the required investigation, the child must be retained by the natural parent or parents or relinquished to the welfare division and placed by the welfare division in a foster home licensed by it until a determination is made by the welfare division concerning the suitability of the prospective adoptive parents.* (Emphasis added.)

[NRS 127.280](#)(1) unquestionably requires written notice to the Nevada State Welfare Division from (a) the prospective adoptive parent or (b) the person recommending the placement, and an investigation by the Nevada State Welfare Division is required before a child can be placed in the prospective adoptive parents' home. The statute does not say that the investigation may occur after the child has been placed in the home of prospective adoptive parents.

Two exceptions to the required investigation exist: (1) For relatives of the child within the third degree of consanguinity; and (2) for licensed child-placing agencies. [NRS 127.280](#)(1) and (2). No attorneys or doctors are licensed child-placing agencies. Only LDS Social Services and Catholic Community Services of Nevada have been licensed as child-placing agencies by the Nevada State Welfare Division.

[NRS 127.120](#)(1) sets forth the rules for filing a petition for adoption. In pertinent part:

The county clerk shall send one copy of the petition to the welfare division of the department of human resources, which shall make an investigation and report as hereinafter provided. . . .

A petition for adoption may be filed after a child has resided with the petitioners for a period of thirty (30) days. [NRS 127.110](#).

Pursuant to [NRS 127.280](#)(1), no child may be placed in the home of prospective adoptive parents for the 30-day residence required until the investigation is completed. This statute does not contradict [NRS 127.120](#)(1). The statutes have outlined those placements which are acceptable without an initial investigation, i.e., those involving relatives within third degree of consanguinity, and those involving licensed child-placing agencies. It is in conjunction with these two types of placements that [NRS 127.120](#)(1) applies.

[NRS 127.280](#)(4) requires that the child must remain with the natural parent or parents or must be relinquished to, and placed in a foster home by, the Nevada State Welfare Division until the required investigation is completed and the suitability determination is made. This provision is intended to prohibit so-called "parking lot placements" where the natural mother comes from the hospital and immediately transfers the child to the potential adoptive parents. Such action violates the statute. If the natural mother does not want to keep the child in her home, the Nevada State Welfare Division, or a relative within the third degree of consanguinity who is a prospective adoptive parent, must take custody of the child. If the proposed adoptive parent is a blood relative, the consanguinity must be proved and a court order entered waiving the

investigation before the adoption may be finalized.

The Legislature has also addressed the issue of an attorney assisting in finding parents or children for an adoption. [NRS 127.285](#) states:

1. Any attorney licensed to practice in this state may perform any legal services in adoption proceedings, if he does not:
  - (a) Take part in finding parents or children; or
  - (b) Otherwise participate in the adoption proceedings.
2. Such attorney may receive compensation for his legal services.

If an attorney is involved with friends, clients or strangers who want a child to adopt and takes part in finding an adoptable child (e.g., checks with other attorneys, clients, strangers, doctors, or hospitals, sends resumes to institutes, planning agencies, or clinics, etc.), he cannot perform any legal services in any subsequent adoption proceedings and, therefore, cannot be compensated.

The Legislature has addressed the issue of who has authority in placing, in arranging placement, in assisting in placing, or in assisting in arranging placement of any child for adoption or permanent free care. [NRS 127.240](#)(1) states:

No person may place, arrange the placement of, or assist in placing or in arranging the placement of, any child for adoption or permanent free care without securing and having in full force a license to operate a child-placing agency issued by the welfare division of the department of human resources. This subsection applies to agents, servants, physicians and attorneys of parents or guardians, as well as to other persons.

In the event that an attorney feels that the phrase “attorneys of parents or guardians” does not apply to him, the Attorney General’s Office takes the following position:

- (1) The list is not all inclusive but is only an example;
- (2) ‘Other persons’ includes every person, entity, institute, or agency, including attorneys for potential adoptive parents, attorneys of adoptive children, or attorneys of clients giving the child for adoption; and
- (3) This subsection is very clear—No person or entity can be involved with placing, arranging, assisting placement or assisting arrangement of a child for adoption without being duly licensed.

Lastly, the Legislature has addressed the issue of who can be compensated for placing children for adoption. [NRS 127.290](#)(1) states:

No person who does not have in full force a license to operate a child-placing agency may request or accept, directly or indirectly, any compensation or thing of value for placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption or permanent free care.

When this statute is read in conjunction with [NRS 127.285](#), *supra*, it is clear that an attorney who is involved in the slightest degree with the adoptive process, other than through traditional legal work, cannot ask for any type of compensation, fee or other thing of value. This statute also prevents any other persons from receiving any type of compensation for placing, arranging placement or assisting in the placing or arranging the placement of children for adoption, except a licensed child-placing agency.

The Legislature has adopted penalties for unlicensed people or entities that receive

compensation for placing any child for adoption, arranging placement of any child for adoption, or assisting in the placing or arranging of placement of any child for adoption. [NRS 127.300](#) states:

Any person who, without holding a valid license to operate a child-placing agency issued by the welfare division of the department of human resources, requests or receives, directly or indirectly, any compensation or thing of value for placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption or permanent free care shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

The Legislature has also listed a penalty for people and entities that advertise, solicit, accept, supply, provide, obtain, place, arrange placement, assist in placing or assist in arranging placement of any child for adoption without having a valid license to do so. [NRS 127.310](#) states:

Any person or organization other than the welfare division of the department of human resources who, without holding a valid unrevoked license to place children for adoption issued by the welfare division:

1. Places, arranges the placement of, or assists in placing or in arranging the placement of, any child for adoption or permanent free care; or
2. Advertises in any periodical or newspaper, or by radio or other public medium, that he will place children for adoption, or accept, supply, provide or obtain children for adoption, or causes any advertisement to be published in or by any public medium soliciting, requesting or asking for any child or children for adoption, is guilty of a misdemeanor.

The Legislature has further prescribed a penalty for violation of the provisions of [NRS 127.280](#) in regard to placement of a child:

Any person who places, accepts placement of, or aids, abets or counsels the placement of any child in violation of the placement provisions of this section is guilty of a gross misdemeanor. [NRS 127.280\(8\)](#).

#### CONCLUSION

It is the opinion of this office that any attorney or physician who undertakes to place a child, arrange the placement of a child, or in any way assists in the placement of a child for adoption, other than the provision of legal or medical services, is acting in direct contravention of Chapter 127 of the Nevada Revised Statutes.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: ISRAEL L. KUNIN, DANIEL D. HOLLINGSWORTH,  
*Deputy Attorneys General*

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**OPINION NO. 84-11 Employment: Ban on solicitation of business in [NRS 612.705\(4\)](#) is**

**unconstitutional infringement of freedom of speech.**

CARSON CITY, June 8, 1984

HAROLD KNUDSON, *Chairman*, Board of Review, Nevada Employment Security Department,  
4600 Kietzke Lane, Bldg. I, Suite 205, Reno, Nevada 89502

DEAR MR. KNUDSON:

You have requested the opinion of this office as to the following:

QUESTION

Is the ban on solicitation of business contained in [NRS 612.705\(4\)](#) constitutional?

ANALYSIS

[NRS 612.705\(4\)](#) provides that:

[a]ny person, firm or corporation who shall solicit the business of appearing on behalf of a claimant or who shall make it a business to solicit employment for another in connection with any claim for benefits under this chapter is guilty of a misdemeanor.

Soliciting (i.e., advertising) for business is a form of speech, often called “commercial speech.” Therefore, the answer to your question involves an analysis of the applicability of the freedom of speech provision of the first amendment of the United States Constitution to commercial speech.

For many years the Supreme Court of the United States declined to find constitutional protection for most commercial speech, choosing to interpret the freedom of speech clause of the first amendment as relating primarily to political speech. However, beginning in the mid-1970's and continuing until today, the Supreme Court has been rapidly granting additional constitutional protections to commercial speech.

In *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222 (1975), the court held that speech is not stripped of first amendment protection merely because it appears in the form of a commercial advertisement which involves sales or solicitations for a financial gain. While recognizing that advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate governmental interest, in *Bigelow* the fact that the advertised activity was a lawful activity seemed particularly important to the court when it struck down an advertising prohibition on the availability of abortion and other family planning services.

The very next year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817 (1976), the court, in considering a ban on advertising drug prices, repeated that speech does not lose its first amendment protection because money is spent to disseminate it, as in paid advertisements of one form or another. Speech was to be protected even though it might involve solicitations to purchase or otherwise pay or contribute money. The court held that states may certainly regulate commercial speech which is false, deceptive, misleading or which proposes illegal transactions, but states may not suppress dissemination of concededly truthful information about an entirely lawful activity on nothing more than fear of the information's effect upon its disseminators and its recipients.

The next significant case is *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980). The court noted that commercial expression not only serves the economic interests of the speaker, but it also assists consumers and furthers the societal interest for the fullest possible dissemination of information. While observing that there

can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity, if the communication is neither misleading nor related to unlawful activity the government's power to prohibit it is circumscribed. The state must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that governmental interest. The restriction must directly advance the state interest involved and, at the same time, if the governmental interest could be served as well by a more limited restriction on commercial speech, excessive restrictions cannot survive.

In *Central Hudson Gas*, the high court specifically rejected the "highly paternalistic" view that the government has complete power to suppress or regulate commercial speech. And in footnote 9 of the opinion appearing at p. 2351 of 100 S.Ct., the court declared that it will review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. "Indeed, in recent years this court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."

The most recent expression of the Supreme Court on first amendment protections for commercial speech is found in *Matter of R. M. J.*, 102 S.Ct. 929 (1982). In that case at p. 937, the Supreme Court generally summarized the commercial speech doctrine, in the context of advertising for professional services, as follows:

Truthful advertising related to lawful activities is entitled to the protections of the first amendment. \* \* \* Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. \* \* \* Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception. Even when communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interests served. Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest.

The constitutional protection of commercial speech has also found expression in a case decided by the United States District Court for the District of Nevada involving rules and regulations which entirely prohibited the truthful advertisement of the terms and availability of certain counseling services. In *Family Counseling Service of Clark County, Nevada, Inc. v. Rust*, 462 F.Supp. 74 (D.Nev. 1978), Judge Foley, relying upon the decision of the Supreme Court in the lawyer advertising case of *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977), held unconstitutional those provisions of the rules and regulations of the Nevada State Board of Marriage and Family Counselor Examiners which prohibited or restrained truthful advertisement of the terms and availability of family counseling services by licensees of that board.

Other provisions of [NRS 612.705](#) appear to impliedly grant legal status to a person, firm or corporation who wishes to engage in the business of providing services for a fee to claimants seeking unemployment compensation benefits before the executive director or the board of review. Since the business to be solicited or advertised appears to be a lawful one, in view of the decision of Judge Foley in the *Family Counseling* case and the recent decisions of the Supreme Court of the United States expanding the constitutional protections for commercial speech, it is our opinion that, if [NRS 612.705\(4\)](#) were made the subject of litigation, the courts in this state would declare the section to be violative of the freedom of speech clause in the first amendment, because the ban is a total one on all such solicitation or advertising. We are aware of no substantial governmental interest advanced by a total and complete ban on all solicitation of

business by such a person, firm or corporation. Even assuming a substantial governmental interest could be articulated, it would be our opinion that less restrictive measures, other than a complete ban on all solicitation of business, would be adequate to protect and advance that governmental interest.

We are fully aware of the presumption of constitutionality which attaches to all enactments of our state legislature; however, with respect to the particular statute under review, there appears to be sufficient authority of the Supreme Court of the United States to lead us to believe that any such presumption is overcome with respect to the ban on solicitation of business found in [NRS 612.705\(4\)](#). We are also aware of the decision of the Nevada Supreme Court in *Viale v. Foley*, [76 Nev. 149](#), 350 P.2d 721 (1960), in which the court, without discussion or analysis, declared that a statute prohibiting outdoor advertising of hotel and motel rates did not prohibit free speech.

In view of more recent decisions of the Supreme Court of the United States such as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, we question the continued vitality of that 24-year-old Nevada decision, insofar as it approves a comprehensive restriction on commercial speech without consideration of less restrictive measures. To that extent, we do not think *Viale v. Foley, supra*, fully represents the current state of the law on this issue.

#### CONCLUSION

It is the opinion of this office that the total and complete ban found in [NRS 612.705\(4\)](#) on soliciting or advertising for business by any person, firm or corporation who engages in the business of providing services to unemployment compensation claimants is an unconstitutional infringement of the first amendment's freedom of speech clause. In our opinion, no misdemeanor prosecution could be successfully maintained for a violation of the statute, nor should any benefits or rights be denied to any person, firm or corporation that has solicited or advertised for such business merely because of such solicitation or advertising.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: WILLIAM E. ISAEFF, *Chief Deputy Attorney General*

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#### **OPINION NO. 84-12 Secretary of State: Resident aliens may apply for and be appointed to the office of notary public in the State of Nevada.**

CARSON CITY, July 27, 1984

THE HONORABLE WILLIAM D. SWACKHAMER, *Secretary of State*, Capitol Complex, Carson City, Nevada 89710

ATTENTION: ROBIN BOGICH, Deputy Secretary of State

DEAR MR. SWACKHAMER:

You have requested our advice regarding the right of resident aliens to become notaries public in the State of Nevada.

#### QUESTIONS

1. In view of the recent decision of the Supreme Court of the United States, may a resident alien become a notary public in the State of Nevada?
2. If the answer to the first question is affirmative, what steps should your office take to commence accepting notary public applications from resident aliens?

### ANALYSIS

In *Bernal v. Fainter*, ..... U.S. ...., 104 S.Ct. 2312 (1984), the Supreme Court of the United States found a Texas law which required that a notary public be a United States citizen violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by denying aliens the opportunity to become notaries public. The court reasoned that a state law which discriminates on the basis of alienage can only be sustained if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available. By applying these same principles the Supreme Court of the United States has invalidated several state statutes that have denied aliens the right to pursue various occupations. *See Bernal v. Fainter, supra*, 104 S.Ct. at 2316.

The court noted that the strict scrutiny test does not apply to laws which discriminatorily exclude aliens from positions intimately related to the process of democratic self-government. Whether a statutory restriction based on alienage fits this narrow “political function” exception is determined through the application of a two-part test. The first part of the test is whether the classification is specific without being either overinclusive or underinclusive. The second part of the test examines whether the classification is applicable only to those persons holding elective or important nonelective executive, legislative and judicial positions which participate directly in the formulation, execution, or review of broad public policy going to the heart of representative government. *See Bernal v. Fainter, supra*, 104 S.Ct. at 2317.

The court applied the two-part “political function” exception to the Texas statute. That statute provided that to be eligible for appointment as a notary public, a person shall be a resident citizen of the United States and of the State of Texas. With respect to the first part of the two-part test, the court found that the citizenship requirement was not overinclusive because it applied only to those persons applying to be notaries. The court noted that the classification might be impermissively underinclusive because it did not require court reporters to be United States citizens even though they perform many of the same services as notaries. Furthermore, the court pointed out that the State of Texas does not require its Secretary of State to be a citizen even though that office is a high-level appointive office performing many important functions including supervision of the licensing of notaries public. After pointing out these problems with the scope of the classification, the court turned to the second part of the test which was the point on which the case was decided.

The court decided that notaries public did not perform important public policy functions which go to the heart of representative government. The court acknowledged the critical need of the state to have oaths administered properly and to have the execution of important documents authenticated carefully. However, the court pointed out that these duties are essentially clerical and ministerial in nature and distinguished these duties from the broad, discretionary responsibilities of persons employed in public service like state police officers and public school teachers. The Supreme Court of the United States summed up by stating:

To be sure, considerable damage could result from the negligent or dishonest performance of a notary’s duties. But the same could be said for the duties performed by cashiers, building inspectors, the janitors who clean up the offices of public officials, and numerous other categories of personnel upon whom we depend for careful, honest service. What distinguishes such personel (sic) from those to which the political function

exception is properly applied is that the latter are either invested with policy-making responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals. Neither of these characteristics pertain to the functions performed by Texas notaries. *Bernal v. Fainter, supra*, 104 S.Ct. at 2319.

It was for this reason that the Supreme Court of the United States concluded that the “political function” exception did not apply to notaries public. The court found that the statutory citizenship restriction did not serve to advance any compelling state interest and therefore failed to survive the strict scrutiny analysis. Accordingly, the court held that the statutory citizenship requirement for notaries public contained in the Texas Civil Code violated the Fourteenth Amendment of the United States Constitution.

The extensive discussion of the opinion in *Bernal v. Fainter, supra*, is set out in our response to your question so that we can point out the similarities between the Texas and Nevada statutes and illustrate why your office should adhere to the holding in this recent opinion and permit resident aliens to make application to your office for appointment as notaries public.

Unlike the Texas statute, the Nevada statutes do not provide an express citizenship requirement for notaries public in Chapter 240 of the Nevada Revised Statutes. However, this citizenship requirement is nonetheless present, due to other provisions in our state statutes and constitution. Nev. Rev. Stat. § 281.020(2)(a) provides that notaries public are appointive officers of the State of Nevada. Nev. Rev. Stat. § 281.040 provides that no person who is not a qualified elector shall be eligible to any office of honor, profit or trust in and under the government and laws of this state. The office of notary public is an office of honor, profit or trust as defined in Nev. Rev. Stat. § 281.040. *See State ex rel. Summerfield v. Clarke*, [21 Nev. 333](#), 337, 31 P. 545 (1892). This requirement that no person is eligible to any office who is not a qualified elector is also contained in our state constitution. *See Nev. Const. art. 15, § 3*. In order to be a qualified elector in the State of Nevada, a person must be, among other things, a citizen of the United States. *See Nev. Const. art. 2, § 1*. Therefore, the State of Nevada has imposed the same citizenship requirement on applicants for the office of notary public that the Texas statutes did prior to that requirement being invalidated by the opinion in *Bernal v. Fainter, supra*.

Our statutory and constitutional citizenship requirement imposed on applicants for the office of notary public is subject to much of the same criticism that was leveled at the same citizenship requirement imposed by the State of Texas. Unlike Texas, our state imposes a United States citizenship requirement on the Secretary of State. *See Nev. Rev. Stat. §§ 281.010(1)(i) and 281.040*, Nev. [Const. art. 15, § 3](#) and Nev. [Const. art. 2, § 1](#). This office is responsible for the licensing of notaries. *See Nev. Rev. Stat. §§ 240.010 and 240.160*. The office of Secretary of State performs many important policy making functions that properly would include that office within the political function exception. In this sense, it can be said that our citizenship requirement is not underinclusive to the same extent as the requirements found in the Texas statutes. However, when our citizenship requirement for the office of notary public is contrasted with the requirements for registration as a certified shorthand reporter, it is found that an applicant for registration as a certified shorthand reporter can be a “citizen of the United States or lawfully entitled to remain and work in the United States . . . .” *See Nev. Rev. Stat. § 656.180(1)*. Therefore, Nevada’s statutory requirement of United States citizenship for applicants to the office of notary public is subject to the criticism of being underinclusive the same as the Texas requirement in *Bernal v. Fainter, supra*, 104 S.Ct. at 2318.

We seriously doubt that the United States citizenship requirement imposed on Nevada’s applicants for the office of notary public would fare any better under strict judicial scrutiny than the Texas requirement did. In *Bernal v. Fainter, supra*, 104 S.Ct. at 2320, the State of Texas contended that its citizenship requirement served the legitimate state concerns that notaries be reasonably familiar with state law and institutions and that notaries may be called upon years later to testify to acts they have performed. The Supreme Court of the United States categorically

rejected these arguments stating:

However both of these asserted justifications utterly fail to meet the stringent requirements of strict scrutiny. There is nothing in the record that indicates that resident aliens, as a class, are so incapable of familiarizing themselves with Texas law as to justify the State's absolute and class-wide exclusion. The possibility that some resident aliens are unsuitable for the position cannot justify a wholesale ban against all resident aliens. Furthermore, if the State's concern with ensuring a notary's familiarity with state law were truly 'compelling,' one would expect the State to give some sort of test actually measuring a person's familiarity with the law. The State, however, administers no such test. To become a notary public in Texas, one is merely required to fill out an application that lists one's name and address and that answers four questions pertaining to one's age, citizenship, residency and criminal record—nothing that reflects the State's asserted interest in insuring that notaries are familiar with Texas law. Similarly inadequate is the State's purported interest in insuring the later availability of notaries' testimony. This justification fails because the State fails to advance a factual showing that the unavailability of notaries' testimony presents a real, as opposed to a merely speculative, problem to the State. Without a factual underpinning, the State's asserted interest lacks the weight we have required of interests properly denominated as compelling. *Bernal v. Fainter, supra*, 104 S.Ct. at 2320.

Our notary application procedures are just as skeletal as those in Texas. The applicant applies on a form submitted to the Secretary of State. Nev. Rev. Stat. § 240.010(2). The applicant is also required to take an oath, post a bond and pay the required fee. *See* Nev. Rev. Stat. § 240.030. No testing to measure a person's familiarity with Nevada law is required. Similarly, there is nothing that we have been referred to which indicates that the unavailability of notaries' testimony is anything other than a speculative problem like that outline in *Bernal v. Fainter, supra*. We are convinced that the holding in *Bernal v. Fainter, supra*, controls the answer we must give to your first inquiry. A resident alien may apply to your office to become a notary public despite the existence of the citizenship requirement presently required by the provisions of Chapter 281 of the Nevada Revised Statutes.

With respect to your second inquiry, we would recommend three steps that should be taken to implement our advice in response to your first question. First, we would recommend that you propose legislation which would allow applications for and appointments to the office of notary public for either citizens of the United States or persons lawfully entitled to remain and work in the United States. Second, we would recommend that your office's application form be revised to solicit either citizenship information or resident alien status information, as is appropriate in the circumstances. Third, you should contact the United States Immigration and Naturalization Service and obtain information concerning the types of resident alien status and the manner of their proof. This last action will assist you in the revision of your application form.

#### CONCLUSION

A resident alien may apply to become a notary public in the State of Nevada. Your office should take the steps suggested in the body of this opinion to implement this expanded ability to apply for appointment to the office of notary public.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: SCOTT W. DOYLE, *Deputy Attorney General*

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**OPINION NO. 84-13 Colorado River Commission: There is no statutory or contractual right for commission's customers to renew existing contracts for Hoover or Parker-Davis power.**

CARSON CITY, August 7, 1984

JACK L. STONEHOCKER, *Director*, Colorado River Commission, Mailroom Complex, Las Vegas, Nevada 89158

DEAR MR. STONEHOCKER:

You have sought the opinion of this office on a question of whether the Colorado River Commission's contractors for Hoover and Parker-Davis power have a right to renew their existing contracts.

FACTS

Pursuant to [NRS 538.161](#), [538.171](#) and 538.181, the Colorado River Commission holds in trust for the State of Nevada the rights of this state to power generated on the Colorado River and sells that power to users within Nevada. Currently, the commission has contracts with the Western Area Power Administration (Western) of the United States Department of Energy for power from the Boulder Canyon Project (Hoover Dam) and Parker-Davis Project (Parker and Davis dams) which expire on May 31, 1987, and March 31, 1986, respectively. The commission has contracts for the sale of this power, which contain the same termination dates, with the following contractors: Basic Management, Incorporated, The Flintkote Company, Kerr-McGee Chemical Corporation, Stauffer Chemical Company, Titanium Metals Corporation of America (these five customers are collectively known as the Basic Magnesium Project), Valley Electric Association, Lincoln County Power District No. 1, Overton Power District No. 5, and the Nevada Power Company. The "General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects" published by Western on May 9, 1983 provide for a renewal of nearly the same amounts of capacity and energy designated in Western's current contracts with the Colorado River Commission. As the commission prepares for the public process of allocating Nevada's share of Hoover and Parker-Davis power, a question arises as to whether the commission's current customers have a contractual or statutory right to renew their present contracts for that power.

QUESTION

What renewal rights, if any, are the Colorado River Commission's present customers receiving Hoover and Parker-Davis power entitled to under their existing contracts and applicable statutes?

ANALYSIS

A careful review of the commission's contracts for the sale of Boulder Canyon Project or Parker-Davis Project power shows that none contains any express provision for renewal of the contract upon termination or for renewal in a subsequent contract of the amount of capacity and energy designated in the current contract. We note that the original power sales contract between

the commission and the Nevada Power Company dated February 21, 1936, did provide for a renewal of the contract, but that provision was deleted in a 1938 amendment.

Although there are no express renewal provisions in the commission's contracts for the sale of Hoover or Parker-Davis power, a question arises whether the following language in the Hoover contracts implies a right of renewal. Similar language does not appear in the Parker-Davis contracts.

Article 3 of the commission's contracts for the sale of Hoover power to the entities comprising the Basic Magnesium Project states:

This contract is *subject to* all of the terms and provisions of EXHIBITS 1, 2, 3, 4, 5 and 6 hereof which are hereby made a part hereof as fully and completely as though set out herein at length. This contract is subject to such other rules and regulations as hereafter may be promulgated by the Secretary of the Interior pursuant to law and to Article 27 of EXHIBIT 2 hereof. (Emphasis added.)

Article 9 of the commission's contract for the sale of Hoover power to the Nevada Power Company (then the Southern Nevada Power Company) dated October 10, 1941, provides:

This contract is *subject to* all the terms and provisions of EXHIBITS 1, 2 and 3 hereof, which are hereby made a part hereof as fully and completely as though set out herein at length. This contract is subject to such other rules and regulations as hereafter may be promulgated by the Secretary pursuant to law and to Article 27 of EXHIBIT 2 hereof. (Emphasis added.)

Further, Article 9 of the present contracts for the sale of Hoover power to both the Lincoln County Power District and the Overton Power District (dated October 27, 1941 and October 9, 1941, respectively) read the same as Article 9 of the Nevada Power Company contract quoted above.

Exhibit 3 in all of these contracts is the contract for the sale of Hoover power between the commission and Western. Article 16 of that contract provides that "[t]he State, if this contract has not been terminated prior to said date [May 31, 1987], shall be entitled to a renewal hereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations. . . ." Does the language quoted above, making the contracts between the commission and its Hoover customers "subject to" a provision which creates an affirmative contractual right of renewal in the State of Nevada, imply the grant of a similar right from the commission to its customers? In the opinion of this office, it does not.

Black's Law Dictionary, 5th Ed., c. 1979, defines the phrase "subject to" as "liable, subordinate, obedient to; provided that," citing the case of *Homan v. Employers Reinsurance Corp.*, 345 Mo. 650, 136 S.W.2d 289 (1940). In *Englestein v. Mirtz*, 345 Ill. 48, 177 N.E. 746 (1931), the Supreme Court of Illinois was faced with the issue of whether the language of a contract providing that "this agreement is subject to agreement this date entered between Kaplan and [defendant] and all covenants and agreements therein mentioned," should be construed as an obligation or covenant under which the plaintiff is to assume his share of the burdens and receive his share of the benefits thereunder. In answering no, the court stated that "there is nothing in the use of the words 'subject to' in their ordinary use, which would even hint at the creation of affirmative rights." *Englestein*, at 752. Quoting the opinion of the earlier case of *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 46 N.E. 1105 (1896), the court explained, ". . . it is the duty of a party who intends by a deed to bind another by a covenant in a former formal instrument to insert such covenant in the contract in such distinct and intelligible terms as that the party to be bound cannot be deceived, and not call upon the courts to infer such a covenant from equivocal words, which were probably understood by one party in a sense different from that sought to be ascribed

to them by the other.’ “ *Englestein*, at 752.

The “subject to” provisions quoted above are so general in their language and so broad in scope that to infer a specific renewal covenant from them would be, in our opinion, to do so from “equivocal words.” Also, the provision to which the customers’ contracts are supposedly made subject creates a renewal right in the State of Nevada, not its customers. Renewal rights in favor of the commission’s customers could easily have been expressed in “distinct and intelligible terms” in their contracts, as it was, for example, in the 1936 power sales contract with the Nevada Power Company. The removal of the renewal provision from that contract fairly suggests the parties’ intention that no renewal right exist in the contractor. We conclude that the “subject to” language quoted above does not create any renewal right in the commission’s Hoover customers.

There is no state statute which grants the commission’s customers a right to renew any power sales contracts. Also, none of the federal statutes pertaining to the Parker-Davis Project—the Rivers and Harbors Act of 1935, the Reclamation Act of 1939 or the Act to Consolidate Parker Dam Project and Davis Project of 1954—contains any provisions for the renewal of power sales contracts.

The Boulder Canyon Project Act (45 Stat. 1057) December 21, 1928, in authorizing the Secretary of the Interior to award contracts for the sale and delivery of electrical energy from the Hoover powerplant provides in subsection (b) of section 5:

The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations. . . .

This language does create an affirmative right to renewal, but only respecting those contracts to which it is referring, that is, contracts with the Secretary of the Interior. Although it reads “[t]he holder of *any* contract . . .” (emphasis added), there is nothing in the language of the Boulder Canyon Project Act, or the one case to date which interprets section 5(b), which would indicate that the renewal provision was intended to apply also to the customers of those entities holding contracts directly with the Secretary.

The case which interprets section 5(b) of the Boulder Canyon Project Act is *Citizens Utility Co. v. United States*, 149 Fed.Supp. 158 (U.S.Ct.Cl. 1957). In that case, the plaintiff, Citizens Utility Company, brought an action for damages because of the federal government’s refusal to renew its contracts for electric energy produced at Hoover Dam. The court held that the plaintiff was entitled to a renewal of its contracts pursuant to section 5(b) of the Boulder Canyon Project Act, notwithstanding the fact that renewal rights were not written into its contracts. Citizens Utility had a contract with the Secretary of the Interior and section 5(b) applies to such contracts.

The significant difference in the situation of the commission’s customers is that they do not have a contractual relationship with the Secretary of the Interior at all. Their contractual relationship for Hoover power is strictly with the State of Nevada.

The court mentions an argument advanced by Citizens Utility: That the equity of section 5(b) makes it applicable to them because “[i]t was intended to protect those who had invested in facilities to use or distribute electricity from the dam, and customers who had become dependent upon the continued flow of that electricity.” *Citizens Utility*, at 162. The court notes simply that “[t]he plaintiffs say, and it would seem to be true, that these facts existed in their situations.” *Citizens Utility*, at 162. The court does not indicate what role, if any, this argument played in its decision of the case. Even if, for the sake of argument, it was supposed that the renewal provision of section 5(b) was intended to provide such protection, we believe it cannot reasonably be said that this protection was intended to encompass anyone other than direct contractors with the Secretary of the Interior. To extend the argument beyond this class would permit many end users of Hoover power who purchased it from the commission’s customers—

the Nevada Power Company or the rural electrification associations—to claim renewal rights on investments they had made to use the power or on the fact that they had become dependent upon the continued flow of that power. We find nothing in the *Citizens Utility* case to suggest that the equity of the renewal provision as argued in that case would serve to make section 5(b) applicable to the commission’s customers.

### CONCLUSION

There is no express or implied renewal provision in the commission’s contracts with its customers for the sale of Hoover and Parker-Davis power and there is no Nevada statute granting such a renewal right. Federal statutes pertaining to the Parker-Davis power also do not contain such a renewal provision. The renewal provision in the Boulder Canyon Project Act, section 5(b), does not apply to contracts with the commission for the sale of Hoover power.

Even though the commission’s customers do not have a legal right to a contract renewal, the commission has the discretionary authority to allocate to existing Hoover and Parker-Davis contractors amounts of power equivalent to that allocated under their present contracts.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: GERALD A. LOPEZ, MARI K. BOCHANIS,  
*Deputy Attorneys General*

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**OPINION NO. 84-14 Child Care Services Bureau; Counties; Cities: Counties and cities have the authority to regulate child care services provided to less than 5 children pursuant to their authority to regulate businesses under [NRS 244.335](#) and [268.095](#).**

CARSON CITY, August 9, 1984

MILLS LANE, ESQUIRE, *Washoe County District Attorney*, Post Office Box 11130, Reno, Nevada 89520

DEAR MR. LANE:

By letters dated July 24, 1984, and July 26, 1984, you have requested an opinion from this office as to the power of the County of Washoe to regulate child care by persons who care for fewer than 5 children, as well as child care without charge. You have also asked whether the county may require registration of persons engaged in child care. The specific questions posed are as follows:

### QUESTION NO. ONE

Given Nevada’s statutory scheme, may Washoe County adopt child care regulations requiring a license for persons caring for fewer than 5 children?

### ANALYSIS

The Nevada Legislature has specifically addressed the licensing of “child care facilities” in [NRS Chapter 432A](#).010 et seq. In adopting these statutes, the Legislature made findings and a

declaration as follows:

The legislature finds and declares that it is desirable that children of our state in need of day care services receive adequate and safe care outside their own homes, and it is the intent of state and local governments to assist in meeting such needs through an administrative procedure which will further the following objectives:

1. Safe and responsive child care facilities and services.
2. Adequate methods to pay the costs of child care on an individual basis in already existing child care programs.
3. Proper operation of child care programs.
4. Provision of services by other public agencies on a subcontracted or purchased basis.
5. Full cooperation with the Federal Government in adopting a state plan for child care that is in accordance with the guidelines of the Federal Panel on Early Childhood.

This legislative intent indicates that the State intended to protect children through the requirements set forth in the sections following thereafter.

The Legislature then proceeded to adopt statutes governing “child care facilities.” In [NRS 432A.020](#) a “child care facility” is defined as an “establishment operated and maintained for the purpose of furnishing care on a temporary or permanent basis, during the day or overnight, for compensation, to five or more children under 18 years of age.”

[NRS 432A.131](#)(1) establishes the Child Care Services Bureau of the Youth Services Division of the Nevada State Department of Human Resources as the sole agency with authority to license child care facilities. [NRS 432A.131](#)(2) sets forth an exception to subsection one, providing that:

2. Child care facilities in any county or incorporated city where the governing body has established a child care licensing agency and enacted an ordinance requiring that child care facilities be licensed by the county or city need not be licensed by the bureau. Such a licensing agency shall adopt such standards and other regulations as may be necessary for the licensing of child care facilities, and the standards and regulations:
  - (a) Must be not less restrictive than those adopted by the bureau.
  - (b) Take effect only upon their approval by the Bureau.

It is apparent that [NRS 432A.131](#)(2) authorizes the county or incorporated city to license child care facilities provided there is an ordinance establishing a child care licensing agency, the regulations under which licenses are approved are not less restrictive than those adopted by the bureau and that all regulations are effective only upon approval by the Bureau. It should be noted that [NRS 432A.131](#) grants this authority to the counties only in the licensing of “child care facilities” which are establishments providing care to 5 or more children under 18 years of age for compensation. There is therefore no authority to license the care of less than 5 children in [NRS 432A.131](#).

Since [NRS 432A.131](#) does not permit the counties to license facilities caring for less than 5 children, such authority must be found elsewhere.

*Pershing County v. Humboldt County*, [43 Nev. 78](#), 181 Pac. 960, 183 Pac. 314 on rehearing (1919), provides insight into the derivation of the powers of counties. At page 84 of that opinion, the court said:

Subject in a state only to constitutional limitation, a county is the merest creature of the legislature. It is recognized by the fundamental law of this state as a body corporate. Const. [Nev. art. 17, sec. 1](#).

From the legislature a county derives its name, its extent of territory, its mode and

manner of government, its powers and rights. . . .

It appearing, then, that the powers and duties of the county are provided for by act of the legislature, it is necessary to look for authority to regulate child care beyond that permitted by [NRS Chapter 432A](#) in some other provision of the Nevada Revised Statutes.

[NRS Chapter 244](#) includes within its provisions authorization for counties to license and regulate certain activities in the county. Only one of those provisions appears to bear on the question herein presented. [NRS 244.335](#) provides in relevant part:

1. . . . The board of county commissioners may:
  - (a) Regulate all character of lawful trades, callings, industries, occupations, professions and business conducted in its county *outside of the limits of incorporated cities and towns*.
  - (b) Fix, impose and collect a license tax for revenue or for regulation, or for both revenue and regulation, on such trades, callings, industries, occupations, professions and business. (Emphasis added.)

[NRS 268.095](#)(1)(a) gives cities the power to license “all character of lawful trades, callings, industries, occupations, professions and businesses conducted *within its corporate limits*.” (Emphasis added.)

[NRS 277.110](#) provides that a public agency may enter into an agreement with another agency to exercise any power, privilege, or authority jointly with any other public agency.

In determining whether the county may regulate child care other than as set out in [NRS 432A](#), child care must be a “trade, calling, industry, occupation, profession or business.” “Occupation” has been defined as “employment” or “one’s regular business or employment or whatever he follows as a means of making a livelihood.” See *Brown v. Wood*, 575 P.2d 760, 767 (Alaska 1978); *Key Life Ins. Co. v. Black*, 230 So.2d 532, 533 (1970). See also *Webster’s New International Dictionary*, 2nd Ed. Unabridged (“That which occupies or engages the time and attention; the principal business of one’s life; vocation; business”) and *Black’s Law Dictionary*, 5th Ed. (1979) (“That which principally takes one’s time, thought and energies, especially one’s regular business or employment; also, whatever one follows as the means of making a livelihood. Particular business, profession, trade, or calling which engages individual’s time and efforts; employment in which one regularly engages or vocation of his life”). It therefore appears that one who takes care of children, for compensation, regardless of the number of children, would be engaged in an “occupation.”

Under this reasoning, it appears that Washoe County may regulate child care for less than 5 children outside the limits of incorporated cities and towns and that the City of Reno and the City of Sparks may regulate such child care within their corporate limits pursuant to the provisions of Chapters 244 and 268 of NRS cited above. As stated previously, [NRS Chapter 277](#) permits one public agency to enter into a cooperative agreement with another public agency to perform a government function. In the instant case it appears that the City of Reno and the City of Sparks have designated the Washoe County Welfare Department as the child care licensing agency pursuant to [NRS Chapter 432A](#). Assuming all the requirements of [NRS Chapter 277](#) have been met, under these designations Washoe County has the authority to license only child care facilities of 5 children or more for compensation within the corporate city limits. If Washoe County desires to regulate child care for less than 5 children within the corporate limits, another cooperative agreement must be established with the City of Reno and the City of Sparks.

It should be noted that the Legislature has defined a “child care facility” in [NRS 432A.020](#). A county may not alter a definition that has been established by the Legislature (see Op. Att’y Gen. 208 (1976) and Op. Att’y Gen. 406 (1967)). Therefore, if Washoe County should decide to regulate facilities providing child care to less than 5 children, such facilities cannot be called

“child care facilities.” Some other designation must be established, such as “child care business.”

It should further be noted that the State has preempted the regulatory area of “child care facilities.” Therefore, a facility that cares for 5 or more children for compensation must, at a minimum, meet the standards for licensing adopted by the Child Care Services Bureau. Further, the county licensing regulations on “child care facilities” must be approved by the Child Services Bureau prior to being effective.

#### CONCLUSION

The County of Washoe may regulate facilities which provide care to fewer than 5 children under the general authority of the county to regulate business outside the limits of incorporated cities and towns. The City of Reno and City of Sparks may regulate facilities which provide care to fewer than 5 children under their general authority to regulate business within the corporate city limits.

#### QUESTION TWO

May Washoe County adopt child care regulations which encompass those persons that provide care without compensation, as well as those persons caring for children for compensation?

#### ANALYSIS

The analysis applied to question number one is germane to this question. Care of children without compensation, however, does not fall within the definition of “occupation” contained in [NRS 244.335](#) and [268.095](#) because this type of care could not be characterized as a means of making a livelihood. Neither [NRS Chapter 244](#), [NRS Chapter 268](#), nor [NRS Chapter 432A](#) authorizes Washoe County’s regulation of child care without compensation.

#### CONCLUSION

Washoe County may not regulate child care without compensation.

#### QUESTION THREE

Does Washoe County have the authority to require registration of persons who care for children but whose operations do not fit within the definition of “child care facility” and thus are not regulated by [NRS Chapter 432A](#)?

#### ANALYSIS

Please refer to the analysis to question number one. It leads one to the conclusion that Washoe County has the power to require registration of child care providers under its general authority to regulate occupations within the count. However, it would be necessary that the child care providers perform their services as a regular or usual means of livelihood before they could be required to register. It should further be noted that should Washoe County wish to regulate within the city limits, a cooperative agreement with the City of Reno and the City of Sparks pursuant to [NRS Chapter 277](#) will be necessary.

#### CONCLUSION

Washoe County may require providers of child care for compensation to register.

#### QUESTION FOUR

In counting the number of children in the home for licensing purposes, does Washoe County have authority to count the caretaker's own children who are in the home?

#### ANALYSIS

If the licensing in question is of "child care facilities," we must look at the terms of [NRS 432A.020\(4\)](#) quoted hereinabove. Given the definition of a "child care facility" as care for 5 or more children for compensation, it is apparent that only those children who are being cared for and not the children of the operator of the child care facility, may be counted. This is reinforced by [NRS 432A.220](#). That statute provides:

Any person who operates a child facility without a license issued by the bureau is guilty of a misdemeanor.

Criminal statutes must be narrowly construed in favor of the person accused of a crime. It is therefore clear that the caretaker's own children may not be counted in determining whether the caretaker is operating a "child care facility" within the terms of [NRS 432A.220](#).

In the analysis of question one it is indicated that the county or city has the authority to license businesses. Pursuant to this authority, the county could adopt a regulation which is more restrictive than [NRS 432A](#) and require that the caretaker's own children be counted in determining whether there is a child care business. It should be noted that the caretaker could not be prosecuted under [NRS 432A.220](#) unless the caretaker was caring for 5 or more children for compensation.

#### CONCLUSION

Based upon the penalties set forth in [NRS 432A.220](#) and the definition of a "child care facility," the caretaker's own children may not be counted in determining a "child care facility" pursuant to [NRS Chapter 432A](#). The county, however, under its general authority to license businesses may adopt a more restrictive regulation requiring the counting of the caretaker's own children in determining whether the caretaker falls into the category of conducting a child care business.

Very truly yours,

BRIAN MCKAY, *Attorney General*

By: NANCY FORD ANGRES, *Deputy Attorney General*

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**OPINION 84-15 Equal Rights Commission: The Nevada Equal Rights Commission qualifies as an agency administering or enforcing a labor law of this state pursuant to [NRS 612.265\(3\)](#). Neither an employer nor the Employment Security Department can offset or recoup unemployment benefits from a back pay award received by a complainant since there is no specific statutory authority to offset or recoup benefits**

**from a collateral source such as a settlement or back pay award due to a claim of discrimination. The Employment Security Department should establish a procedure whereby information is provided.**

CARSON CITY, August 13, 1984

MS. DELIA MARTINEZ, *Executive Director*, Nevada Equal Rights Commission, 1515 E. Tropicana, Suite #590, Las Vegas, Nevada 89158

DEAR MS. MARTINEZ:

You have requested an opinion from this office concerning the relationship between the Employment Security Department and the Equal Rights Commission with respect to unemployment benefits.

### FACTS

The Employment Security Department (ESD), which administers the unemployment compensation program for the State of Nevada, is restricted from disclosing information obtained during the course of determining benefit rights except in certain specified cases. [NRS 612.265](#)(1). The Nevada Equal Rights Commission (NERC), in the course of investigating discrimination complaints, often finds that information obtained at a prior unemployment benefit hearing may be relevant to subsequent discrimination complaints by the same complainant. Since the sworn testimony at unemployment hearings or the findings in the resulting decisions often contain admissions as to the reasons for an employee's termination, these may be relevant to the commission's findings in employment discrimination claims. However, the chief of appeals of the Employment Security Department is reluctant to disclose such confidential information unless he receives an opinion that the Nevada Equal Rights Commission does fall under the exceptions enumerated in [NRS 612.265](#)(3).

### QUESTION NO. 1

Does the Nevada Equal Rights Commission qualify as an agency administering or enforcing the labor laws pursuant to [NRS 612.265](#)(3), thereby enabling the Commission to receive unemployment hearing testimony or other relevant information from the Employment Security Department?

### ANALYSIS

The Nevada Equal Rights Commission is entrusted by the Nevada Legislature with administering and enforcing the provisions of [NRS 613.310](#) through 613.430, a portion of our statutes entitled "Equal Employment Opportunities." [NRS 613.405](#). Chapter 613 of the NRS is entitled "Fraudulent and Discriminatory Employment Practices." The Nevada Equal Rights Commission is charged with ensuring that employees are not discriminated against in employment on the basis of race, color, religion, sex, age, physical, aural or visual handicap or national origin. [NRS 613.330](#). It appears by this title and its content that these provisions of [NRS Chapter 613](#) are part of the labor laws of the State of Nevada.

In view of the provisions of [NRS 612.265](#)(3) which are at issue here, it would appear that the Nevada Equal Rights Commission is in fact an agency administering or enforcing the labor laws of this state. [NRS 612.265](#) reads in pertinent part as follows:

1. Except as otherwise provided in this section, information obtained from any

employing unit or person pursuant to the administration of this chapter and any determination as to the benefit rights of any person is confidential and may not be disclosed or be open to public inspection in any manner which would reveal a person's or employing unit's identity.

3. Subject to such restrictions as the executive director may by regulation prescribe, such information may be made available to any agency of this or any other state, or any federal agency, charged with the administration or enforcement of an employment compensation law, public assistance law, workmen's compensation or labor law, or the maintenance of a system of public employment offices, or any state or local agency for the enforcement of child support, or the Internal Revenue Service of the Department of the Treasury. Information obtained in connection with the administration of the employment to the operation of a public employment service or public assistance program.

The Nevada Equal Rights Commission's enforcement of the equal employment opportunities provisions of Chapter 613 of the Nevada Revised Statutes makes the commission a state agency charged with the enforcement of a labor law within the definition of [NRS 612.265\(3\)](#). Therefore, the Executive Director of the Employment Security Department may promulgate regulations pursuant to [NRS 612.265\(3\)](#) to permit dissemination of information to the commission which has been obtained by the Employment Security Department in administering its program of unemployment compensation.

## CONCLUSION

The Nevada Equal Rights Commission qualifies as an agency administering or enforcing a labor law of this state pursuant to [NRS 612.265\(3\)](#) which allows it to receive unemployment hearing information from the Employment Security Department.

## FACTS

The Employment Security Department has informed the Nevada Equal Rights Commission that it plans to offset the unemployment benefits paid to claimants during their unemployment against settlement awards paid months later as a result of successful discrimination claims. The Employment Security Department wants to recoup the benefits that it paid the claimant while unemployed because it views the discrimination claim settlement award as reimbursement of claimant's back pay.

## QUESTION NO. 2

Can either an employer of the Employment Security Department offset or recoup unemployment benefits from a back pay award received pursuant to a settlement or award of back pay to a complainant?

## ANALYSIS

There have been attempts by both employers and the state to recoup unemployment benefits that were paid to a claimant prior to a settlement or an award of back pay as a result of a discrimination action. The Ninth Circuit court of Appeals has ruled in a case entitled *Kauffman v. Sidereal Corp.*, 695 F.2d 343 (9th Cir. 1982) that unemployment benefits should not be offset by the employer from the claimant's back pay award. The Ninth Circuit addressed this issue

after noting a divergence in the rulings of several jurisdictions that have faced the same issue. The reasoning of the Ninth Circuit was based on the legislative history of Title VII of the Civil Rights Act of 1964, which does not specify that unemployment benefits must be deducted. The Court of Appeals also relied on the reasoning of the Supreme Court of the United States which explicitly rejected deductions from a back pay award in a decision upholding a National Labor Relations Board's refusal to deduct unemployment benefits from an employee's back pay award for discriminatory discharge. The Supreme Court stated:

To decline to deduct state unemployment compensation benefits from computed back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received. *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361 (1951).

The Ninth Circuit went on to quote *Gullett Gin Co.*, *supra*, by stating that payments of unemployment compensation were not made to the employees by the employer, but by the state out of state funds derived from taxation. These taxes were paid in part by employers; however, the "payments to the employees were not made to discharge any liability or obligation of the employer, but to carry out a policy of social betterment for the benefit of the entire state." *Id.* at 347 quoting *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 347 (1951). The Ninth Circuit held that the reasoning of *Gullett Gin* was persuasive because the Supreme Court stated on another occasion that the back pay provision of Title VII "was expressly modeled on the back pay provision of the National Labor Relations Act." *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

The Ninth Circuit also found that the reasoning of the trial court was persuasive in the *Kauffman* case, *supra*, when it stated that if Congress did not intend for an employee to receive unemployment benefits in addition to back pay, the logical solution would be a recoupment of the unemployment benefits by the state employment agency. Secondly, the court stated that although § 2000e-5g of Title VII requires the deduction of "amounts earnable with reasonable diligence" from back pay awards, the disallowance of an offset of unemployment benefits does not have the detrimental effect of discouraging discharged employees from seeking other work. *Kauffman*, *supra*, at 347. Therefore, the lower court held that unemployment benefits received by a successful plaintiff in an employment discrimination action should not be offset against a back pay award.

The jurisdictions are split on the issue, but the better reasoned cases rely on the *Gullett Gin* case holding that the employer cannot deduct unemployment benefits from back pay awards. *Marshall v. Goodyear Tire and Rubber Co.*, 554 F.2d 730 (5th Cir. 1977); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983); *Boich v. Federal Mine Safety and Health Review Comm.*, 704 F.2d 275 (6th Cir. 1983); *Brown v. A. J. Gerrard Mfg. Co.*, 695 F.2d 1290 (11th Cir. 1983); *Internat'l Assn. of Machinists & Aerospace Workers v. Champion Carriers, Inc.*, 470 F.2d 744 (10th Cir. 1972); *Abron v. Black & Decker Mfg. Co.*, 654 F.2d 951 (4th Cir. 1981).

Both the *Kauffman* and *Gullett Gin* cases, *supra*, leave the issue of recoupment of benefits by the state unemployment agency open. As noted in the *Gullett Gin* case, some states permit recoupment in NLRB awards; however, the U.S. Supreme Court left this issue as a matter between the state and the employee. *Gullett Gin*, *supra* at 340, footnote 1. In *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), the U.S. Supreme Court, citing *Gullett Gin* in a footnote, addressed the respondent's suggestion that the petitioner would enjoy a windfall if she were paid unemployment compensation and was subsequently awarded back pay by the Labor Board. The court merely stated that the state was free to recoup the payment. *Id.* at 239.

The jurisdictions which have ruled that the state may recover unemployment benefits from a back pay award have relied on two theories. The first is that the claimant who later receives a back pay award was not “unemployed” within the meaning of the act. *In re Skutnik*, 51 N.Y.S.2d 711, 713 (1944); *State of Washington v. Continental Baking Co.*, 431 P.2d 993 (Wash. 1967). The better reasoned cases rely on specific statutory authority that claimants must return any unemployment benefits received after receiving back pay awards. *Caldwell v. Division of Unemployment Disability Ins.*, 367 A.2d 442 (N.J. 1976); *see also Arizona Department of Economic Security v. Lidback*, 546 P.2d 1152 (Ariz. 1976).

It is this office’s opinion, after an analysis of these cases, that the Employment Security Department may recoup benefit amounts from claimants who receive unemployment compensation and are later compensated for this period of time by receiving a back pay award if the department has statutory authority to do so. However, the only provision that was given by the department to this office as authority for recoupment was Nev. Rev. Stat. 612.365. This section addresses the department’s authority to recover for overpayments. The fact that the department may err and overpay benefits to a claimant, or that a claimant may misrepresent the facts and receive an overpayment, differs significantly from the situation in question here. Claimants in the cases at issue collect the correct amount of unemployment benefits while unemployed. The fact that they may later collect back pay from the former employer is not really a question of overpayment within the general definition of the term. *State Revenue Commission v. Alexander*, 187 S.E. 707, 709 (1936); *Kavanaugh v. Noble*, 332 U.S. 535 (1947); 30A, Words & Phrases, overpayment, p. 348 (1972). Back pay awards or settlements are collateral sources which are not addressed specifically by Nev. Rev. Stat. 612.365. Since there is presently no such provision which exists, the department may not recoup past unemployment benefits paid to a claimant solely because the individual received a settlement or award or back pay at a later time. The Employment Security Department must obtain specific statutory authority before it may recoup benefits from such a source.

## CONCLUSION

Neither an employer nor the Employment Security Department may offset or recoup unemployment benefits from a back pay award received by a complainant, since there is no specific statutory authority to offset or recoup benefits from a collateral source such as a settlement or back pay award due to a claim of discrimination.

## FACTS

The Nevada Equal Rights commission, as mentioned above, is entrusted with investigating discrimination complaints. Often testimony given at a prior unemployment benefit hearing may be very important to the finding of discrimination by the commission. In addition, in Ch. 233 of the NRS which creates the commission, the legislature disclosed the broad intent that:

The people of Nevada should be afforded full and accurate information concerning actual and alleged practices of discrimination and acts of prejudice, and that such information may provide the basis for formulating statutory remedies of equal protection and opportunity for all citizens in this state. [NRS 233.010\(2\)](#).

In light of this directive, the Nevada Equal Rights Commission wishes in some cases to obtain testimony given at unemployment benefit hearings or a hearing officer’s decision outlining the testimony relied upon.

## QUESTION NO. 3

What procedures or policies need to be established or modified to allow the Nevada Equal Rights Commission to obtain a copy of testimony or decisions from unemployment hearings.

## ANALYSIS

[NRS 612.265](#) provides that the information obtained from a person pursuant to the administration of this chapter shall be confidential. Nev. Rev. Stat. 612.265(2) states that any claimant is entitled to information from the records of Employment Security Department to the extent necessary for the proper presentation of his claim to Employment Security Department. As mentioned before, Nev. Rev. Stat. 612.265(3) states that the Executive Director of Employment Security Department may enact regulations making such information available to various agencies including one charged with enforcing a labor law. However, in this same section, Nev. Rev. Stat. 612.265(8) declares that all letters, reports or communications of any kind, oral or written, from the employer or employee to each other or to the Employment Security Department, or any of its agents, representatives or employees, are privileged and must not be the subject matter or basis for any lawsuit, if the letter, report or communication is written, sent, delivered or prepared pursuant to the requirements of this chapter.

At first glance, [NRS 612.265\(8\)](#) appears to contradict [NRS 612.265\(3\)](#) implying that any and all communications including information concerning the testimony at unemployment hearings is privileged and cannot be made the basis for a lawsuit. However, the plain meaning of this subsection in the reference to “communication of any kind” refers to information communicated in the context of the department’s administrative determinations. In addition, the prohibition appears to be directed to preventing defamation suits resulting from statements made by employers concerning employees and vice versa which are properly prepared and delivered in the context of the statutory determination procedure.

Also, subsection 8 does not prevent use of information which is used as corroborating evidence or as impeaching evidence, if necessary, in an administrative action before the Nevada Equal Rights Commission.

The legislative bill which amended [NRS 612.265\(3\)](#) to read “any agency of this state . . . charged with the administration or *enforcement* of . . . *workman’s compensation* or *labor law*. . . .” (Chap. 386, 1971 Statutes of Nevada p. 750) was designated S.B. 419. Attached to the minutes of the committee hearing on the bill was an analysis prepared by Employment Security Department concerning the changes in subsection 3. (Minutes of Assembly Labor & Management Committee—April 13, 1971, Fifty-sixth session.) This prepared text gives the reason for which these amendments were made, which was:

To allow the Employment Security Department to give information to the Nevada Industrial Commission, and to *other* federal and *state agencies charged with enforcement of fair employment practices and having anti-discrimination responsibilities*. This brings state law into conformity with provision of federal law. (Emphasis added.)

It is evident from the legislative history that the amendments to [NRS 612.265\(3\)](#) were intended to provide information for anti-discrimination or fair employment practice purposes, which is within the domain of the Nevada Equal Rights Commission. In keeping with the legislative intent, the Commission should be allowed to receive the information it considers necessary for its investigations.

## CONCLUSION

The Employment Security Department should establish a procedure whereby information is to be provided the Nevada Equal Rights Commission upon request. The specific method by which such information is provided, whether in typewritten transcript form or by tape, is left to the respective agencies to handle in the most efficient manner.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: PAMELA M. BUGGE, *Deputy Attorney General*

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**OPINION NO. 84-16 County Officers; Elections: A vacancy occurring in a partisan county office after the date specified in [NRS 293.165](#)(3) and (4) is to be filled by appointment rather than the procedure contained in [NRS 293.165](#).**

CARSON CITY, September 12, 1984

THE HONORABLE HY FORGERON, *District Attorney of Lander County*, P.O. Box 1179, Battle Mountain, Nevada 89820

DEAR MR. FORGERON:

You have requested clarification of Op. Att'y Gen. No. 84-4 (February 6, 1984).

#### QUESTION

What procedure for filling a vacancy in a county office is to be used if the office becomes vacant after the date specified in [NRS 293.165](#)(3) and (4)?

#### ANALYSIS

In Op. Att'y Gen. No. 84-4 (February 6, 1984), we concluded that if an elected county officer resigned after July 3, 1984, that office must appear on the ballot of the 1984 general election to fill the unexpired two-year portion of the term. We went on to state that candidates for that office that are to appear on the ballot are to be designated in accord with the procedures contained in [NRS 293.165](#). That statute provides that a vacancy occurring in a party nomination for office may be filled by a candidate designated by the party's central committee of the county or the state, as the case may be. However, no change may be made on the ballot after the third Tuesday in September of the year in which the general election is held. The statute goes on to provide that all designations made pursuant to that section must be filed before 5:00 p.m. on the third Tuesday in September. In each case, the statutory filing fee must be paid and an acceptance of the designation must be filed before 5:00 p.m. on that date.

You relate that a county commissioner in Lander County whose office is not up for election in the 1984 general election has indicated that, because of a job transfer by his employer, it is his intention to resign his office effective October 1, 1984. Under these circumstances, you ask whether the office should be filled by appointment pursuant to [NRS 244.040](#) for the entire unexpired portion of the commissioner's term, or should the procedures outlined in Op. Att'y Gen. No. 84-4 (February 6, 1984) be followed?

In resolving your inquiry, we must address the effect of the commissioner's prospective resignation. The legal effect of this type of resignation has been analyzed in at least three

separate Nevada Supreme Court opinions. In *State ex rel. Nourse v. Clarke*, [3 Nev. 566](#) (1867), our Supreme Court concluded that a civil officer has the absolute right of resignation at will. In *State ex rel. Williams v. Beck*, [24 Nev. 92](#), 49 P. 1035 (1897), our court found that the resignation involved in that case was to become effective at a future date and upon the happening of certain specified contingencies. Citing *State ex rel. Nourse v. Clarke, supra*, the court held that, the resignation of the office holder being conditional in nature and not to take effect except upon certain contingencies at a future date, there was no vacancy in the office until the happening of the contingencies and the arrival of the specified day. The court found that in the meantime the resignation was within the control of the office holder and could be withdrawn at his pleasure.

In *State ex rel. Ryan v. Murphy*, [30 Nev. 409](#), 97 P.391 (1908), the court considered the resignation of a county officer which was tendered at one date but was not to take effect until a date in the future. Unlike the resignation involved in *State ex rel. Williams v. Beck, supra*, the resignation in this case had no conditions attached to it, except that it was to take effect at a specified date in the future. In *State ex rel. Ryan v. Murphy, supra*, the office holder purportedly withdrew his resignation prior to the date that it was to take effect. The court determined that to constitute a complete and operative resignation there must be an intention to relinquish a portion of the term of office accompanied by the act of relinquishment. A prospective resignation amounts to a notice of intention to resign at a future date, and if that proposed resignation is not accompanied by the giving up of the office, possession of the office is still retained. Therefore, the court held that prior to the effective date of the resignation, a public officer may withdraw his proposed resignation.

Applying the rules found in these three cases to the facts which you have related leads us to conclude that the county commissioner has only given notice of his intention to resign at a future date. This means that the county commissioner in question could revoke his intended resignation at any time prior to the effective date of that resignation, which is October 1, 1984. If the commissioner revokes his resignation, no vacancy will be created in that office and the commissioner will be permitted to serve out the unexpired portion of his term. If the commissioner allows his resignation to become effective on October 1, 1984, a vacancy will occur in the office of county commissioner.

However, the procedures contained in [NRS 293.165](#) for placing that vacant office on the ballot of the 1984 general election are inapplicable because the vacancy will not have occurred until after the third Tuesday in September, which is the last date on which the procedures contained in that section may be used. Therefore, we must conclude that should a vacancy occur on October 1, 1984 under the circumstances described in this opinion, the appropriate means to fill that vacancy is through the appointment procedure contained in [NRS 244.040](#) which is the only other means authorized by law. The appointment made pursuant to that section will extend for the entire unexpired portion of the term of the commissioner resigning.

## CONCLUSION

If an elected county officer resigns after the third Tuesday in September of the year in which a general election is held, the vacancy created by that resignation may not be filled at the ensuing general election pursuant to the procedures set forth in [NRS 293.165](#). That vacancy must be filled pursuant to the appointment procedures contained in [NRS 244.040](#), and the appointment extends through the balance of the unexpired term of the officer who resigned.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: SCOTT W. DOYLE, *Deputy Attorney General*

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**OPINION NO. 84-17 Employee Benefit Plans: [NRS 608.156](#), [NRS 608.157](#) and [NRS 608.158](#) are preempted by federal law as to those employee benefit plans subject to ERISA.**

CARSON CITY, November 2, 1984

MR. FRANK T. MACDONALD, *Labor Commissioner*, 505 E. King St., Suite 602, Carson City, Nevada 89710

DEAR MR. MACDONALD:

[NRS 608.156](#) states that employers which provide health benefits for their employees must provide benefits at a particular level for the treatment of alcohol and drug abuse.

[NRS 608.157](#) states the employers who provide health benefits for mastectomies must provide commensurate coverage for a certain number of prosthetic devices and reconstructive surgery.

[NRS 608.158](#) states that an employer must notify his or her employees when he or she will not be making a premium payment on health or life insurance provided to them as certificate holders under the employer's group policy.

You have been informed that certain employers believe that these statutes are preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* and are, therefore, unenforceable. You have asked for our opinion on such a contention.

#### QUESTION

Are NRS §§ 608.156-608.158 preempted by federal law? If so, is such preemption applicable to all Nevada employee benefit plans?

#### ANALYSIS

We note initially that Title 57 of NRS contains several requirements similar to two of those at issue herein. [NRS 689A.041](#) requires all individual policies of health insurance which provide coverage for mastectomies to also provide coverage for prosthetic devices and for reconstructive surgery. [NRS 689A.046](#) requires a certain level of coverage for the treatment of alcohol and drug abuse in individual policies *if* coverage is provided for such a problem. [NRS 689B.036](#) mandates coverage at a certain level for the treatment of alcohol and drug abuse in group health policies, and such group policies must contain prosthetic devices and reconstructive surgery coverage under [NRS 689B.0375](#).

Accordingly, insurance companies cannot issue policies in the State of Nevada which do not meet these requirements. [NRS 689A.030](#); [NRS 689B.030](#). Thus, employers who have an insured employee benefit plan are unable to purchase coverage which does not comply with [NRS 608.156](#) and [NRS 608.157](#).

For the purposes of this opinion we shall, therefore, assume that it is self-insured, or more properly self-funded, employee benefit plans which, not being subject to the Insurance Code, believe they are exempt from the Labor Code statutes at issue.

Nonetheless, we note that courts have often addressed the question of whether an insurance code statute mandating certain benefits affected employee benefit plans and was, therefore, subject to preemption by ERISA. *Attorney General v. Travelers Ins. Co.*, 463 N.E.2d 548 (Mass.

1984); *Eversole v. Metropolitan Life Ins. Co., Inc.*, 500 F.Supp. 1162 (U.S.C.C. Ca. 1980); *St. Paul Elec. Workers Welfare Fund v. Markman*, 490 F.Supp. 931 (U.S.D.C. Minn. 1980); *Metropolitan Life Ins. Co. v. Whaland*, 410 A.2d 635 (N.H. 1979); *Wayne Chemical, Inc. v. Columbus Agcy. Serv. Corp.*, 567 F.2d 692 (U.S.D.C. 7th Cir. 1977); *Wadsworth v. Whaland*, 562 F.2d 70 (U.S.D.C. 1st Cir., 1977) cert. denied, 435 U.S. 980. The issue in such cases, however, differs from that addressed in this opinion due to the fact that ERISA does not “exempt or relieve any person from any law of any State which regulates insurance, banking or securities.” 29 U.S.C. 1144(b)(2)(A). We also note that the factual situations as well as the legal analysis used in these cases have been diverse and have not, as of this time, led to clear authority on that issue.

ERISA defines an employee benefit plan as “any plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death. . . .” 29 U.S.C. § 1002(1). Finally, we note that the provisions of ERISA at issue herein apply only to actions occurring after January 1, 1975, 29 U.S.C. § 1144(b)(1), and that the Act applies to employee benefit plans established or maintained by employers or employee organizations engaged in or affecting commerce, 29 U.S.C. § 1003(a), unless such plan is governmental, church, foreign or maintained solely for workmen’s compensation, unemployment and disability purposes. 29 U.S.C. § 1003(b).

Thus, the employers to whom the remaining portion of this opinion is addressed include, as noted earlier, only those whose employee benefit plans are self-funded or not otherwise subject to insurance division regulation, and also which come within the scope of ERISA.

ERISA explicitly preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan,” 29 U.S.C. § 1144(a). Not surprisingly, questions over the extent and meaning of this preemptory language have been numerous, with the primary query being what the phrase “relate to any employee benefit plan” encompassed. It has been contended that only laws governing ERISA’s own subject matter, that is, funding, vesting and disclosure “relate to” such benefit plans and that preemption applied only in those areas. *Delta Air Lines, Inc. v. Tramarsky*, 650 F.2d 1287 (1981); *See Hewlett-Packard Co. v. Barnes*, 425 F.Supp. 1294 (N.D. Cal. 1977) 571 F.2d 502, cert. denied, 439 U.S. 831 (1978). However, such a contention would appear to have been firmly rejected by a recent ruling by the United States Supreme Court.

In *Shaw v. Delta Air Lines, Inc.*, ..... U.S. ...., 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), the Court addressed New York’s Human Rights Law which forbade discrimination in employee benefit plans on the basis of pregnancy and its Disability Benefits Law which required employers to pay sick leave benefits to employees unable to work because of pregnancy. The question before the Court was whether ERISA, which does not mandate particular benefits and does not proscribe discrimination, preempted these New York laws.

The Court had “no difficulty” in determining that both laws “relate[d] to” employee benefit plans. Giving the broadest possible definition to that phrase the Court noted that the legislative history of the Act called “the reservation to Federal authority the sole power to regulate the field of employee benefit plans” the “crowning achievement” of the legislation and stated that “A law ‘relates to’ an employee benefit plan . . . if it has a connection with or reference to such a plan.” *Shaw, id.* at 2900; *See California Hosp. Ass’n. v. Henning*, 569 F.Supp. 1544 (1983). An analysis not relevant to the situation before us led to the Court’s determination that New York’s Human Rights Law was only partially preempted and that the state’s Disability Benefits Law was not preempted.

When we apply these defining terms to the statutes at issue herein and note that the exceptions which saved New York’s laws do not exist here, we reach the conclusion that all three impermissibly relate to employee benefit plans and are, therefore, superseded by federal authority. [NRS 608.156](#) mandates a particular benefit level for alcohol and drug abuse in

employee benefit plans. Such a provision clearly intrudes on the federal authority to regulate employee benefit plans, as does [NRS 608.157](#) which requires coverage for prosthetic devices and reconstructive surgery if the plan provides coverage for mastectomies. Although [NRS 608.158](#) differs from the above two statutes in that it does not mandate coverage or coverage levels it also, without question, has a “connection with or reference to” employee benefit plans in that it establishes a responsibility to be borne by the establishing employer.

#### CONCLUSION

We conclude that [NRS 608.156](#), [NRS 608.157](#), and [NRS 608.158](#) are preempted by federal law as to those employee benefit plans subject to ERISA.

Respectfully submitted,

BRIAN MCKAY, *Attorney General*

By: DEBORAH SCOTT GALLAGHER, *Deputy Attorney General*

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**OPINION NO. 84-18 Justices of the Peace, Compensation, Longevity Salary: Justices of the peace are not entitled to payment for longevity provided for elected county officers in [NRS 245.044](#).**

CARSON CITY, December 17, 1984

MR. WILLIAM G. ROGERS, *Lyon County District Attorney*, 31 S. Main Street, Yerington, Nevada 89447

DEAR MR. ROGERS:

You have requested an opinion from this office regarding the following:

#### QUESTION

Is a justice of the peace, whose salary is set by the board of county commissioners pursuant to [NRS 4.040](#), entitled to the longevity increases provided for elected county officers in [NRS 245.044](#)?

#### ANALYSIS

[NRS 4.040](#)(1) provides that:

The several boards of county commissioners of each county, at the regular meeting in July of any year in which an election of justices of the peace is held, shall fix the minimum compensation of the justices of the peace within their respective townships for the ensuing term, either by stated salaries, payable monthly, semi-monthly or at regular 2-week intervals, or by fees, as provided by law, or both, and they may thereafter increase or change such compensation during the term but shall not reduce it below the minimum so established.

Pursuant to this authority, it is the responsibility of each board of county commissioners to set the

salary for each justice of the peace within the county.

[NRS 245.044](#)(1) provides that:

On and after July 1, 1973, if an elected county officer has served in his office for more than 4 years, he is entitled to an additional salary of 1 percent of his base salary provided in [NRS 245.043](#) or 253.043 for each full calendar year he has served in his office. The additional salary provided in this section must not exceed 20 percent of the base salary provided in [NRS 245.043](#) or 253.043.

While this statute on its face appears to be applicable to all elected county officers, it specifically references the base salary provisions of [NRS 245.043](#) and [253.043](#) for the purpose of determining the amount of the additional salary due a particular officer. A review of the provisions of those statutes reveals that neither statute sets a base salary for the office of justice of the peace. Therefore, while a justice of the peace is elected to office (see [NRS 4.020](#)) and is a county officer (see [NRS 281.010](#)(1)(n)(9)), there is no expressed method provided to compute any additional salary for a justice of the peace under [NRS 245.044](#). Thus, the question arises as to whether the provisions of [NRS 245.044](#) were nonetheless intended to apply to justices of peace.

In order to determine whether justices of the peace are entitled to the additional salary provided for elected county officers by [NRS 245.044](#)(1), the provisions of that statute must be interpreted. The object of the interpretation of this statute is to ascertain the intention of the legislature. *List v. Whisler*, [99 Nev. 133](#), 138-139, 660 P.2d 104 (1983); *Alper v. State ex rel. Dept. of Hwys.*, [96 Nev. 925](#), 928, 621 P.2d 492 (1980). In this case it must be determined whether the legislature intended the provisions of [NRS 245.044](#)(1) to apply to justices of the peace notwithstanding the fact that such officers are not included on the lists of officers referred to in that statute.

[NRS 245.044](#)(1) references the county officers listed in [NRS 245.043](#) (county commissioners, district attorneys, sheriffs, county clerks, county assessors, county recorders and county treasurers) and the county officers specified in [NRS 253.043](#) (public administrators in counties with a population of 250,000 or more) as being eligible to receive the additional salary provided by that section. Justices of the peace are not among those county officers included by reference as being eligible to receive the longevity salary provided by [NRS 245.044](#). It is a well-settled rule of statutory construction that by expressly enumerating the county officers to which [NRS 245.044](#) applies, the legislature, by implication, has excluded other county officers from being eligible for longevity salary who are not expressly referenced in that statute. See *O'Callaghan v. District Court*, [89 Nev. 33](#), 35, 505 P.2d 1215 (1973). We recognize this rule of statutory construction is neither final nor exclusive. This rule of construction is only applied if the result prompted by that application is consistent with the context and objects sought to be attained by the legislature. See *Young Electric Sign Co. v. Erwin Electric Company*, [86 Nev. 822](#), 825-826, 477 P.2d 864 (1970). Other considerations lead us to conclude that the result prompted by application of the rule “expressio unius est exclusio alterius” is correct in these circumstances.

After initial enactment in 1973, [NRS 245.044](#) was amended in 1975 to provide specifically for the computation of longevity pay for the officers serving the initial term of office on the board of supervisors of Carson City. See 1975 Nev. Stat. ch. 544 § 1(3), at 958. [NRS 245.044](#) was amended a second time in 1983 by passage and approval of 1983 Nev. Stat. ch. 558 § 1, at 1649.

That amendment provided payment of longevity salary to public administrators compensated pursuant to [NRS 253.043](#). Although the public administrator in counties with a population of 250,000 or more is an elected county officer (see [NRS 281.010](#)(1)(n)(4) and 253.010(1) and (2)), that officer did not receive longevity salary pursuant to [NRS 245.044](#) until the 1983 amendment became effective. The fact that the legislature amended [NRS 245.044](#) in the manner that it did in 1983 is persuasive evidence that the legislature does not intend that eligibility for longevity

salary pursuant to [NRS 245.044](#) be extended by implication. The 1983 amendment to [NRS 245.044](#) provides a clear indication that eligibility for longevity pay pursuant to that section must be expressly provided. An amendment is persuasive evidence of what the legislature intended by the first statute. See *Estate of Hughes v. First National Bank*, [95 Nev. 146](#), 149-150, 590 P.2d 1164 (1979); *Edwards v. State Dept. of Human Resources*, [96 Nev. 689](#), 693 n. 3, 615 P.2d 951 (1980).

The reason for omitting justices of the peace from the longevity salary statute is justified by constitutional considerations as well. Article 4, § 20 of the Nevada Constitution provides, in pertinent part, that:

The legislature shall not pass local or special laws in any of the following enumerated cases—that is to say:

Regulating the jurisdiction and duties of justices of the peace and of constables, and fixing their compensation;

Article 4, § 21, provides that “In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.”

The conclusion that must be drawn from a review of these two provisions of the state constitution is that the legislature is prohibited from enacting any special or local law fixing the compensation of any justice of the peace serving in any particular county. Op. Att’y Gen. No. A-6 (March 14, 1939). Since the legislature is constitutionally prohibited from fixing a salary for justices of the peace dependent upon which county the justice serves, it has delegated this responsibility to the respective boards of county commissioners by way of the provisions of [NRS 4.040](#). Because the amount of additional salary payable pursuant to [NRS 245.044](#) depends upon reference to the provisions of [NRS 245.043](#) or 253.043, such additional salary cannot be paid to a justice of the peace if [NRS 245.043](#) or 253.043 are special or local laws due to the constitutional prohibition against the legislature fixing the compensation of such an officer.

A statute that refers to a specific county by name is a local or special law since it is not a statute of general application. See *Cauble v. Beemer*, [64 Nev. 77](#), 177 P.2d 677 (1947). [NRS 245.043](#) specifically designates the salaries of certain county officers according to which county the officer serves. Since it is not a statute of general application, [NRS 245.043](#) is a special or local law.

[NRS 253.043](#) sets the salary for the public administrator for all counties with a population of 250,000 or more. See [NRS 253.041](#). It is not a statute of general application because [NRS 253.043](#) establishes the salary for the public administrator only in the most populous counties. It does not apply to all public administrators. A special statute is one, like [NRS 253.043](#), which applies to less than all members of the class to which it relates. *Damus v. County of Clark*, [93 Nev. 512](#), 516, 569 P.2d 933 (1977).

Since both [NRS 245.043](#) and [253.043](#) are special and local laws, the legislature could not constitutionally use them to fix the compensation of justices of the peace by specifying any compensation for that office in either of these statutes. An act of the legislature is presumed to be constitutional. *Princess Sea Industries, Inc. v. State of Nevada*, [97 Nev. 534](#), 635 P.2d 281 (1981). The legislature is presumed to have a knowledge of the state of the law on the subjects upon which it legislates. *Clover Valley Co. v. Lamb*, [43 Nev. 375](#), 383, 187 Pac. 723 (1920). Thus, it must be assumed that in enacting [NRS 245.044](#), the legislature was well aware of the constitutional prohibition against setting the compensation for justices of the peace by way of local or special law. As a result, while [NRS 245.044](#) would appear on its face to be applicable to justices of the peace, the reference to [NRS 245.043](#) and [253.043](#) makes the statute a special or local law constitutionally inapplicable to justices of the peace. Therefore, it must be assumed

that the legislature did not intend the provisions of [NRS 245.044](#) to be applicable to justices of the peace.

While the longevity pay provided by [NRS 245.044](#) is not available to justices of the peace, neither is the exact compensation payable to justices of the peace dependent upon any act of the legislature, as are the salaries payable to other county officials. [NRS 4.040\(1\)](#) authorizes the increase of compensation for justices of the peace at anytime during a term of office. If a justice of the peace requests an increase in the salary for his position, the board of county commissioners has the legal authority to review and grant such a request.

#### CONCLUSION

A justice of the peace is not entitled to the longevity increases provided in [NRS 245.044](#).

Sincerely,

BRIAN MCKAY, *Attorney General*

By: DON CHRISTENSEN, *Deputy Attorney General*

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**OPINION NO. 84-19 Counties; County Clerks; Justice Courts: The 1979 amendment to [NRS 1.020](#) making justice court a court of record requires that the county clerk be the ex officio clerk of that court in accord with Nev. [Const. art. 4, § 32](#).**

CARSON CITY, December 26, 1984

JAMES M. BARTLEY, ESQ., *Chief Civil Deputy*, Clark County District Attorney's Office, Clark County Courthouse, Las Vegas, Nevada 89155

DEAR MR. BARTLEY:

You have requested our opinion concerning the procedure by which to appoint Justice Court Clerks.

#### QUESTION

May the board of county commissioners appoint a clerk for the justice court pursuant to [NRS 4.350](#) in view of the fact that [NRS 1.020](#) has designated that justice courts are courts of record?

#### ANALYSIS

Nev. [Const. art. 6, § 8](#) provides in pertinent part:

\* \* \*

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

The legislature, acting pursuant to the constitutional provision just quoted, amended [NRS 1.020](#) to designate the justice courts of this state as courts of record. The justice courts were added to the listing of courts of record by 1979 Nev. Stat. ch. 659 § 6, at 1512. Prior to that 1979 statutory amendment, the justice courts of this state were not courts of record.

Nev. Const. art 4, § 32 provides in pertinent part:

\* \* \*

The county clerks shall be ex officio clerks of the courts of record and of the boards of county commissioners in and for their respective counties.

The constitutional provision just quoted requires the county clerks of this state, by virtue of their office, to be the clerks of the courts of record for the respective counties.

The constitution recognizes two classes of officers, one which is created by the constitution itself, and the other which is created by statute. Where an office is created by statute, it is wholly within the control of the legislature creating it. But when an office is created by the constitution, it cannot be enlarged or lessened in scope by any statute, or filled in any other manner than the manner directed by the constitution. See *State ex rel. Josephs v. Douglass*, [33 Nev. 82](#), 93, 110 P. 177 (1910). Nev. [Const. art. 4, § 32](#) imposes a mandatory duty on the county clerks of this state to be ex officio clerks of the courts of record. Nev. [Const. art. 6, § 8](#) authorizes the legislature to designate courts of record other than the supreme court and the district courts of this state. By passage of 1979 Nev. Stat. ch. 659, the legislature exercised its constitutional prerogative and designated the justice courts of this state to be courts of record by amending [NRS 1.020](#). The passage of that legislative amendment coupled with the constitutional requirement that the county clerk be the ex officio clerk of the courts of record prescribed the manner by which the clerk of the justice court is selected. Since the effective date of the 1979 amendment to [NRS 1.020](#), the county clerks have been required to act as the clerk of the justice courts by virtue of the constitutional obligation set forth in Nev. [Const. art. 4, § 32](#).

[NRS 4.350\(1\)](#) provides:

The board of county commissioners may appoint a clerk for the justice's court upon the recommendation of the justice of the peace. The compensation of a clerk so appointed shall be fixed by the board of county commissioners.

Since the enactment of 1941 Nev. Stat. ch. 178 § 1, at 402, the legislature has authorized the appointment of justice's court clerks by the board of county commissioners of the county in which the township is located. This constituted a permissible method of selection of this court clerk so long as the court was not a court of record. However, the passage of the 1979 amendment to [NRS 1.020](#) mandated that a different official serve as the clerk of the justice court.

That different official is the county clerk, and by virtue of the provisions of Nev. [Const. art. 4, § 32](#), the county clerk is required to be elected.

We are very much aware of the general rule that unless the legislature intended to abrogate one of two conflicting statutes, both must be maintained. *Mengelkamp v. List*, [88 Nev. 542](#), 546, 501 P.2d 1032 (1972). We also recognize the rule that repeal by implication is not a favored doctrine of statutory construction. *Western Realty v. City of Reno*, [63 Nev. 330](#), 344, 472 P.2d 158 (1946). However, in view of the clear and unambiguous provisions contained in Nev. [Const. art. 4, § 32](#) and art. 6 § 8 and the 1979 amendment made to [NRS 1.020](#) which designated the justice courts of this state to be courts of record, we do not see a means by which to reconcile the appointment process for a justice court clerk contained in [NRS 4.350](#) with the constitutional requirement that the elected county clerks of this state shall be ex officio clerks of the courts of record.

When two provisions are irreconcilably repugnant, then the presumption is that the legislature intended the later act should prevail and the earlier act should be repealed. *Laird v. State of Nevada Public Employees Retirement Board*, [98 Nev. 42](#), 45, 639 P.2d 1171 (1982); *Young v. Sheriff of Clark County*, [92 Nev. 408](#), 409, 551 P.2d 425 (1976), and *City of Las Vegas v. International Association of Firefighters, Local 1285*, [91 Nev. 806](#), 808, 543 P.2d 1345 (1975). In this circumstance the rule of statutory construction just mentioned dictates the conclusion that the 1979 amendment to [NRS 1.020](#) making justice courts courts of record constitutes the most

recent expression by the legislature of the manner in which these courts are to operate. Since this enactment makes justice courts courts of record, the county clerk is obligated to discharge the constitutional duty to serve as the ex officio clerk of the justice courts. The appointment procedure for the justice court clerks contained in [NRS 4.350\(1\)](#), which was first enacted in 1941, cannot be reconciled or sustained in light of the 1979 amendment to [NRS 1.020](#). Therefore, the 1979 amendment to [NRS 1.020](#) must prevail over the previously enacted appointment process contained in [NRS 4.350\(1\)](#).

#### CONCLUSION

In view of the provisions contained in Nev. [Const. art. 4, § 32](#) and Nev. [Const. art. 6, § 8](#) and the 1979 amendment made to [NRS 1.020](#) which designated the justice courts of this state to be courts of record, we conclude that the elected county clerks of this state are the ex officio clerks of the justice courts.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: SCOTT W. DOYLE, *Deputy Attorney General*

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#### **OPINION NO. 84-20 County Hospitals: County hospital may refuse admission or medical services to nonemergency, nonindigent patient because he owes hospital money.**

CARSON CITY, December 31, 1984

MR. A. D. DEMETRAS, *District Attorney of Nye County*, P.O. Box 593, Tonopah, Nevada 89049

DEAR MR. DEMETRAS:

You have sought advice from our office concerning the operation of Nye General Hospital as the same relates to the following:

#### QUESTION

May Nye General Hospital refuse admission or medical services to a nonemergency patient for the reason that the patient owes money to the hospital and is not indigent?

#### ANALYSIS

Nye General Hospital is a county hospital established pursuant to [NRS 450.010-450.510](#), inclusive, and is required by law to be operated for the benefit of Nye County and for any person falling sick or being injured or maimed within its limits. The privileges and use of Nye General Hospital may be extended to persons residing outside of Nye County on terms and conditions prescribed in regulations duly promulgated and adopted by the hospital's board of trustees. [NRS 450.390](#) (1). Persons using Nye General Hospital who are not indigent are required by law to pay the hospital reasonable compensation for occupancy, nursing care, medicine and attendants (other than medical or surgical attendants) according to regulations prescribed by the hospital's board of trustees. After demand by the hospital, if the person using the county hospital (or a

relative obligated by law) fails to pay the hospital this reasonable compensation, the same may be recovered in a lawsuit brought by the hospital's board of trustees. [NRS 450.390\(2\)](#). The board of trustees may exclude from the use of the hospital any and all persons who willfully violate the hospital's rules and regulations. [NRS 450.390\(4\)](#).

You relate in your opinion request that some people using Nye General Hospital have in the past simply refused to pay their medical bills, but still continue to demand admission to and medical services from the hospital. Apparently, these people are not indigent. As we understand it, the proposed regulation would not apply to persons presenting themselves for emergency treatment. In an emergency, we believe Nye General Hospital would have to receive and treat such persons; refusal to extend emergency medical services on the basis of the patient's previous unpaid hospital bill could expose the hospital to considerable liability on the basis of its failure to treat. *See generally Stanturf v. Sipes*, 447 S.W.2d 558 (Mo. 1969), Annot., 35 A.L.R.3d 841, *et seq.*; and *Wilmington General Hospital v. Manlove*, 174 A.2d 135 (Del. 1961). *See also* [NRS 450.420\(3\)](#).

We believe your inquiry involves an interpretation of the relationship between [NRS 450.390\(2\)](#) which, in pertinent part, authorizes a county hospital to charge reasonable compensation for care and treatment, and to recover those charges through legal action and [NRS 450.390\(4\)](#) which authorizes a county hospital to exclude those persons who willfully violate the hospital's rules and regulations. As your request in the preceding three paragraphs points out, there is some doubt as to the appropriate interpretation that is to be given to these two subsections. Where the meaning of the words of a statute is doubtful, the intention of the legislature must be resorted to and we may look beyond the words of the statute itself for evidence of that intention. *State Department of Commerce v. Carriage House Associates*, [94 Nev. 707](#), 710, 586 P.2d 1337 (1978).

With respect to the admissions policy of a public hospital, the general rule for a long time has been:

[T]hat since all persons cannot participate in its benefits, no one has, individually, a right to demand admission. The trustees or governing board of a public hospital alone determine the right of admission to the benefits to the institution, and their discretion in this regard will not be reviewed by the courts at the suit of an individual applicant. 40 Am.Jur.2d, *Hospitals and Asylums*, § 12.

This general rule appears to have formed the basis for [NRS 450.390\(3\)](#).

Our Nevada statutes appear to depart from the general rule in only one instance. Whenever a person presents himself at a county hospital for the treatment of an emergency condition, it appears that such treatment must be rendered, at least to the level where the immediate emergency is alleviated. Under [NRS 450.420\(3\)](#), the financial condition of the injured or sick person is irrelevant in the case of an emergency. The county is chargeable by law with the entire cost of emergency treatment provided to any person at the county hospital, except for a person who is eligible for aid pursuant to [NRS 428.115](#), *et seq.* Although the hospital is authorized by law to attempt to seek collection from the person admitted or treated in an emergency situation, the ability to do so cannot influence the decision to provide the treatment or admission.

In the case of a nonemergency, nonindigent person, we find nothing in our statutes or case law which requires a departure from the general rule noted above as to hospital admissions. To the contrary, broad rulemaking authority has been conferred on county hospital trustees by the legislature. *See* [NRS 450.390\(3\)](#) and (4), [450.410](#), [450.420](#) and [450.450](#). We would also note that Nevada law gives a clear preference for the use of county hospital facilities to charity cases, specifically stating that the admission of paying patients "shall not be permitted to interfere with the admission, care and treatment of purely charitable cases." [NRS 450.410\(1\)](#). Since every county hospital has a finite number of beds, it reasonably follows the trustees may use their

rulemaking power to ensure those beds are available for those with a legal priority to them.

From the excellent annotation "Liability of Hospitals for Refusal to Admit or Treat Patient," 35 A.L.R.3d 841, *et seq.*, we have observed that courts throughout the United States seem to agree that in nonemergency situations there is no duty to admit or treat. *See, Hill v. Ohio County*, 468 S.W.2d 306 (Ky.Ct.App. 1970); *Campbell v. Mincey*, 413 F.Supp. 16 (N.D. Miss. 1975); *Harper v. Baptist Medical Center-Princeton*, 341 S.2d 133 (Ala. 1976); *Fabian v. Matzko*, 344 A.2d 569 (Pa.Super. 1975).

To assist you in drafting admission regulations for Nye General Hospital, we are enclosing a copy of the regulations used by Southern Nevada Memorial Hospital in Clark County which, in our opinion, are generally consistent with the law as regards both emergency and nonemergency situations.

#### CONCLUSION

A county hospital may refuse admission or medical services to a nonemergency, nonindigent patient for the reason that the patient already owes money to the hospital.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: WILLIAM E. ISAEFF, *Chief Deputy Attorney General*