

**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

AGO 2005-01 AGREEMENTS; CITIES AND TOWNS; COUNTIES;

FUNDS: Due to the absence of legislative authority that provides cities and counties the power to delegate the discretionary function of making charitable contributions, TMWA is not vested with the power to make charitable donations to the River Fund.

Carson City, January 21, 2005

Honorable Richard A. Gammick, District Attorney, County of Washoe  
Post Office Box 30083, Reno, NV 89520

Dear Mr. Gammick:

You have requested our opinion concerning the Truckee Meadows Water Authority (TMWA) and whether it may make charitable contributions of money within its control to the Truckee River Fund (the River Fund), particularly from money collected from water customers. TMWA was created in the year 2000, when the cities of Reno and Sparks and the County of Washoe entered into a Cooperative Agreement (the Agreement) pursuant to chapter 277 of the Nevada Revised Statutes (NRS). TMWA was established to acquire the water assets and operations held by Sierra Pacific Power Company in the Truckee Meadows. The Agreement sets forth the Conferred Functions and Powers of TMWA in § 5 and § 6 respectively of the Agreement.

In July 2004, TMWA approved the creation of a River Fund by and between TMWA and the Community Foundation of Western Nevada, a Nevada non-profit corporation.<sup>1</sup> The general purpose of the River Fund is to distribute the net income and principal of the Fund for the exclusive use for projects that protect and enhance water quality or water resources of the Truckee River, or its watershed.

QUESTION

Whether TMWA may make charitable contributions to the River Fund?

ANALYSIS

Under Nevada law, cooperative agreements that establish a separate legal entity must specify the precise organization, composition, and nature of such

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<sup>1</sup> The Community Foundation of Western Nevada is a 501(c)(3) organization as set forth in the Internal Revenue Section Code of 1986 (26 U.S.C. 501 (c) (3)). This organization provides an umbrella charitable organization for Western Nevada communities to manage dedicated funds for specific purposes.

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entity and the powers delegated thereto. NRS 277.120(1). In accordance with the requirements of NRS 277.120(1), § 6 of the Agreement provides a detailed list of “Powers” pertaining to TMWA’s operation of a public water system. The specified powers include TMWA’s ability to purchase and sell property; employ staff; issue bonds, notes, and other obligations; execute contracts; exercise the power of eminent domain; and “perform all other acts necessary or convenient for the performance of any Conferred Function or the exercise of any of its powers.”

TMWA’s powers arise solely out of the Agreement; there is no express legislative authority granted to TMWA. Thus, it must be determined whether Reno, Sparks, and the County of Washoe have the power to make charitable contributions; whether these public entities are authorized to delegate to TMWA the power to make charitable contributions; and if so, whether that power was specifically delegated to TMWA in the Agreement.

The Nevada Legislature, pursuant to NRS 244.1505 and NRS 268.028, vested counties and incorporated cities in Nevada with the discretionary power<sup>2</sup> to expend money to nonprofit organizations created for religious, charitable, or educational purposes for a selected purpose if it provides a substantial benefit to the inhabitants. Therefore, counties and cities have discretionary power to expend money for charitable purposes.

It must next be determined whether counties and cities are authorized to delegate to another entity their express statutory power to expend money to nonprofit organizations created for religious, charitable, or educational purposes.

There is no express legislative authority that allows or prohibits a county or city from delegating its discretionary power to expend money to nonprofit organizations created for religious, charitable, or educational purposes. However, there is a general rule of law concerning the delegation of power by a public agency that has been expressed by this Office. This Office has opined, “powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization.” Attorney General letter opinion to Howard Barrett (November 23, 1981) *citing to California Sch. Emp. A. v. Personnel Com’n. of P.V.U.S.D.*, 474 P.2d 436, 439 (Ca. 1970); *See Op. Nev. Att’y Gen. No. 96-11* (April 25,

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<sup>2</sup> The power is discretionary because these statutes provide that a city and a board of county commissioners “may” expend money for charitable purposes.

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1996) (City of Reno Redevelopment Agency had no authority to enact rules or regulations which altered or enlarged the terms of legislative enactments); *See also* 63C AM. JUR 2D *Public Officers and Employees* § 235 (2004).

The power conferred upon cities and counties in NRS 244.1505 and NRS 268.028 vests discretionary power to make charitable contributions only with the governing body of the city and the board of county commissioners. The power granted to cities and counties is in the nature of a public trust that may not be exercised or delegated in the absence of statutory authorization. Therefore, the county and cities cannot confer their discretionary power to make charitable contributions to TMWA. As a result, TMWA may not make charitable donations to the River Fund absent express legislative authority.

Based on the foregoing, it is unnecessary to determine whether the discretionary power to make charitable contributions was specifically delegated to TMWA.

CONCLUSION

Due to the absence of legislative authority that provides cities and counties the power to delegate the discretionary function of making charitable contributions, TMWA is not vested with the power to make charitable donations to the River Fund.

Sincere regards,

BRIAN SANDOVAL  
Attorney General

By: SONIA E. TAGGART  
Senior Deputy Attorney General

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**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

AGO 2005-02 CITIES AND TOWNS: ELECTIONS: NRS 293C.115 does not violate the prohibition contained in Nev. Const. art. 15, § 11 against the legislative creation of an office with a term of more than four years.

Carson City, February 8, 2005

Paul G. Taggart, Fernley City Attorney, 108 North Minnesota Street, Carson City, Nevada 89703

Dear Mr. Taggart:

You have asked a question concerning the constitutionality of NRS 293C.115.

QUESTION

Is NRS 293C.115 constitutional in light of the prohibition contained in Nev. Const. art. 15, § 11 against the legislative creation of an office with a term of more than four years?

ANALYSIS

During the 2003 Legislative Session, the Legislature passed enabling legislation to allow certain cities to change their election dates to coincide with the statewide General Election. Your inquiry is limited to whether the City of Fernley (Fernley) may lawfully hold its next general election in November 2006 and that question turns on whether NRS 293C.115 is a constitutional enactment. NRS 293C.140(1) provides in relevant part:

*Except as otherwise provided in NRS 293C.115, a general city election must be held in each city of population categories one and two on the first Tuesday after the first Monday in June of the first odd-numbered year after incorporation, and on the same day every 2 years thereafter as determined by law, ordinance or resolution, at which time there must be elected the elective city officers, the offices of which are required next to be filled by election. [Emphasis added.]*

You have indicated that Fernley is a city whose population is within the two population categories encompassed by NRS 293C.140. Accordingly, but for the exception found in NRS 293C.115, Fernley would be required to hold its general city elections in June of odd-numbered years, or June 2005 in the instant case.

NRS 293C.115 provides in relevant part:

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1. The governing body of a city incorporated pursuant to general law may by ordinance provide for a . . . general city election on:

(a) The dates set forth for . . . general elections pursuant to the provisions of chapter 293 of NRS; . . .

. . . .

3. If a governing body of a city adopts an ordinance pursuant to subsection 1:

(a) The term of office of any elected city official may not be shortened as a result of the ordinance; and

(b) Each elected city official *holds office until the end of his term and until his successor has been elected and qualified.*

[Emphasis added.]

Fernley is an incorporated city to which NRS 293C.115 applies.

You have indicated that Fernley has passed an ordinance pursuant to NRS 293C.115(1) to set its general elections as scheduled in chapter 293 of NRS. NRS 293.12755 provides: “A general election must be held throughout the State on the first Tuesday after the first Monday of November in each even-numbered year.” In combination with the requirement of NRS 293C.115(3)(b), the effect of the ordinance is to extend the incumbency of Fernley elected officials from June 2005 to November 2006. You question whether this extension of incumbency conflicts with Nev. Const. art. 15, § 11, which provides in relevant part:

The tenure of any office not herein provided for may be declared by law, or, when not so declared, such office shall be held during the pleasure of the authority making the appointment, *but the legislature shall not create any office the tenure of which shall be longer than four (4) years . . .* [Emphasis added.]

This office has succinctly restated the requirement of the constitutional provision: “[w]here an office is created by the Legislature, the term of such office may not exceed four years.” Op. Nev. Att’y Gen. No. 1929—326 (March 15, 1929). An example of a statutory enactment which violated Nev. Const. art. 15, § 11 follows.

In *Davenport v. Harris*, 19 Nev. 222, 223—224 (1885), the court considered a statutory provision which purportedly created a five-year term for

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certain school trustees. The specific language under consideration was, "one trustee shall be elected annually to hold office for three years where there are three trustees, *and for five years where there are five trustees*, or until his successor shall be elected and qualified." [Emphasis added.] The parties and the court acknowledged that the enactment violated Nev. Const. art. 15, § 11:

It is admitted that the provision which declares that the term of trustee shall be five years in boards of five trustees is in conflict with the constitutional prohibition declaring that 'the legislature shall not create any office the term of which shall be longer than four years,' . . . .

Accordingly, where the Legislature creates an office with a term of more than four years, the enactment conflicts with the constitutional provision. But the instant case involves an enactment which does not specifically affect the length of the office, which remains at four years. Instead, NRS 293C.115 provides that the incumbents of the subject city offices shall hold over until the November 2006 general city election, as provided by ordinance. This Office had occasion to examine the constitutional provision in a similar context in 1911, as follows.

The four-year tenure of office of the Chairman of the Publicity Commission, Mr. Davis, had elapsed, yet he held over as Chairman for one month after the expiration of his term of office. Mr. Davis subsequently filed his claim for one-months' salary, \$208.33. In interpreting Nev. Const. art. 15, § 11, we stated:

The tenure of the office under consideration was, in unmistakable terms, limited to a period of four years. But it must be borne in mind that *there is a distinction between the tenure of the office and the office itself*. In this instance, the *tenure* was for a period of four years; yet as to *the existence of the office itself*, there was no limitation placed by the legislature, the office continuing to exist after the expiration of the appointment of the Chairman.

Op. Nev. Att'y Gen. No. 1911—24 (July 6, 1911) (emphasis added). We concluded that Mr. Davis's holding over of the office did not constitute a violation of Nev. Const. art. 15, § 11.

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The case of *State ex rel. Harrison v. Menaugh*, 51 N.E. 117 (Ind. 1898), adds weight to the argument that the incumbency-extension provision of NRS 293C.115 is not in conflict with Nev. Const. art. 15, § 11. In *Menaugh*, the court considered a statutory provision which extended the date of an election for township trustees and therefore continued their incumbency past a constitutional four-year term limit. In upholding the constitutionality of the enactment as a valid exercise of legislative power, the court clarified:

Counsel for appellant seem especially to base their contention on section 2 of article 15 of the constitution, which, as we have seen, prohibits the legislature from creating any office the tenure of which shall be longer than four years, and their insistence is that this restriction will prevent the act in question from being upheld. It is manifest, we think, that this contention is wholly untenable. *An examination of the act will readily disclose that it does not profess to create the office of township trustee, nor to extend the term thereof beyond the constitutional limit.* It proceeds upon the theory that the office has been previously created, and it merely declares as the legislative will that the time of holding an election for township trustees, etc., shall be changed from the general election on the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and on such day 'of every fourth year thereafter.'

*See Harrison v. Menaugh*, 51 N.E. at 121 (emphasis added). In a subsequent and different case, *citing Menaugh*, the Indiana Supreme Court further explained the difference between a statutory extension of an election and a statutory provision which directly extends the term of the office of an incumbent:

We think the decision in *State ex rel. [sic] v. Menaugh* is controlling in this. Moreover, the general rule is that it is within the province of the Legislature to postpone elections and readjust the commencement of the terms of offices, such as are of legislative creation

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particularly, in which case the incumbents may either hold over, or special elections may be authorized to fill the vacancies thus occasioned until the next general election. Such statutes are not considered in violation of the Constitution, where the object is to regulate the time of holding elections, and not merely to extend the terms of incumbents; but, if the legislative intent is clearly to extend the terms of present incumbents in office, the act will fall under the ban of the constitutional provision. (Citations omitted.)

*Spencer et al. v. Knight*, 98 N.E. 342, 346 (Ind. 1912) (citations omitted).

NRS 293C.115 does not create an office longer than four years, nor does it directly extend the term of office of incumbent city officers, such as the statute struck down in *Davenport*. Rather, NRS 293C.115 recognizes the permissible four-year terms of city offices, but allows the incumbents to hold over until the next General Election. The statute is clearly aimed only at postponing a general city election and, under the above authorities, does not violate the provision of Nev. Const. art. 15, § 11 which prohibits the creation of an office with a term of more than four years. Finally, if any doubt remains as to the constitutionality of the statute, the presumption enunciated in *Citizens for Honest & Responsible Government v. Heller*, 116 Nev. 939, 11 P.3d 121 (2000), comes into play to support NRS 293C.115's constitutionality: "An act is presumed to be constitutional and will be upheld unless the violation of constitutional principles is clearly apparent." *Id.* at 946 (citations omitted).

### CONCLUSION

NRS 293C.115 does not violate the prohibition contained in Nev. Const. art. 15, § 11 against the legislative creation of an office with a term of more than four years.

Sincere regards,

BRIAN SANDOVAL  
Attorney General

By: JAMES T. SPENCER  
Senior Deputy Attorney General



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AGO 2005-03 FEES; WITNESSES: A witness who voluntarily comes to Nevada from another state to testify at a preliminary hearing, who is then subpoenaed to appear when present in the county in which the court sits, is entitled to a witness fee for the time she is present in court under subpoena.

Carson City, February 10, 2005

Robert S. Beckett, Nye County District Attorney, Post Office Box 39,  
Pahrump, Nevada 89041, Kirk D. Vitto, Nye County Chief Deputy District  
Attorney, Post Office Box 39, Pahrump, Nevada 89041

Dear Messrs. Beckett and Vitto:

You have asked a question as to the proper calculation of witness fees and expenses for a certain out-of-state witness whose testimony is necessary for the prosecution of a criminal case.

QUESTION

What are the allowable witness fees and expenses payable to an out-of-state witness whose testimony is necessary for the prosecution of a criminal case?

ANALYSIS

You have provided the following facts. A witness who resides in another state has information which is essential to the prosecution of a defendant charged with First Degree Murder. It will take her one day to travel to Pahrump to attend an all-day preliminary hearing held the next day, at which she will be sworn and will testify. Being beyond the reach of a subpoena to attend the preliminary hearing, NRCP 45(e), the witness has nonetheless agreed to come to Nevada voluntarily but will be served with a subpoena when she arrives in Pahrump. Following the hearing, it will then take her a third full day to travel back home. You ask what witness fees and expenses are properly payable to this witness under the described conditions. You have directed our attention to NRS 50.225 as being authority helpful in addressing the following issues.

Entitlement to Witness Fees

NRS 50.225 provides in relevant part, "1. For attending the courts of this state in any criminal case . . . or proceeding before a court of record . . . in obedience to a subpoena, each witness is entitled: (a) To be paid a fee of \$25 for each day's attendance . . . ."

The subject out-of-state witness will voluntarily come to Nevada, but will be served with a subpoena when she reaches Pahrump. NRS 50.225(1) allows the subject witness payment of fees for the single day that she will be sworn

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and attending the preliminary hearing. Payment of fees is not conditioned on the witness testifying on the date she is subpoenaed. *Lamar v. Urban Renewal Agency*, 84 Nev. 580, 445 P.2d 869 (1968).

Although the statutory term “attending the courts of this state” is not directly defined, we believe that there is a clear requirement that the term refers to the witness’s actual presence at the proceeding and cannot include travel time. First, this interpretation comports with the common, dictionary definition of “attend” as meaning “to be present at,” as pointed out in the materials submitted in support of your request. *See*, for example, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 85 (1976). “When the language of a statute is plain, its intention must be deduced from that language.” *Hedlund v. Hedlund*, 111 Nev. 325, 328, 890 P.2d 790, 792 (1995).

Second, NRS 50.165 provides some guidance in that it describes a witness’s duty to appear in response to a subpoena as “[a] witness . . . shall attend at the time appointed,” indicating that a witness’s attendance does not start until the time specified in the subpoena. Third, we cannot ignore the fact that the witness fee provisions, NRS 50.225(1), coexist in the same section with provisions relating specifically to travel and per diem, NRS 50.225(3). This evidences a legislative intent that attendance and travel are not synonymous. If the Legislature had intended that a witness be entitled both to fees and travel reimbursement for time traveling to attend a hearing or trial, it could have easily so provided:

Why should we presume that the legislature intended that such an interpretation should be placed upon section 9? If such had been the intention of the legislature we think it could have made that idea clear by the use of about six or eight words more than it did in section 9.

*Eddy v. State Board of Embalmers*, 40 Nev. 329, 334, 163 P. 245, 246 (1917).

### Witness Reimbursement for Travel Expenses and Lodging

NRS 50.225(3) provides in relevant part:

If a witness . . . being a resident of another state, voluntarily appears as a witness at the request of . . . the district attorney . . . of the county in which the court is held, he is entitled to reimbursement for the *actual*

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*and necessary expenses for going to and returning from the place where the court is held. He is also entitled to receive the same allowances for subsistence and lodging as are provided for State officers and employees generally.*<sup>1</sup> [Emphasis added.]

This subsection specifically addresses the entitlements of a witness, beyond Nevada subpoena authority, who voluntarily comes to Nevada to testify. Accordingly, this subsection requires that our subject witness be reimbursed for air fare and related expenses required for her travel to and from Pahrump. Further, the subsection requires that the witness be paid, under the current statutory scheme, \$26 per diem for each full travel day and a reasonable lodging rate, not to exceed \$90 per night.

CONCLUSION

A witness who voluntarily comes to Nevada from another state to testify at a preliminary hearing, who is then subpoenaed to appear when present in the county in which the court sits, is entitled to a witness fee for the time she is present in court under subpoena. The witness is also entitled to her actual and necessary expenses for going to and coming from the place where the court is located and per diem and lodging reimbursement as provided for State officers and employees.

Sincere regards,

BRIAN SANDOVAL  
Attorney General

By: JAMES T. SPENCER  
Supervising Senior Deputy Attorney General

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<sup>1</sup> See NRS 281.160(1), which currently provides a per diem of \$26 plus a reasonable room rate for each 24-hour period that a State officer or employee is away from his office and outside of the State. The State has defined "reasonable room rate" as being actual lodging expenditures up to \$90 per night. See State Administrative Manual § 214, copy enclosed for your convenience.

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### AGO 2005-04 BALLOTS; LABOR COMMISSIONER; WAGES:

Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in NRS 608.250, the statutory exclusions from overtime compensation and the provisions of NRS 608.250 relied upon in NRS 608.018, would stand as enacted for purposes of the overtime compensation law.

Carson City, Nevada, March 2, 2005

Michael Tanchek, Nevada Labor Commissioner, Office of the Labor Commissioner, Department of Business and Industry, 675 Fairview Drive, Suite 226, Carson City, Nevada 89701

Dear Mr. Tanchek:

As the Nevada Labor Commissioner, you are requesting an opinion regarding the potential effect of the amendment to the Nevada Constitution as proposed by the initiative placing Question No. 6, "Raise the Minimum Wage for Working Nevadans Act," on the 2004 General Election Ballot. Your questions concern the consequences of such an amendment upon Nevada's existing statutory framework for minimum wage and overtime compensation benefits. Notwithstanding the recent introduction of Assembly Bill 87 in the current session of the Nevada Legislature, the issues and conclusions of this opinion should be shared with appropriate legislative committees for consideration of prudent anticipatory statutory amendments to current laws that will be impacted by any passage of Question No. 6 amending the Nevada Constitution.

### GENERAL BACKGROUND INFORMATION

Currently under NRS 608.250, certain employees in private employment are entitled to minimum wages at a rate to be established by the Nevada Labor Commissioner in accordance with federal law. Nevada's overtime compensation statute, NRS 608.018, incorporates select provisions of the minimum wage law at NRS 608.250 to delineate which employees are excluded from entitlement to statutory overtime compensation. Complimenting these Nevada laws, the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C.A. § 201 *et seq.*, sets forth the minimum wage and overtime compensation benefits required by federal law.<sup>1</sup> Under the FLSA, the general minimum wage rate is set at \$5.15 per hour. 29 U.S.C.A. § 206(a)(1) (1998). In accordance therewith, the Nevada Labor Commissioner has also set Nevada's general minimum wage rate at \$5.15 per hour. NAC 608.110(1).

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<sup>1</sup> Although states remain free to enact their own laws governing minimum wages and overtime benefits, compliance with state legislation will not excuse noncompliance with the FLSA. 29 U.S.C.A. § 218(a) (1998); *Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240, 1246 (Alaska 1979).

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Ballot Question No. 6, which is aimed at raising Nevada's minimum wage rate, stemmed from an initiative petition. *See Nev. Const. art. 19, § 2* (reserving to the people the power to propose, by initiative petition, amendments to the constitution, and to enact or reject them at the polls); *Garvin v. Ninth Judicial Dist. Court ex rel. County of Douglas*, 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) (discussing the initiative power). The initiative proposes to amend Article 15 of the Nevada Constitution to add the following section addressing minimum wages:

*Sec. 16. Payment of minimum compensation to employees.*

*A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such*

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*bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.*

*B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to*

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*enforce this section shall be awarded his or her reasonable attorney's fees and costs.*

*C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period of not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.*

*D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.*

Compilation of Ballot Questions 2004, Question No. 6, § 3.

A majority of Nevada voters voting on Question No. 6 in the 2004 general election approved the proposed constitutional amendment. However, before the proposed amendment can become effective, the Secretary of State must resubmit the question for its approval by the voters in the 2006 general election. If a majority of the 2006 general election voters also approve the proposed amendment, it will become part of the Nevada Constitution upon certification of the election results. Nev. Const. art. 19 § 2(4); NRS 295.035.

### QUESTION ONE

Would the provisions of NRS 608.250 through NRS 608.290 be voided by the successful passage of the proposed amendment?

### ANALYSIS

Neither the arguments for or against the initiative's passage nor the text of the proposed constitutional amendment refer directly to the existing minimum

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wage statutes. *See* Compilation of Ballot Questions 2004, Question No. 6. Even so, the primary focus of the initiative is on raising the current Nevada minimum wage of \$5.15 per hour, which wage is established pursuant to the statutory scheme. Thus it unmistakably appears that the voters intended for the proposed amendment to transform the existing statutory framework for minimum wages. The extent of the transformation that would actually be affected depends upon the extent of conflict between the proposed amendment and the existing statutes.

A constitutional amendment, ratified subsequent to the enactment of a statute, is controlling on any point covered in the amendment. *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 378 (1882). Further, ratification of a constitutional amendment will render void any existing law that is in conflict with the amendment. Op. Nev. Att’y Gen. 08 (May 19, 1908); *see also* 16 AM. JUR. 2d *Constitutional Law* § 68 (1979) (if there is a conflict between a statute and a subsequently adopted constitutional provision, the statute must give way). We now consider the relevant statutory provisions in turn.

### NRS 608.250

#### Responsibility for Wage Calculation

NRS 608.250 governs the minimum wage for private employment and provides as follows:

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless he determines that those increases are contrary to the public interest.
2. The provisions of subsection 1 do not apply to:
  - (a) Casual babysitters,
  - (b) Domestic service employees who reside in the household where they work.
  - (c) Outside salespersons whose earnings are based on commissions.
  - (d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 man-days of agricultural



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labor in any calendar quarter of the preceding calendar year.

(e) Taxicab and limousine drivers.

(f) Severely handicapped persons whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

This statute's provisions for calculation of the minimum wage and the responsibility therefor are completely covered by and conflict with the corresponding provisions of the proposed amendment. First, like NRS 608.250, the proposed amendment provides a comprehensive minimum wage calculation method which is applicable to private employment. *See Proposed Amendment, § 16(A),(C)* (setting forth a minimum wage calculation applicable to "any . . . entity that may employ individuals or enter into contracts of employment").

Second, obvious conflict is revealed when comparing the competing methods of wage calculation. Specifically, NRS 608.250(1) requires that the Labor Commissioner, "in accordance with federal law, establish . . . the minimum wage" and "prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless he determines that those increases are contrary to the public interest." By the terms of these provisions, the minimum wage rate cannot be higher than the federal minimum wage rate (which is currently \$5.15 per hour). However, the proposed amendment sets the minimum wage rate at either \$5.15 or \$6.15 per hour, depending upon whether an employer provides sufficient health benefits. The proposed amendment also vests the Governor or a state agency designated by him with the responsibility of publishing adjustments to the minimum wage and requires those adjustments to be based upon increases in the federal minimum wage or increases in the Consumer Price Index not to exceed 3% per year, whichever is greater. *See Proposed Amendment, § 16(A)*.

Based on this overlapping and contradictory coverage, the existing statutory provisions would not survive the proposed amendment. Instead, the

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proposed amendment would supplant and repeal by implication the provisions of NRS 608.250 for wage calculation and the responsibility therefor.

### Exclusions Based on Employee Type

Also apparent from a comparison of the proposed amendment and statute is the disagreement on the issue of which employees are entitled to minimum wages. NRS 608.250(2) sets forth various exclusions from the statutory minimum wage entitlement for certain types of employees, *i.e.*, casual babysitters, domestic service employees who reside in the household where they work, etc. However, NRS 608.250 does not provide any exclusion which is based on an employee's age,<sup>2</sup> the nonprofit status of an employer, or training periods of employment. In contrast, the proposed amendment does not exclude from its minimum wage coverage the types of employees listed at NRS 608.250(2), except to the extent that those types of employees may also be "under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Proposed Amendment, § 16(C) (defining "employee" for coverage purposes to exclude certain employees under age eighteen).

The effect of the proposed amendment on the NRS 608.250 exclusions is controlled by two presumptions. First, the voters should be presumed to know the state of the law in existence related to the subject upon which they vote. *Op. Nev. Att'y Gen. 153* (December 21, 1934). Second, it is ordinarily presumed that "[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed." *McKay v. Board of Supervisors*, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986). In keeping with these presumptions, the people, by acting to amend the minimum wage coverage and failing to include the statutory exclusions in the proposed amendment, are presumed to have intended the repeal of the existing exclusions so that the new minimum wage would be paid to all who meet its definition of "employee." Accordingly, the proposed amendment would effect an implied repeal of the exclusions from minimum wage coverage at NRS 608.250(2).

### NRS 608.260

#### Civil Court Remedies for Evasion of Minimum Wage Laws

Each competing minimum wage scheme provides a complete civil court remedy for evasion of its requirements. *See* NRS 608.260 (stating, in part, "[T]he employee may, at any time within 2 years, bring a civil action to

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<sup>2</sup> Previously, NRS 608.250 expressly allowed for a minimum wage for minors that was eighty-five percent of the minimum wage for adults; however, the pertinent statutory language was deleted in 2001 when the statute was amended to allow the Labor Commissioner to establish prevailing wages in accordance with federal law. *See* 2001 Nev. Stat., ch. 90, §9, at 564-65. *Cf.* NAC 608.110(2) (setting forth a lesser minimum wage for employees under age eighteen).

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recover the difference between the amount paid to the employee and the amount of the minimum wage."); *compare* Proposed Amendment, § 16(B) (an employee may bring an action against his employer in the courts of this state and shall be entitled to all appropriate remedies available under the law or in equity, including back pay, damages, reinstatement or injunctive relief, and if prevailing, shall be entitled to reasonable attorney's fees and costs). As the proposed amendment has completely covered the topic of a civil court remedy, providing for even greater relief, its remedy would supplant and repeal by implication the existing civil remedy provision at NRS 608.260.

### NRS 608.270(1) and NRS 608.290(2) Administrative Enforcement of Minimum Wage Laws

NRS 608.270(1)(a) states that the "Labor Commissioner shall . . . [a]dminister and enforce the provisions of NRS 608.250." In addition, NRS 608.290(2) provides with regard to violations of NRS 608.250 that "[i]n addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than \$5,000 for each such violation." The presumptive partial repeal of NRS 608.250 notwithstanding, legal authority suggests that the proposed amendment would serve to modify these statutes as necessary to effectuate their continued use in enforcing the new minimum wage law.

The proposed amendment is silent with respect to the administrative enforcement authority of the Labor Commissioner and his imposition of administrative sanctions. Where, as here, "express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy [between the laws] as to preclude the presumption, or the [new law] revises the whole subject-matter of the former. [Citations omitted.]" *Ronnow v. City of Las Vegas*, 57 Nev. 332, 365, 65 P.2d 133, 145 (1937). [Text altered.] The statutes in question here are consistent with the basic provisions of the proposed amendment.

The minimum wage changes proposed by Question No. 6, though materially different in wage outcome, applicability and civil court remedy, essentially create a new method of calculating the wage rate and do not attempt to alter the underlying current statutory basis for administrative enforcement of the new wage by the Labor Commissioner. By providing for a higher minimum wage and a more extensive civil court remedy, the people intended to strengthen an employee's ability to assert his right to the minimum wage. The current administrative enforcement jurisdiction of the Labor Commissioner is well-suited to serve this general purpose, and it merely strengthens what the proposed amendment seeks to guaranty. *See Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) (statutes must be interpreted consistently with their general purposes); *see also Rogers v. Heller*,

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117 Nev. 169, 176 n.17, 18 P.3d 1034, 1038 n.17 (2001) (recognizing that rules of statutory construction apply to constitutional provisions).

The current minimum wage statutes evidence the Legislature's clear intent that the Labor Commissioner should enforce Nevada's minimum wage law and impose administrative sanctions for violations thereof. Additionally, NRS 607.160(1)(a)(2) provides that "[t]he Labor Commissioner . . . [s]hall enforce *all labor laws* of the State of Nevada . . . [t]he enforcement of which is not specifically and exclusively vested in any other officer, board or commission." [Emphasis added.] NRS 607.160(3)—(6) contemplate the Labor Commissioner will impose administrative penalties and pursue administrative and civil actions for violation of Nevada's labor laws. Further, NRS 607.170(1) allows the Labor Commissioner to prosecute claims and commence actions to collect wages for any person who is unable to afford counsel.

The intent behind the administrative enforcement provisions at NRS 608.270(1)(a) and NRS 608.290(2), *i.e.*, that the Labor Commissioner shall enforce the state's minimum wage law, is likely to prevail despite the specific references to NRS 608.250 in NRS 608.270(1)(a) and NRS 608.290. *McKay*, 102 Nev. at 650, 730 P.2d at 443 (the intent behind a law will prevail over the literal sense of the words used in the law). However, given the specific references to NRS 608.250 in NRS 608.270(1)(a) and NRS 608.290, it is conceivable that a court of law could find the Legislature intended the existing enforcement statutes apply only to the minimum wage as calculated under NRS 608.250, and not recognize the amendment to the Nevada Constitution as merely augmenting the statutes establishing the Labor Commissioner's pre-amendment administrative enforcement authority. If so, the intent behind existing statutes would be upset by allowing them to stand as enforcement tools for the new law, and the statutes should be treated as repealed. *See City and County of San Francisco v. County of San Mateo*, 896 P.2d 181, 195 (Cal. 1995) (Mosk, J., concurring) (existing statutes must be treated as repealed if the intent behind them would be thwarted by allowing them to stand in the face of a constitutional amendment). On the other hand, the more likely and appropriate conclusion is that the proposed amendment would modify these enforcement statutes to allow for the Labor Commissioner's enforcement of the new minimum wage law. *Cf. Perry v. Consolidated Special Tax Sch. Dist. No. 4*, 103 So. 639, 642 (Fla. 1925) (recognizing that previous statutory provisions, as modified by constitutional amendment, are sufficient to effectuate new constitutional provisions so that new provisions may be enforced even though they are not contained in or contemplated by present statutes).

NRS 608.270(1)(a), (2), NRS 608.280, and NRS 608.290(1)  
Criminal Enforcement of Minimum Wage Laws

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

NRS 608.270(1)(a) and (2) establish that the district attorneys will prosecute violations of NRS 608.250 and, for the willful failure to do so, will be subject to a misdemeanor conviction and removal from office. In addition, NRS 608.280 requires the Attorney General to prosecute willful violations of NRS 608.270. Finally, NRS 608.290(1) also makes the violation "of NRS 608.250 or any regulation adopted pursuant thereto" a misdemeanor. For the same reasons given in the preceding section of this opinion (addressing the proposed amendment's effect upon the Labor Commissioner's administrative enforcement authority), it is also likely that a court would find that the proposed amendment only modifies, rather than repeals, the existing criminal enforcement statutes. In short, by enacting these criminal statutes the Legislature plainly intended that criminal sanctions would be used as a tool to enforce the state minimum wage law. Although, as with the provisions discussed in the preceding section, it is possible that a court could determine that the Legislature's intent is ambiguous with respect to application of the criminal enforcement statutes to the new minimum wage law. After considering this risk, the reasonable and fair conclusion is that the legislative intent behind the existing provisions is consistent with using these provisions to enforce the new minimum wage law. The criminal enforcement statutes are also consistent with the proposed amendment's apparent purpose of strengthening an employee's ability to collect minimum wages. The people, by presumption, were aware of the law's provisions when voting in favor of the proposed amendment. *See Op. Nev. Att'y Gen. 153 (December 21, 1934)*. As both the initiative and the proposed amendment are silent as to repeal of the criminal enforcement provisions, these provisions are likely to survive as modified to effectuate their continued use as an enforcement tool for the new minimum wage law. *See Ronnow v. City of Las Vegas, 57 Nev. at 332, 365, 65 P.2d 133,145 (1937)*.

### CONCLUSION TO QUESTION ONE

If the proposed constitutional amendment is approved at the 2006 general election as established by certified election results, it would supplant and repeal by implication the wage calculation and coverage provisions of NRS 608.250 and the civil remedy of NRS 608.260. NRS 608.270(1) and NRS 608.290(2) would likely be found to have been modified as necessary to effectuate the Labor Commissioner's enforcement of the new minimum wage. The criminal enforcement provisions of NRS 608.270(1)(b) and (2), NRS 608.280, and NRS 608.290(1) also would likewise be found to be modified to allow for their continued use in enforcing the new minimum wage law.

### QUESTION TWO

Would the passage of the proposed amendment require the payment of the minimum wage to those types of employees currently excluded under NRS 608.250(2)?

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

### ANALYSIS

As discussed in response to Question One above, the proposed amendment does not contain any of the exceptions to coverage currently set forth at NRS 608.250(2). The only exception under the proposed amendment is for employees who are "under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Proposed Amendment, § 16(C) (defining "employee" for coverage purposes to exclude certain employees under age eighteen). In light of this, the exclusions under NRS 608.250 are repugnant to the proposed amendment, the plain wording of which requires payment of the minimum wage regardless of whether an employee is currently excluded under NRS 608.250(2). Consequently, the proposed amendment would effect an implied repeal of the exclusions set forth at NRS 608.250 from minimum wage coverage.

### CONCLUSION TO QUESTION TWO

The proposed amendment would require payment of the new minimum wage to employees who are currently excluded under NRS 608.250(2) from entitlement to minimum wages, unless those employees fall outside the amendment's definition of a protected "employee."

### QUESTION THREE

Does the language of Section 16(B) of the proposed amendment specifically and exclusively vest the enforcement of the minimum wage provisions with the courts, so as to preempt the enforcement jurisdiction of the Labor Commissioner?

### ANALYSIS

Your question alludes to the language of NRS 607.160(1)(a)(2), which states, "The Labor Commissioner . . . [s]hall enforce all labor laws of the State of Nevada . . . [t]he enforcement of which is not specifically and exclusively vested in any other officer, board or commission." As discussed in response to Question One above, the provisions of NRS 607.160 and NRS 607.170, as well as the provisions under NRS 608.270(1)(a) and NRS 608.290(2), demonstrate the Legislature's intent that the Labor Commissioner enforce Nevada's minimum wage law, even as amended or supplanted by the instant initiative. Therefore, the proposed amendment would likely only modify the existing statutes as needed for such enforcement. The proposed amendment's civil remedy at section 16(B) would supplant the existing statutory civil remedy at NRS 608.260, but this would have no additional affect on the existing statutes providing for the Labor Commissioner's enforcement jurisdiction in other areas.

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Moreover, section 16(B) of the proposed amendment provides, in relevant part, that an employee “*may* bring an action against his or her employer in the courts of this State to enforce the provisions of this section.” [Emphasis added.] The use of the word “*may*” in this context indicates that the remedy is intended to be permissive and it does not indicate exclusivity of the remedy. *D'Angelo v. Gardner*, 107 Nev. 704, 721 n.11, 819 P.2d 206, 217 n.11 (1991); *Ewing v. Fahey*, 86 Nev. 604, 608, 472 P.2d 347, 350 (1970). Indeed, the analogous provision currently set forth in NRS 608.260 states that an “employee may . . . bring a civil action,” and this remedy coexists with other statutes providing for enforcement by the Labor Commissioner. Thus the proposed amendment's civil remedy at section 16(B) does not specifically and exclusively vest authority elsewhere or divest the Labor Commissioner of all of his jurisdiction.

### CONCLUSION TO QUESTION THREE

Section 16(B) of the proposed amendment does not interfere with all of the enforcement jurisdiction of the Labor Commissioner. It is likely that authority not specifically in contradiction to the amendment would survive a legal challenge.

### QUESTION FOUR

Would preemption of NRS 608.250 have any effect on the statutory exclusions from entitlement to overtime compensation set forth in NRS 608.018?

### ANALYSIS

The overtime compensation statute, NRS 608.018, should not be affected by the proposed amendment, even though it partially relies on NRS 608.250.

NRS 608.018 provides, in relevant part:

1. Except as otherwise provided in this section, an employer shall pay one and one-half times an employee's regular wage rate whenever an employee works:
  - (a) More than 40 hours in any scheduled week of work; or
  - (b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.
2. The provisions of subsection 1 do not apply to:

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(a) Employees who are not covered by the minimum wage provisions of NRS 608.250;

(b) Employees who receive compensation for employment at a rate not less than one and one-half times the minimum rate prescribed pursuant to NRS 608.250;

....

(d) Salesmen earning commissions in a retail business if their regular rate is more than one and one-half times the minimum wage, and more than one-half their compensation comes from commissions;

....

(k) Drivers of taxicabs or limousines;

(l) Agricultural employees; . . .<sup>3</sup>

As set forth above, NRS 608.018(2)(a) incorporates by reference the standard for minimum wage entitlement in NRS 608.250. By this, NRS 608.018(2)(a) excludes from entitlement to statutory overtime compensation those employees who are also not entitled to minimum wages. NRS 608.250(2) sets forth a list of employees who are not entitled to minimum wages, including casual babysitters, taxicab and limousine drivers, and certain domestic service employees, outside salespersons, employees engaged in agriculture and severely handicapped persons. NRS 608.250(2)(a)—(f).

The exclusions at NRS 608.250(2)(d) (for employees "engaged in agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor") and in NRS 608.250(2)(e) (for "[t]axicab and limousine drivers") are also subsumed in other corresponding statutory exclusions from overtime compensation. In particular, NRS 608.018(k) and (l) set forth exclusions which are at least as broad as those at NRS 608.250(2)(d) and (e) and which do not depend on or refer to NRS 608.250. Accordingly, any question as to the continuing validity of NRS 608.250(2) cannot affect the lack of entitlement to statutory overtime compensation for taxicab and limousine drivers or for agricultural employees.

On the whole, the exclusions from statutory overtime coverage, as incorporated from NRS 608.250(2), are complimentary to the exclusions under the FLSA's overtime compensation provisions.<sup>4</sup> Hence, it is apparent that the

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<sup>3</sup> The provisions of NRS 608.018 do not refer to, rely on, or parallel the provisions of NRS 608.250 and would not be affected by the repeal of the NRS 608.250 scheme for minimum wage. Furthermore, it should be noted that NRS 608.180—608.195 provide for civil and criminal enforcement and remedies for violations of NRS 608.018. This enforcement scheme is unrelated to the topic of minimum wage and would likewise remain unaffected by the proposed amendment.

<sup>4</sup> See, e.g., 29 U.S.C.A. § 213(a)(1) (1998) (addressing outside salespersons); 29 U.S.C.A. § 213(a)(6) (1998) (addressing employees employed in agriculture); 29 U.S.C.A. §§ 213(a)(7),



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Legislature intended to enact state overtime compensation law that was generally consistent with federal law on the same topic and to exclude from statutory overtime compensation the types of employees identified at NRS 608.250(2). This intent should be respected regardless of changes in the law on the distinct subject matter of minimum wages.

Moreover, NRS 608.018(2)(a) does not depend on the aspects of NRS 608.250 that offend the proposed amendment, *i.e.*, the provisions for minimum wage calculation and entitlement. Because the subject of the proposed amendment is the minimum wage and not entitlement to overtime compensation, NRS 608.018(2)(a) does not conflict with the organic provisions of the proposed amendment. Therefore, NRS 608.018(2)(a), which incorporates the identification of types of employees found in NRS 608.250(2), would survive the limited repeal of NRS 608.250(2) specific to its exclusion from minimum wage coverage for the same types of employees.

In contrast, the exclusions from statutory overtime entitlement set forth at NRS 608.018(2)(b) and (d) rely on the calculation of the minimum wage under NRS 608.250. Subsection (2)(b) expressly does so, excluding from overtime compensation "[e]mployees who receive compensation for employment *at a rate not less than one and one-half times the minimum rate prescribed pursuant to NRS 608.250.*" [Emphasis added.] Subsection 2(d) excludes "[s]alesmen earning commissions in a retail business *if their regular rate is more than one and one-half times the minimum wage,* and more than one-half their compensation comes from commissions." [Emphasis added.]

The apparent intent behind NRS 608.018(2)(b) and (d) was to exclude from overtime compensation employees and certain salesmen who earned as a regular rate at least one and one-half times the minimum rate set by the Labor Commissioner – a rate that is limited by the rate provided by federal law. *See* NRS 608.250(1). In enacting NRS 608.018(2)(b) and (d), the Legislature could not have anticipated that overtime compensation would be required even though an employee earned more than one and one-half times the rate under federal law and NRS 608.250. Incorporation of the wage calculation at NRS 608.250 into NRS 608.018 reflects the Legislature's determination as to the proper balance of state interests. Amending or supplanting NRS 608.018(2)(b) or (d) with the higher minimum wage rate of the proposed amendment would prove more costly for employers and would frustrate the apparent intent of the Legislature to tie this variable in the overtime calculation to the federal minimum wage.<sup>5</sup> For this reason, and even more so because the proposed

(..continued)

214(c) (1998) (addressing handicapped workers); 29 U.S.C.A. § 213(a)(15) (1998) (addressing casual babysitters and those engaged in domestic service).

<sup>5</sup> For example, the current minimum wage rate is \$5.15 per hour. This rate multiplied by one and one-half equals \$7.73 per hour. Thus under NRS 608.018(2)(b) and (d), statutory overtime compensation is required until an employee or salesman with sufficient commissions earns at least \$7.73 per hour. Under the proposed amendment, assuming no adequate insurance is provided, the minimum wage would be initially set at \$6.15 per hour. This rate multiplied by one and one-half

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amendment is not concerned with overtime compensation, it would not effect a repeal or modification of these overtime compensation exclusions linked to NRS 608.250.

The rule that all statutes in force and not inconsistent with the new constitutional provisions shall continue until amended or repealed by the Legislature seems particularly apt here. *See* 16 AM. JUR. 2d *Constitutional Law* § 67. Under this rule, the minimum wage calculation provisions of NRS 608.250, as incorporated into NRS 608.018(2)(b) and (d), should continue for the purpose of requiring the Labor Commissioner to establish a wage rate to be used in determining entitlement to statutory overtime compensation under NRS 608.018(2)(b) and (d).

CONCLUSION TO QUESTION FOUR

Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in NRS 608.250, the statutory exclusions from overtime compensation and the provisions of NRS 608.250 relied upon in NRS 608.018, would stand as enacted for purposes of the overtime compensation law.

Sincere regards,

BRIAN SANDOVAL  
Attorney General

By: PATRICIA PALM GASPARINO  
Deputy Attorney General

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(..continued)  
equals \$9.23 per hour. If the calculation from the proposed amendment were incorporated into NRS 608.018(2)(b) and (d), then an employee would be entitled to statutory overtime compensation until he earned \$9.23 per hour.

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AGO 2005-05 OPEN MEETING LAW; PUBLIC BODIES: Under the Open Meeting Law, a public body may be created by the actions of its members.

Carson City, March 31, 2005

Richard E. Burdette, Jr., Energy Advisor to Governor Guinn, Director, Nevada State Office of Energy, 101 North Carson Street, Carson City, Nevada 89701

Dear Mr. Burdette:

You have requested an opinion from this office concerning the applicability of Nevada's Open Meeting Law to the Governor's Forum on Natural Resources and Electrical Generation (Forum).

QUESTION

Whether the Forum is a "public body" that must comply with Nevada's Open Meeting Law?

ANALYSIS

Whether or not the Forum is required to comply with the Open Meeting Law depends upon how the members of the forum, both staff and volunteers, conduct themselves. If the Forum conducts itself as an advisory collegial body supported in whole or in part by tax revenue it will be subject to compliance with the Open Meeting Law. Section 3.01 of the NEVADA OPEN MEETING LAW MANUAL states:

The combined definitions of "meeting," "action," and "quorum" in NRS 241.015(1), (2), and (4) indicate the type of body covered by the Open Meeting Law is a *collegial* body. Those definitions repeatedly use the plural word "members" and also the words "quorum" and "simple majority," which indicate the body must be comprised of more than one person and those persons share voting powers. The definitions further indicate the Open Meeting Law concerns itself with meetings, gatherings, decisions, and actions obtained through a collective consensus of the members, all of which indicates a fundamental assumption the Open Meeting Law concerns itself only

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with collegial bodies. *See* A. Schwing,  
OPEN MEETING LAWS, § 6.32 (1994).

Without question, the Governor or his staff could individually meet, discuss, and receive recommendations from any single member of the proposed Forum without raising any concerns regarding the applicability of the Open Meeting Law. Cautiously, the Governor or his staff could meet with all of the members of the proposed Forum collectively, discuss the facts and issues and solicit each member's individual recommendation. Under these circumstances, the Forum would not be obligated to comply with the Open Meeting Law because, as cited above, the Open Meeting Law concerns itself with meetings, gatherings, decisions, recommendations, and other actions "obtained through a collective consensus of the members."

Section 3.01 of the NEVADA OPEN MEETING LAW MANUAL delineates three elements that create a "public body." Those elements are: (1) a collegial body that is (2) "administrative, advisory, executive or legislative body of the state of local government" and (3) "expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue." NEVADA OPEN MEETING LAW MANUAL, § 3.01 (9<sup>th</sup> ed. 2001) *citing* NRS 241.015(3).

"Fundamental to the nature of public bodies is their character as collegial entities, acting as a body rather than as a number of separate individuals." OPEN MEETING LAWS 2d, A. Schwing § 6.3 (2<sup>nd</sup> ed. 2000). If the Forum makes all decisions, recommendations, or actions through a "collective consensus of its members" or a majority vote, the Forum is a collegial body. NEVADA OPEN MEETING LAW MANUAL, § 3.01 (9<sup>th</sup> ed. 2001). Thus if the Forum decides to act as a collegial body, the analysis must then determine whether the Forum is "administrative, advisory, executive or legislative body of the state or local government." NRS 241.015(3).

Section 3.01 of the NEVADA OPEN MEETING LAW MANUAL also states, in part, for a public body to be administrative, advisory, executive or legislative body of the state or local government it must "(1) owe its existence to and have some relationship with a state or local government, (2) be organized to act in an administrative, advisory, executive or legislative capacity, and (3) must perform a government function." NEVADA OPEN MEETING LAW MANUAL, § 3.01 (9<sup>th</sup> ed. 2001) *citing, in part*, NRS 241.015(3). First, the Governor created the Forum, and thus, the Forum has a relationship with the state government. Second, the Governor organized the Forum to advise him on a variety of natural resources and energy issues, which means the Forum was organized to act in an advisory capacity. Finally, the Forum performs a government function because it advises the Governor on the management of Nevada's natural resources and energy. Therefore, the Forum meets the second element

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of a public body because it is an “administrative, advisory, executive or legislative body of the state or local government.” NRS 241.015(3).

If the Forum acts as a collegial body, and it is an “administrative, advisory, executive or legislative body of the state or local government,” it must then be determined whether the Forum advises an “entity which expends or disburses or is supported in whole or in part by tax revenue.” NRS 241.015(3). The Governor’s Office expends or disburses or is supported in whole or in part by tax revenues. The Governor organized the Forum to advise him on natural resource and energy issues. Therefore, the Forum advises an “administrative, advisory, executive or legislative body” of the state government.

Further, it is presumed that the Governor’s Office will provide staff support to the Forum. Staff will be responsible for timely posting of agendas and keeping minutes in compliance with the Open Meeting Law, if the Forum conducts itself as a collegial body. It is also presumed that the Forum will be allowed to use state facilities to conduct its meetings, and the Forum will use state equipment, when necessary, to conduct its business. Thus, the Forum, itself, is being supported in whole or in part by tax revenues, and the Forum meets the third element of a public body.

### CONCLUSION

The Governor and his staff must determine whether the Governor’s goals can be met through staff analysis of the various conclusions and recommendations received from each individual Forum member, or whether they require a collegial body’s collective consensus to provide advice to the Governor. That decision directs whether the proposed Forum must conduct its business as a “public body” subject to the requirements of the Open Meeting Law. If the Forum acts as a collegial body, it must comply with the Open Meeting Law, and if the Forum members individually provide recommendations and advice to the Governor, the Forum does not need to comply with the Open Meeting Law.

Sincere regards,

**BRIAN SANDOVAL**  
Attorney General

By: **NEIL A. ROMBARDO**  
Senior Deputy Attorney General

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AGO 2005-06 PUBLIC EMPLOYEES RETIREMENT BOARD; PUBLIC EMPLOYEES' BENEFIT PROGRAM; EMPLOYEES; RETIREES: The authority of the County Plan sponsor and the rights of the participants in the Plan are derived from: 1) the relevant Nevada Revised Statutes; 2) any regulations or ordinances adopted by a government sponsor of a relevant plan of benefits; and 3) the County Plan documents. The County Commission has the authority to establish "misconduct" eligibility exclusions from the right to receive a premium subsidy for employees and retirees that "continue in the County Plan." A voluntary or involuntary break in employment service or break in continuing coverage with the County that is contiguous to any PERS retirement prevents an employee or former employee from "continuing" in either the County Plan or by option in the PEBP, and the break extinguishes all statute-based claims to a premium subsidy. However, the County Commission has no authority to alter any vested statutory right to premium subsidy for its active employees that timely opt to join the PEBP at retirement pursuant to NRS 287.023.

Carson City, April 21, 2005

Theodore Beutel, Eureka County District Attorney, Post Office Box 190  
Eureka, Nevada 90316

Dear Mr. Beutel:

Your County Commissioners have expressed a desire to prohibit payment of premium subsidy amounts for persons participating in Eureka County's employee group insurance plan (County Plan) that are convicted of any work related crime or terminated from employment for misconduct. Your preliminary analysis has led you to ask, "what authority does Eureka County have to prohibit discretionary benefits to employees terminated for misconduct or convicted for work related misconduct?" Your question has been rephrased to focus our analysis on the broadest category of County employees, those participating in the Public Employees Retirement System (PERS).

QUESTION

May the Eureka County Commission establish a group plan eligibility exclusion from a premium subsidy benefit paid by the County for PERS participating employees that are terminated for misconduct, and for PERS participating employees or PERS eligible retirees that are convicted for work related misconduct?

ANALYSIS

A premium subsidy benefit is one where the employer is contributing a financial subsidy in a defined proportion or amount to assist in the payment of the total premium cost of coverage for particular eligible enrollees in the

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employer's group insurance plan. The authority of the Eureka County Commission (as the plan sponsor of the County Plan) to establish and alter the benefits eligibility of the participants in the Plan is derived from: 1) the relevant Nevada Revised Statutes; 2) the regulations or ordinances adopted by a government sponsor of a relevant plan of benefits; and 3) the County Plan documents. A plan's documents establish a contractual agreement and can be made up of one or more group insurance contracts between Eureka County, the insurance provider(s) and the enrolled participants during the County Plan's relevant enrollment period.<sup>1</sup> Whether or not such creates a vested property right in a premium subsidy protected under constitutional principles is a question to be evaluated in each case. In *Lawrence v. Town of Irondequoit*, 246 F. Supp. 2d 150, 156--57 (W.D.N.Y. 2002) the court stated:

I agree with the Town that plaintiffs here do not have a constitutionally protected property interest in receiving fully paid Blue Million coverage. 'Property interests protected by due process are neither created nor defined by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' " *Martz v. Village of Valley Stream*, 22 F.3d 26, 29 (2d Cir.1994) quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). 'When determining whether a plaintiff has a claim of entitlement, we focus on the applicable statute, contract or regulation that purports to establish the benefit.'" *Id.* at 30, citing *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 175 (2d Cir.1991).

### County Authority Regarding Active Employees

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<sup>1</sup> Generally, plan documents define the eligibility and coverage agreement for a one-year enrollment period. The County Plan is an employee benefits governmental plan and is not subject to the requirements of the Employee Retirement Income Security Act (ERISA). 29 U.S.C. 1003(b)(1). The County Plan sponsor (Eureka County) is not a "person" as defined by under NRS 679A.100, and therefore is not an "insurer" subject to the Nevada Insurance Code, though the Plan's contracted insurance providers may be. See NRS 0.039 (the general definition of the word "person" in the Preliminary Chapter to the Nevada Revised Statutes).

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

The statutory authority for the County Plan is found generally in NRS 287.010-- 287.040, inclusive. NRS 287.010(1)(a) provides the Eureka County Commission the discretionary authority to:

Adopt and carry into effect a system of group life, accident or health insurance, or any combination thereof, for the benefit of its officers and employees, and the dependents of officers and employees who elect to accept the insurance and who, where necessary, have authorized the governing body to make deductions from their compensation for the payment of premiums on the insurance.

In addition to the authority to “adopt and carry into effect a system [of group insurance,]” NRS 287.010(1)(b) likewise provides permissive authority to the County Commission to “purchase group policies of life, accident or health insurance, or any combination thereof” for the same beneficial purpose as set forth above. Thus it is a discretionary employment benefit whether or not to provide a group insurance plan to the employees of Eureka County.

NRS 287.010(1)(d) provides the County Commission the discretionary authority to, “Defray part or all of the cost of maintenance of a self-insurance fund or of the premiums upon insurance. The money for contributions must be budgeted for and in accordance with the laws governing the county, . . .”

With regard to active officers, employees and their dependent coverage, the statutes do not guarantee a County Plan participant a right to obtain a premium subsidy, which defrayed cost of coverage is solely a discretionary benefit that may be offered by the County Commission. Once the County Commission chooses to provide the premium subsidy to the group coverage, any conditions precedent or subsequent (whether by ordinance, regulation or contract) to original or continuing eligibility of each individual for such subsidy must be guided by the boundaries of law regarding “vested” benefits. *Nicholas v. State*, 116 Nev. 40, 44, 992 P.2d 262, 264-265 (2000) (“Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived; it has ripened into a full contractual obligation.”); see also *Tiedemann v. Department of Management Services*, 862 So.2d 845, 846 (Fla. App. 2003).

As for her equal protection challenge, Tiedemann concedes that mental illness, the basis for her claim, involves neither a



## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

suspect class nor a fundamental right. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *D.W. v. Rogers*, 113 F.3d 1214, 1219 (11th Cir.1997). Therefore, the Plan's treatment of self-inflicted injuries will survive an equal protection challenge if it is rationally related to some legitimate government purpose. *See City of Cleburne*, 473 U.S. at 446, 105 S.Ct. 3249. The law may differentiate between persons similarly situated if there is a rational basis for doing so.

*Tiedemann*, 862 So.2d at 846.

Unless the premium subsidy benefit has somehow vested, and the premium subsidy benefit is not a fundamental right, and its denial is not done for some wrongful discriminatory reason regarding a member of a protected class, the denial should survive legal challenge provided a court finds the denial is rationally related to some legitimate government purpose. Protecting public funds has been found to be a legitimate government purpose. *Id.* at 847. Since the statutes do not cause the premium subsidy benefit to vest, the County Commission has the authority to establish eligibility conditions for its application to active employees participating in the County Plan.

### County Authority Regarding Active Employees that Retire

With regard to retirees, determining whether there is a vested right to a premium subsidy is complicated by a local government employee's unilateral one-time option to choose where his retirement health benefits plan will reside. With regard to local government officers and employees and NRS 287.023, the Attorney General's Office has previously opined in the context of determining dependent coverage that "[e]ither the employee or his dependents must have something that could be continued at his retirement before the option to join the state program matures." Op. Nev. Att'y Gen. No. 98-26 (September 23, 1998). We stated in that opinion:

Subsection 1 of NRS 287.023 sets forth the three options which are available at the local government employee's retirement: 1) cancel existing group insurance; 2) continue any such existing group insurance; or 3) join the state's program of group insurance. However, all of these

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

options are contingent upon a requirement that “at the time of his retirement, [he] was covered *or had his dependents covered* by any group insurance or medical and hospital service established pursuant to NRS 287.010 and 287.020.” NRS 287.023 (emphasis added); *see also* NRS 287.010 and 287.020 (which set forth the authority for local government group insurance programs); *compare* NRS 287.041-.049 (which sets forth the authority for the state’s program of group insurance). Timely notice under NRS 287.023(3) is a condition precedent to the option to continue coverage with the local government or otherwise join the state program for the first time. *See also* NRS 287.045(5).

Therefore, if at the time the county employee enters retirement status he was participating in the County Plan, he has an option to stay with the County Plan (continue) or alternatively join the State of Nevada’s Public Employees’ Benefits Program (PEBP). This option vests upon timely notice and enrollment. With regard to the right to premium subsidy for retirees of a local government plan, such as the County Plan, the Legislature provides the following in NRS 287.023(4):

A governing body of any county . . .

(a) *May pay* the cost, or any part of the cost, of coverage established pursuant to NRS 287.010, 287.015 or 287.020 for persons who *continue* that coverage pursuant to subsection 1, but must not pay a greater portion than it does for its current officers and employees.

(b) *Shall pay* the same portion of the cost of coverage under the Public Employees’ Benefits Program for persons who *join the Program* upon retirement pursuant to subsection 1 as the State pays pursuant to subsection 2 or NRS 287.046 for persons retired from state service who have continued to participate in the Program. [Emphasis added.]

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Once a retiring County Plan employee exercises the option to join the State's Public Employees' Benefits Program, any previously existing discretionary authority of the County Plan regarding the provision of a premium subsidy for its active employees or retirees that continue in the County Plan is superceded and the retiree's rights are based upon the PEBP's statutes, regulations, and contracts. See NRS 287.023(4)(b) (Eureka County's mandatory duty to pay a premium subsidy for its retirees that have joined the PEBP). Unavoidably, this right to premium subsidy is vested as a matter of law and is not a discretionary benefit within Eureka County's authority to alter.

### County Authority Regarding Terminated PERS-Vested Employees of the County

NRS 287.046(2) provides: "The Department of Personnel shall pay a percentage of the base amount provided by law for that fiscal year toward the cost of the premiums or contributions for the Program [PEBP] for *persons retired from the service of the state who have continued to participate in the Program.*" [Emphasis added.]

NRS 287.046 is not applicable to local government employees and State of Nevada employees (who are PERS-vested individuals) that terminate employment (either voluntarily or involuntarily) prior to reaching the age limitation for retiring under the Public Employees Retirement System. This statute is not applicable to local government retirees that opt to join the PEBP pursuant to NRS 287.023 at their retirement, whose premium subsidy rights are controlled solely by NRS 287.023(4). The break in PEBP participation caused by voluntary or involuntary termination of any state employee (or any local government employee participating in the PEBP under an agreement between PEBP and their local government employer pursuant to NRS 287.045(3)) in the time period contiguous to the act of retirement under PERS, is a break in service that prevents the person from "continuing" the employment benefits and thus serves as a statutory bar to any claim of entitlement to a premium subsidy under NRS 287.046 or NRS 287.023(4)(b). See Op. Nev. Att'y Gen. No. 98-26, page 187-188 (September 23, 1998) ("The plain meaning of "continue" in the context of the statute presumes there were benefits in place that could be continued. . . . Either the employee or his dependents must have something that could be continued at his retirement before the option to join the state program matures. . . . The option to continue relates back to the existing coverage in place at retirement that can be continued with that local government program.")

For PERS-vested individuals from Eureka County employment that retire under the Public Employees Retirement System at a time when they are neither participating in PEBP or the County Plan (whether by choice or termination from employment), their right to health care benefits is controlled by the

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

discretionary benefits offered by the County Plan, if any, and the regulations of the PEBP. The PEBP's regulation, NAC 287.095 states:

"Participant" includes the following persons who are eligible to participate in the Program:

1. An officer or employee of a participating public agency;
2. *A retired officer or employee;*
3. A dependent of such an officer or employee or retired officer or employee;
4. A survivor of a deceased officer or employee of a public employer if the deceased officer or employee had 10 years or more of service credit, as determined by the appropriate certifying agency, and is deemed to be retired pursuant to NRS 286.676;
5. A survivor of a deceased retired officer or employee;
6. A surviving spouse of a police officer, fireman or official member of a volunteer fire department who was killed in the line of duty;
7. A surviving child of a police officer, fireman or official member of a volunteer fire department who was killed in the line of duty;
8. A state employee participating in a biennial plan that lasts not less than 4 months or more than 6 months who plans to return to the same or similar position in the next authorized biennial employment period if the state employee has timely enrolled, reenrolled, opted to continue coverage or insurance, or opted to join the Program pursuant to this chapter and chapter 287 of NRS in any applicable group coverage or insurance offered by, through or in cooperation with the Program;
9. A former member of the board of trustees of a school district pursuant to NRS 287.024; and
10. A Legislator. [Emphasis added.]

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The PEBP's regulation, NAC 287.135, defines a "retired officer or employee" to include:

'Retired officer or employee' means:

1. *An officer or employee of a public employer who has met the requirements to receive, and is receiving any distribution of, benefits from:*

- (a) The Judges' Retirement System;
- (b) The *Public Employees' Retirement System (PERS)*;
- (c) The Legislators' Retirement System; *or*
- (d) A long-term disability plan of the public employer.

2. An officer or employee of a public employer who:

- (a) Has met the requirements to receive, and is receiving any distribution of, benefits from a retirement program for professional employees offered by or through the University and Community College System of Nevada, including, without limitation, a retirement plan alternative provided pursuant to NRS 286.802, a tax sheltered annuity or a deferred compensation plan; and
- (b) Has participated in the retirement program described in paragraph (a) for at least 5 years as a full-time employee or the equivalent of a full-time employee. [Emphasis added.]

The PEBP applies this definition to NAC 287.530(5) to allow PERS-vested officers and employees from both state and local governments (that have a break in service immediately preceding PERS retirement) to join the PEBP so long as they have at least five years of service prior to receiving retirement benefits from PERS. NAC 287.530(5) states:

A person who, on the official date of his retirement or total disability, is not a participant in the Program and who:

- (a) Is vested in a retirement system as a retiree;
- (b) Attains the age of eligibility or is totally disabled;

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

- (c) Receives a retirement or disability benefit from such a system;
- (d) Wishes to join the Program;
- (e) Has retired or was disabled directly from service with a public employer with at least 5 years of service before receiving retirement benefits; and
- (f) Within 60 days after his official date of retirement or total disability:
  - (1) Notifies his last public employer of his intent to enroll in the Program; and
  - (2) Enrolls in the Program, is subject to a 60-day waiting period.

However, this conditional right for a PERS-vested individual to join the PEBP (that cannot “continue” benefits contiguously between employment and retirement) does not include any right to premium subsidy from either the state or a local government. *Compare* NRS 287.046(2); *compare also* NRS 287.023(4).<sup>2</sup> Therefore, the County Commission has the authority to establish eligibility conditions for this category of PERS-vested retirees to receive any premium subsidy from the County.

### CONCLUSION

The authority of the County Plan sponsor and the rights of the participants in the Plan are derived from: 1) the relevant Nevada Revised Statutes; 2) any regulations or ordinances adopted by a government sponsor of a relevant plan of benefits; and 3) the County Plan documents. The County Commission has the authority to establish “misconduct” eligibility exclusions from the right to receive a premium subsidy for employees and retirees that “continue in the County Plan.” A voluntary or involuntary break in employment service or break in continuing coverage with the County that is contiguous to any PERS retirement prevents an employee or former employee from “continuing” in either the County Plan or by option in the PEBP, and the break extinguishes all statute-based claims to a premium subsidy. However, the County Commission has no authority to alter any vested statutory right to premium subsidy for its active employees that timely opt to join the PEBP at retirement pursuant to NRS 287.023.

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<sup>2</sup> NAC 287.095 includes numerous other categories of PEBP eligible participants. Their rights regarding benefits should be considered separately on a case-by-case basis regarding whether or not their benefits are fully vested.

**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

Sincere regards,

BRIAN SANDOVAL  
Attorney General

By: Randal R. Munn  
Special Assistant Attorney General

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**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

AGO 2005-07 AGREEMENTS; CITIES AND TOWNS; COUNTIES;

FUNDS: TMWA is vested with the power to make charitable donations to the River Fund.

Carson City, June 23, 2005

Honorable Richard A. Gammick, District Attorney, County of Washoe  
Post Office Box 30083, Reno, Nevada 89520

Dear Mr. Gammick:

On January 21, 2005, this Office issued an opinion concerning the Truckee Meadows Water Authority (TMWA) and whether it can make charitable contributions to the Truckee River Fund (River Fund). Attorney General Opinion (AGO) No. 2005-01 concluded that TMWA is not vested with the power to make charitable donations to the River Fund.

Since AGO No. 2005-01 was issued, new information, including a persuasive legal analysis<sup>1</sup> concerning both TMWA itself and the River Fund, has been submitted. Because of the new information and a more complete understanding of the purposes of TMWA and the River Fund, we have reconsidered our opinion. Based on the following analysis, we believe that TMWA, a joint powers authority created pursuant to Nevada Revised Statutes (NRS) chapter 277 and a Cooperative Agreement entered into among Reno, Sparks, and Washoe County, is able to make charitable contributions to the River Fund<sup>2</sup> as long as the contributions further TMWA's purpose to develop and appropriately manage the water resources of the Truckee Meadows geographic area.

QUESTION

Whether TMWA may make charitable contributions to the River Fund?

ANALYSIS

Pursuant to NRS chapter 277, Reno, Sparks, and Washoe County entered into a Cooperative Agreement creating TMWA to, among other things, develop and manage the present and future water needs of the greater Truckee Meadows community. Cooperative Agreement at 2. The parties expressed the desire "to establish a separate legal entity to exercise power, privilege and

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<sup>1</sup> Michael Pagni provided an in-depth analysis by letter to Attorney General Brian Sandoval dated May 3, 2005 (Pagni letter)

<sup>2</sup> The River Fund is intended to fund projects designed to improve the Truckee River watershed, water quality, and recreational uses of the river. The Cooperative Agreement creating TMWA establishes that TMWA's purpose is to develop and appropriately manage the water resources of the Truckee Meadows geographic area.



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authority, . . . to develop and maintain supplies of water for the benefit of the Retail Service Area . . . .”<sup>3</sup> Cooperative Agreement at 2.

NRS 277.100 defines a “public agency” to include “[a]ny agency of this state . . . .” NRS 277.120 provides that any agreement made pursuant to NRS 277.110 which establishes a separate legal or administrative entity to conduct the relevant joint or cooperative undertaking is a separate legal entity. Here the Cooperative Agreement plainly evidences the intention of Reno, Sparks, and Washoe County to create a “political subdivision of the State of Nevada” which “shall be separate from the Members, pursuant to NRS 277.074 and 277.120.” Cooperative Agreement at 5.

NRS 277.120 sets forth the statutory requirements for the establishment of such a separate legal or administrative entity. NRS 277.120 provides, in relevant part:

1. Except as otherwise provided in [NRS 277.105](#), any agreement made pursuant to [NRS 277.110](#) which establishes a separate legal or administrative entity to conduct the joint or cooperative undertaking shall specify:
  - (a) The precise organization, composition and nature of such entity and the powers delegated thereto.
  - (b) The duration of the agreement.
  - (c) The purpose of the agreement.
  - (d) The manner of financing such undertaking and of establishing and maintaining a budget therefor.
  - (e) The method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.
  - (f) Any other necessary or proper matters.

In addition to expressing the intention to create a separate legal entity, the Cooperative Agreement specifically designates TMWA, the boundaries of its authority, its duration, its purpose, the manner of financing the agency, maintenance of an annual budget, the means for terminating the agreement,

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<sup>3</sup> “Retail Service Area” is defined by the Cooperative Agreement to mean “the former Sierra Pacific Power Company retail water service area as described in the agreement between Sierra Pacific Power Company and Washoe County dated June 25, 1996, as amended, or as said retail service area may be modified from time to time pursuant to such agreement.” Cooperative Agreement at 4.

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and numerous other “necessary or proper matters” incident to TMWA’s mission. See Cooperative Agreement at 3, 5, 6, 8, 17, 22, 23.

NRS 277.120 recognizes that when local governments create a joint powers authority such as TMWA, they establish “*a separate legal or administrative entity* to conduct the joint or cooperative undertaking . . . .” [Emphasis added.] By evidencing the clear intention to create such a separate legal entity in the Cooperative Agreement, Reno, Sparks, and Washoe County created TMWA to be an independent and legally equivalent public agency.

NRS chapter 277 contemplates that *any* governmental function may be exercised by a joint powers authority. NRS 277.110 provides that any public agency “may exercise all the powers, privileges and authority conferred by NRS 277.080 to 277.180, inclusive, upon a public agency.” Thus, based on this precise statutory language, it appears that TMWA, as a public agency, is empowered by NRS chapter 277 to exercise the same discretionary powers as its local government creators as long as these powers are exercised consistently with the mission of TMWA and within its geographic area.

NRS 244.1505 and 268.028 vest counties and incorporated cities with the discretionary power to expend money to nonprofit organizations “for a selected purpose if it provides a substantial benefit to the inhabitants.” NRS 277.045(1) directs that political subdivisions “may enter into a cooperative agreement for the performance of *any* governmental function.” [Emphasis added.] Because Reno, Sparks, and Washoe County have statutory authority by virtue of NRS 244.1505 and 268.028 to expend money to nonprofit, charitable organizations for selected, beneficial purposes, it follows that TMWA has the same authority to perform the same governmental function. NRS 277.045.

The Cooperative Agreement grants TMWA the powers consistent with those previously exercised by Sierra Pacific Power Company for the management and stewardship of the water resources within the Truckee Meadows. Because most of the water used in the Truckee Meadows in normal water years is derived from the Truckee River, management of the river is central to TMWA’s mission. The River Fund is intended to further appropriate stewardship of the river’s resources. As set forth in the Pagni letter, the River Fund provides “a funding source for larger projects than contemplated by the Community Outreach Plan, by increasing community involvement and attracting matching private funding sources to enhance the value of TMWA’s contributions.” Pagni letter at 5. According to Pagni, TMWA provides “seed money” for private investments in projects that are independently determined by TMWA to protect and enhance water quality or water resources of the Truckee River or its watershed. All expenditures to the fund are subject to TMWA Board approval as established in specially adopted resolutions. Assuming that contributions to the River Fund are for projects within

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TMWA's geographical jurisdiction, such contributions appear to be consistent with TMWA's mission.

CONCLUSION

Based on the foregoing, we have determined that the Truckee Meadows Water Authority does have the legal authority to make contributions to the Truckee River Fund for the furtherance of its objectives as long as its contributions go to projects within TMWA's geographic jurisdiction.

Sincere regards,

BRIAN SANDOVAL  
Attorney General

By: MARTA A. ADAMS  
Senior Deputy Attorney General

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**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

**AGO 2005-08 COMMISSIONERS; MEETINGS; OPEN MEETING LAW:**

A public body may create reasonable rules and regulations regarding the written remarks of members of the public. However, any rule or regulation that discourages public comment, or is content based, may violate the Open Meeting Law.

Carson City, July 12, 2005

Richard A. Gammick, Washoe County District Attorney, Washoe County  
Court House, 75 Court Street, Reno, Nevada 89520-3083

Dear Mr. Gammick:

You have requested an opinion from the Attorney General's Office regarding the following question.

**QUESTION**

What limitations can a board of county commissioners (board) place on written remarks prepared by the general public and submitted to the board for inclusion in the minutes pursuant to NRS 241.035(1)(d)?

**ANALYSIS**

NRS 241.035(1)(d) states:

1. Each public body shall keep written minutes of each of its meetings, including:

. . . .

(d) The substance of remarks made by any member of the general public who addresses the body if he requests that the minutes reflect his remarks or, if he has prepared written remarks, a copy of his prepared remarks if he submits a copy for inclusion.

In analyzing the public comment requirements of the Open Meeting Law, this office previously opined that a public body may place "reasonable rules and regulations" on public comment. *See NEVADA OPEN MEETING LAW MANUAL*, § 8.04 (9<sup>th</sup> ed. 2001). Such rules and regulations must be viewpoint neutral, but the public body may prohibit comments that are "not relevant to, or within the authority of, the public body," or if the comments are "repetitious, slanderous, offensive, inflammatory, irrational or amounting to personal attacks or interfering with the rights of other speakers." *See NEVADA OPEN MEETING LAW MANUAL*, § 8.04 (9<sup>th</sup> ed. 2001) *quoting* from AG File No. 00-

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

047 (April 27, 2001). Further, “[a]ny rule or regulation . . . that . . . limits or restricts . . . public comment . . . must be clearly articulated on the agenda.” *See* OMLO 99-08 (July 8, 1999). If such rules and regulations discourage or prevent public comment, even if technically compliant with the Open Meeting Law, they may violate the spirit of the Open Meeting Law. *See* OMLO 99-11 (August 26, 1999).

The United States Supreme Court has held: “[h]owever wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation.” *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984). However, “some state constitutions” and state laws may be interpreted differently and provide such right, “but the right is qualified to permit public bodies to regulate the time and circumstances of public participation.” *OPEN MEETING LAWS* 2d, A. Schwing, § 5.94, p. 247 (2000). In Nevada, a member of the general public only has the *right* to address the public body pursuant to the public comment period created in NRS 241.020(2)(c)(3). NRS 241.035(1)(d) states that the public body must retain a copy of the written remarks of a member of the general public who addresses the public body as minutes. Therefore, the right to submit written remarks stems from the public comment period in NRS 241.020(2)(c)(3), and as a result, this Office believes that it is acceptable for a public body to create reasonable rules and regulations with regard to written remarks from members of the general public.

The Washoe County Clerk would like to create a policy that limits written remarks from the general public to the following:

Persons are invited to submit written remarks for all matters, both on and off the agenda. Written remarks presented for inclusion in the Board’s minutes must be flat, unfolded, on white paper of standard quality and 8 ½ by 11 inches in size. Written remarks shall not exceed five (5) pages in length. The County Clerk will not accept for filing any submission that does not comply with this rule. On a case-by-case basis, the Board may permit the filing of noncomplying [sic] written remarks, documents and related exhibits pursuant to NRS 241.035(1)(e).

The suggested policy appears content neutral. The policy limiting the number of pages has the same purpose as time limitations placed on oral public comments. The requirement regarding the uniformity of the paper is

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reasonable because it allows the clerk to maintain the records in a consistent, organized fashion. Thus, as long as this rule and regulation is articulated on the board's agenda, it complies with the Open Meeting Law.

CONCLUSION

A public body may create reasonable rules and regulations regarding the written remarks of members of the public. However, any rule or regulation that discourages public comment, or is content based, may violate the Open Meeting Law.

Sincere regards,

**BRIAN SANDOVAL**  
Attorney General

By: **NEIL A. ROMBARDO**  
Senior Deputy Attorney General

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## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

### AGO 2005-09 BOARDS & COMMISSIONS: CONFIDENTIALITY:

GOVERNOR: TERM LIMITATIONS: The Governor may make an appointment to fill a vacancy on a board or commission for a term of years that expires before or after November 7, 2006, up to the time the new governor is sworn in unless the vacancy has remained unfilled for a period of 90 days. In that case, the Governor shall not, within 60 days preceding the expiration of his term in office, fill the vacancy to be effective beyond the termination of his own term in office.

Carson City, September 28, 2005

Governor Kenny C. Guinn, Office of the Governor, 101 North Carson Street  
Carson City, Nevada 89701

Dear Governor Guinn:

You have asked a series of questions related to your appointment authority pertaining to State Boards and Commissions. Several of these questions have been addressed in previous opinions<sup>1</sup> of this office and some are issues of first impression.

#### QUESTION ONE

May the Office of the Governor keep a completed application and background check of an applicant for a board or commission confidential?

#### ANALYSIS

NRS 239.010(1) provides, "All public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person..."

In a September 25, 1995 confidential memorandum opinion from Assistant Attorney General Brooke Nielsen to Governor's Counsel Ann Andreini, this Office opined that, "Although there may be public interest in the identity of applicants for governor appointed positions, the governor's office cannot lawfully release the identity of such individuals who have written to the governor seeking appointment to state office, without that individual's prior written agreement." *See Attachment 1.*

However, in an earlier official Attorney General's Opinion, this office opined that the public interest outweighed any need for confidentiality in the process of selecting a university system chancellor. Op. Nev. Att'y Gen. No. 94-16 (January 4, 1994). *See Attachment 2.*

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<sup>1</sup> These opinions are attached, as noted.

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

The September 25, 1995 memorandum opinion relied on NRS 378.290(2)(a), which prohibits the public inspection of correspondence to the Governor in the records of the Division of State Library and Archives that “identifies or can be readily associated with the identity of any person other than a public officer or employee acting in his official capacity . . . unless the person so named or identified is deceased or gives his prior written permission for the disclosure.”

The memorandum opinion states:

The clear implication of [NRS 378.290] Subsection 2(a) is that a governor’s correspondence is confidential even after it is turned over to the state archivist to the extent that the identity of non-public officers might be disclosed. It would be irrational to conclude that a governor’s correspondence is public when he is in office and only becomes confidential after he leaves office. The rules of statutory interpretation dictate that all segments of a statute must be construed as a whole to give meaning to all, and that statutes may not be interpreted to produce unreasonable results. *See Breen v. Caesars Palace*, 102 Nev. 79, 714 P.2d 1070 (1986), *White v. Warden, Nevada State Prison*, 96 Nev. 634, 614 P.2d 536 (1980).

Although, generally, one might argue that the public interest in knowing who is seeking appointment to public office may outweigh the privacy rights of those persons, the clear intent of NRS 378.290(2)(a) is that correspondence received by the Governor is confidential, to the extent the identity of non-public officers cannot be disclosed. Not all government held documents are “public records.” *See City of Reno v. Reno Gazette Journal*, 119 Nev. 55, \_\_\_, 63 P.3d 1147, 1150 (2003) (“The Nevada Public Records Act merely provides that public records that are not ‘declared by law to be confidential,’ must be open for inspection. It does not declare that records regarding acquisition of property are public.”)

### CONCLUSION TO QUESTION ONE

Per NRS 378.290, the Office of the Governor may keep a completed application and background check of an applicant for a board or commission confidential to the extent that they identify or can be readily associated with the identity of the applicant in his non-official capacity.



## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

### QUESTION TWO

May a person serve on a board or commission before or without completing the oath or affirmation?

### ANALYSIS

NRS 282.010(1) provides, “Members of the Legislature and all officers, executive, judicial and ministerial, shall, before entering upon the duties of their respective offices . . . take and subscribe to the official oath.” [Emphasis added.]<sup>2</sup>

NRS 281.005(1) defines “public officer” as “a person elected or appointed to a position which: (a) Is established by the Constitution or a statute of this state . . . ; and (b) Involves the continuous exercise, as part of the regular and permanent administration of government, of a public power, trust or duty.”<sup>3</sup>

The “refusal or neglect of the person elected or appointed to take the oath of office, as prescribed in NRS 282.010” creates a vacancy in that office. NRS 283.040(1)(e).

Because NRS 282.010(1) requires all executive branch officers to take and subscribe to the official oath “before entering upon the duties of their respective offices,” a person may not serve on a board or commission before or without completing the oath or affirmation.

### CONCLUSION TO QUESTION TWO

A person may not serve on a board or commission before or without completing the oath or affirmation as required by NRS 282.010(1).

### QUESTION THREE

Can an appointee who has been appointed to serve for a term of years, and who is not subject to a term limit, continue to serve until a person is appointed to replace him?

### ANALYSIS

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<sup>2</sup> NRS 41.0307(4) provides that the terms “public officer” and “officer” include, “A member of a part-time for full-time board, commission or similar body of the State or a political subdivision of the State which is created by law.

<sup>3</sup> For purposes of this analysis, we will assume that all members of boards and commissions appointed by the Governor are public officers in the executive branch pursuant to NRS 41.0307(4) and NRS 281.005(1). *See* Op. Nev. Att’y Gen. No. 352 (November 5, 1954) (County Game Management Board members created pursuant to the State Fish and Game Act of 1947 were public officers required, under the Constitution and Statutes, to take and subscribe to the constitutional oath of office). *See Attachment 3.*

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Except as otherwise provided by law, the provisions of NRS Chapter 232A apply to all members appointed by the Governor to boards, commissions or similar bodies. The provisions of NRS chapter 232A are intended to supplement present statutes that specifically apply to such boards, commissions or other similar bodies. *See* NRS 232A.010.

NRS 232A.020(1) provides, “After the Governor’s initial appointments of members to boards, commissions or similar bodies, all such members shall hold office for terms of 3 years or *until their successors have been appointed and have qualified.*” [Emphasis added.] This general statute specifically provides for appointed members of boards and commissions to hold over in office until their successors have been appointed and qualified. This general rule should be applied to all boards and commissions to the extent their specific statutes are silent on the subjects.

### ANSWER TO QUESTION THREE

A member of a board or commission who has been appointed to serve for a term of years may continue to serve until his successor has been appointed and qualified unless the particular board’s or commission’s statute provides otherwise.

### QUESTION FOUR

If an appointee continues to serve beyond the ending date of his term of years appointment, what is the starting date and ending date for the term of years appointment of his successor?

### ANALYSIS

The general rule is that a holdover does not change the length of the holdover member’s term of years, but rather shortens the tenure of the succeeding member.

A term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he or she was appointed. The period between the expiration of an officer’s term and the qualification of his or her successor is as much a part of the incumbent’s term of office as the fixed constitutional or statutory period. This is true even where a person is elected as his or her own successor. Thus, a holdover does not change the length of the term, but merely shortens the tenure of the succeeding

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officer. Accordingly, when the term of an office holder has expired and the office holder remains in office as a holdover for a period of time until his or her successor is appointed and qualified, the successor's appointment must be made for the term commencing on the date the office holder's term expired rather than on the date of the appointment, and the duration of the appointed successor's term will be the unexpired balance of the term that commenced on the expiration of the original office holder's term.

[63C Am. Jur. 2d *Public Officers and Employees* Sec. 151 1997).]

In *Seway v. Schultz*, 268 N.W.2d 149 (S.D. 1978) members of the county planning and zoning board continued to serve beyond their designated terms of years due to the failure of the county commissioners to make reappointments or new appointments. In deciding that the holdover period after the expiration of the terms must be included in the appointments of members to succeeding terms, the court said:

It is clear that the statute fixes the term of the office and not that of the officer. The statute conclusively establishes that the office has a fixed and definite term of five years after the initial staggering process is completed. The term of office of each successive appointee, whether for an entire term or for part of an unexpired term, is controlled by the date fixed by the first appointment. Although there may be holdovers into portions of succeeding terms and appointments are made to replace these holdovers, the term of the replacement can only run from the expiration of the last legal term. *Id.* at 151.

In *Seway v. Schultz*, the purpose of the South Dakota statute, SDCL 11-2-3, was to prevent more than one-third of the positions on the board from expiring in any one year. While most Nevada board and commission statutes do not specifically provide for staggered terms, there is clearly a public policy interest and a common law basis for having a term of years of an "office" begin and end in a predictable fashion.

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### CONCLUSION TO QUESTION FOUR

A holdover appointee does not change the length of the office's term of years, but rather shortens the tenure of the succeeding member to hold the office's term of years. The successor member's tenure is then the unexpired balance of the office's term of years that commenced running prior the successor's appointment.

### QUESTION FIVE

What must the Governor do to comply with the requirements of NRS 223.190?

### ANALYSIS

NRS 223.190 provides, "At the earliest day practicable, the Governor shall lay before the Legislature a statement of all appointments made by him to fill vacancies in office since the preceding session."

You have provided us a copy of the most recent such statement to the Legislature dated February 4, 2003, the second day of the 2003 Legislative Session. That statement includes the Governor's appointments to State departments, boards, commissions and committees, county commissions, town boards, conservancy districts and district courts. The statement identifies the appointee, the position and the date of appointment.

NRS 223.190 requires the Governor to provide a statement of the appointments he has made to fill vacancies in office since the last session of the Legislature at the earliest practicable date. The Governor's February 4, 2003 statement certainly appears to meet that requirement. While "earliest day practicable" has no precise meaning in this context, it can reasonably be interpreted to mean as soon as possible after the Legislature is in session and the information is available and compiled.<sup>4</sup>

### CONCLUSION TO QUESTION FIVE

To comply with the requirements of NRS 223.190, the Governor must provide a statement of the appointments he has made to fill vacancies in office since the last session of the Legislature as soon as possible after the Legislature is in session and the information is available and compiled.

### QUESTION SIX

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<sup>4</sup> We have found no statute or court case defining "earliest day practicable." A disciplinary proceeding before the Arizona Supreme Court, *In the Matter of a Suspended Member of the State Bar of Arizona, Michael C. Blasnig*, 174 Ariz. 9, 846 P.2d 822 (1992), referred to the conducting of a hearing "at the earliest practicable date, but in no event later than thirty days after receipt of said notice."

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May the Governor make an appointment to fill a vacancy on a board or commission for a term of years that expires before November 7, 2006, but is not filled before that date? May the Governor make an appointment to fill a vacancy on a board or commission for a term of years that expires after November 7, 2006, but before the next Governor is sworn in?

### ANALYSIS

These two questions will be answered as one, since the analysis is the same.

One specific limitation on the Governor's authority to fill a vacancy to appointive office is NRS 283.120 which states:

Whenever any vacancy shall occur in any appointive office or position in this state required by law to be filled by the Governor, such vacancy remaining unfilled for a period of 90 days, the Governor shall not, within 60 days preceding the expiration of his term in office, fill the vacancy to be effective beyond the termination of his own term in office.

In an informal letter opinion of June 25, 1979, this office opined that a prospective appointment by Governor Michael O'Callaghan made on December 5, 1978, to a vacancy that occurred at midnight on December 31, 1978, was valid because Governor O'Callaghan's successor, Governor Robert List was not sworn in until 10:00 a.m. on January 1, 1979. *See Attachment 4.* That opinion reasoned that pursuant to Article V, Section 4 of the Nevada Constitution, Governor O'Callaghan held his office "until his successor shall be qualified", which didn't occur until Governor List took his oath of office. Nevada Constitution, Article XV, Sec. 2.

### CONCLUSION TO QUESTION SIX

The Governor may make an appointment to fill a vacancy on a board or commission for a term of years that expires before or after November 7, 2006, up to the time the new governor is sworn in unless the vacancy has remained unfilled for a period of 90 days. In that case, the Governor shall not, within 60 days preceding the expiration of his term in office, fill the vacancy to be effective beyond the termination of his own term in office.

**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

Sincere regards,

BRIAN SANDOVAL  
Attorney General

By: JONATHAN L. ANDREWS  
Chief Deputy Attorney General

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## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2005-10 EMPLOYEES; CLASSIFICATIONS: An employee whose position is moved to the unclassified service pursuant to § 1 of Assembly Bill 577 of the 2005 Legislative Session, but who has elected to stay in the classified service of the State pursuant to § 2 of the bill, is not entitled to receive the two-grade increase authorized for the employee's former class series pursuant to § 11 of the bill.

Carson City, November 28, 2005

Jeanne Greene, Director, State of Nevada, Department of Personnel, 209 East Musser Street, Room 101, Carson City, Nevada 89701-4204

Dear Ms. Greene:

You have requested an opinion from this Office regarding the application to certain employees of the two-grade pay increase provided for in Assembly Bill 577 of the 2005 Legislative Session.

### QUESTION

Is an employee whose position is moved to the unclassified service pursuant to §1 of Assembly Bill 577 of the 2005 Legislative Session, but who has elected to stay in the classified service of the State pursuant to § 2 of the bill, entitled to receive the two-grade increase authorized for the employee's former class series pursuant to § 11 of the bill?

### ANALYSIS

During the 2005 Legislative Session, the Nevada Legislature passed Assembly Bill 577 (A.B. 577), Act of June 6, 2005, ch. 435, 2005 Nev. Stat. 1952. This enactment is of a type that recurs biennially to adjust salaries within the unclassified service of the State. Each legislative session this type of bill is informally referred to as the "unclassified pay bill," although the bill is also commonly used to implement cost-of-living adjustments to both the classified and unclassified services.

Pursuant to § 1 of A.B. 577, certain positions formerly in the classified service of the State were moved to the unclassified service of the State. However, pursuant to § 2(4) of A.B. 577, an employee whose position was moved from the classified service to the unclassified service has an option to remain in the classified service. Section 2(4) of A.B. 577 provides in relevant part:

4. An employee occupying a position that is currently in the classified service that is moved into the unclassified service pursuant to this act has the option to remain in the classified service *at his*

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*current grade*, with all rights afforded classified employees, or move into the unclassified service. If the employee chooses to move into the unclassified service, the employee cannot at a later date choose to return to the classified service while occupying this position. [Emphasis added.]

A.B. 577 also contains § 11, which provides a two-grade pay increase to certain classified employees, providing in relevant part:

1. To effect a two-grade pay increase on the classified employee compensation plan for certain law enforcement . . . personnel, the following amounts are hereby appropriated from the State General Fund to the State Board of Examiners for the Fiscal Year 2005-2006 and the Fiscal Year 2006-2007 . . . .

2. To effect a two-grade pay increase on the classified compensation plan for certain law enforcement . . . personnel, the following amounts are hereby appropriated from the State Highway Fund to the State Board of Examiners for the Fiscal Year 2005-2006 and the Fiscal Year 2006-2007 . . . .

The term, “certain law enforcement personnel” applies to only classes selected pursuant to authority set forth in § 11(3) of A.B. 577, which provides, in relevant part: “The Department of Personnel shall designate those law enforcement . . . classes eligible for the two-grade pay increases pursuant to this section.”

Thus the Legislature provided an employee whose position was moved from the classified service to the unclassified service the option to remain in the classified service, at his current grade, with all rights afforded classified employees. The Legislature’s use of the phrase “at his current grade, with all rights afforded classified employees” denotes an intent not to grant the two-grade increase provided for in § 11 to an employee in a position that is moved to the unclassified service and whose former class series is designated to receive a two-grade increase pursuant to § 11 if the employee elects to remain in the classified service of the State pursuant to § 2(4) of the act. However, such an employee would retain the rights provided to classified employees,



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such as rights concerning appointment, transfer, promotion, and separation from service.

Such an interpretation is consistent with the rule of statutory construction that “[c]ourts must construe statutes . . . to give meaning to all of their parts and language. . . . The court should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.” *Del Papa v. Bd. of Regents of the Univ. and Comm. Coll. Sys. of Nevada*, 114 Nev. 388, 392, 956 P.2d 770, 773-74 (1998) (citation omitted). Thus in determining the application of these sections, the Legislature’s use of the phrase “at his current grade” must be given meaning.

Furthermore, to construe § 4 to grant the two-grade increase provided for in § 11 to an employee in a position that is moved to the unclassified service, but who elects to remain in the classified service, would essentially write the phrase “at his current grade” out of § 4 or render it meaningless, violating the often relied-on tenet of statutory construction that “[n]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided.” *Rodgers v. Rodgers*, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994) (citation omitted). Any interpretation which would render a portion of a statute meaningless should be avoided and instead the word or phrase should be given a substantive interpretation. *Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). In fact, “effect and meaning must be given to every part of the statute which is being subjected to the process of construction—to every section, sentence, clause, phrase and word.” *Orr Ditch Co. v. Justice Court*, 64 Nev. 138, 150, 178 P.2d 558, 564 (1947).

We have been advised that because certain employees in a particular class series have elected to remain in the classified service at their current grades, other equivalent positions of employees who have transferred to the unclassified service will have a higher pay pursuant to § 1 of A.B. 577 than the positions of employees who elected to remain in the classified service. Such a result is not repugnant to the provisions of NRS 284.160. NRS 284.160 requires the Director of the Department of Personnel to prepare, maintain, and revise as necessary a classification plan for all positions in the *classified* service so that the same schedule of pay may be equitably applied to all positions in the same class. The Director has, in fact, prepared a classification plan for all positions in the classified service so that the same schedule of pay may be equitably applied to all positions in the same class. The election of an employee to remain in the classified service of the State at his current grade does not affect the classification plan for positions in the classified service, and the schedule of pay remains equitably applied to all positions in the same class.

Even if a conflict did exist between § 4 of the bill and NRS 284.160, the specific statute governs over the more general statute. “[I]t is an accepted rule

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of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally.” *Sierra Life Ins. Co. v. Rottman*, 95 Nev. 654, 656, 601 P. 2d 56, 57 (1979) (citation omitted). Both of these statutes relate to the pay of State employees. NRS 284.160 provides a general rule for preparing a classification plan for all positions in the classified service so that the same schedule of pay may be equitably applied to all positions in the same class. Section 4 of A.B. 577 provides a more specific rule concerning the pay of an employee whose position is transferred to the unclassified service, but who elects to remain in the classified service. Accordingly, under this tenet of statutory construction, the provisions of § 4 of A.B. 577 prevail over the general provisions of NRS 284.160.

Furthermore, “when statutes are in conflict, the one more recent in time controls over the provisions of an earlier enactment.” *Laird v. Nevada Pub. Employees Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982). This tenet of statutory construction also supports the conclusion that § 4 of A.B. 577 prevails over NRS 284.160. NRS 284.160 was most recently amended in 1991, whereas § 4 of A.B. 577 was enacted on June 6, 2005.

### CONCLUSION

An employee whose position is moved to the unclassified service pursuant to § 1 of Assembly Bill 577 of the 2005 Legislative Session, but who has elected to stay in the classified service of the State pursuant to § 2 of the bill, is not entitled to receive the two-grade increase authorized for the employee’s former class series pursuant to § 11 of the bill.

Sincere regards,

GEORGE J. CHANOS  
Attorney General

By: JAMES T. SPENCER  
Chief Deputy Attorney General

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**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

AGO 2005-11 EQUAL RIGHTS COMMISSION; DISCRIMINATION; PUBLIC ACCOMMODATIONS: NERC may accept and investigate charges of discrimination based upon sexual orientation by places of public accommodation, pursuant to the powers granted to it under NRS Chapter 233. In the event the Nevada Equal Rights Commission finds that a person has been discriminated against based upon their sexual orientation by a place of public accommodation, the Commission may take any action authorized in NRS Chapter 233 against the place of public accommodation.

Carson City, December 21, 2005

Birgit K. Baker, Director, Department of Employment, Training, and Rehabilitation, 500 East Third Street, Carson City, Nevada 89713

Dear Ms. Baker:

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

QUESTION ONE

May the Nevada Equal Rights Commission accept and investigate sexual orientation-based charges of discrimination by places of public accommodation?

ANALYSIS

This question arises from legislation enacted in 2005. Act of June 17, 2005, ch. 4, 2005 Nev. Stat. 92 (Special Session) (A.B. 5). This measure enlarged the jurisdiction of the Nevada Equal Rights Commission (NERC) by amending portions of NRS Chapter 233, permitting NERC to address discrimination in public accommodations on the basis of sexual orientation. However, no commensurate amendments were made to NRS Chapter 651, which directly governs public accommodations. From this disparity arise questions regarding NERC's authority.

The Legislature expressly amended NRS Chapter 233 by adding sexual orientation as a new category of discrimination which the public policy of the State opposes in certain instances. A new section was added to NRS 233.010 that reads:

It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all the people of the State, and to foster the right of all persons reasonably to seek and be granted services in places of public accommodation without discrimination, distinction or restriction because of race, religious creed, color, age, sex, disability, sexual orientation, national origin or ancestry.

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NRS 233.010(2).

The Legislature also supplied a definition of sexual orientation: "Sexual orientation' means having or being perceived as having an orientation for heterosexuality, homosexuality or bisexuality." NRS 233.020(5).

Further, NRS 233.150, as amended in Section 4 of A.B. 5, on its face authorizes NERC to investigate allegations of sexual orientation discrimination by places of public accommodation. It states as follows (additions are in italics):

The Commission may:

1. Order its Administrator to :

*(a) With regard to public accommodation, investigate tensions, practices of discrimination and acts of prejudice against any person or group because of race, color, creed, sex, age, disability, sexual orientation, national origin or ancestry, and may conduct hearings with regard thereto.*

*(b) With regard to employment and housing, investigate tensions, practices of discrimination and acts of prejudice against any person or group because of race, color, creed, sex, age, disability, national origin or ancestry, and may conduct hearings with regard thereto.*

2. Mediate between or reconcile the persons or groups involved in those tensions, practices and acts.

3. Issue subpoenas for the attendance of witnesses or for the production of documents or tangible evidence relevant to any investigations or hearings conducted by the Commission.

4. Delegate its power to hold hearings and issue subpoenas to any of its members or any hearing officer in its employ.

5. Adopt reasonable regulations necessary for the Commission to carry out the functions assigned to it by law.

The manner by which instances of alleged discrimination are presented to NERC for investigation is by complaint. NRS 233.156 states that "[t]he Commission shall accept any complaint alleging an unlawful discriminatory practice over which it has jurisdiction pursuant to this chapter." Following this, NRS 233.160 as amended in Section 5 of A.B. 5, specifies the manner in which a complaint may be filed.

The plain language of the statutory provisions shows that NERC is authorized by the Legislature to receive complaints of discrimination in public accommodations on account of sexual orientation. Likewise, consideration and investigation of such claims is within the jurisdiction of NERC.

### CONCLUSION TO QUESTION ONE

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NERC may accept and investigate charges of discrimination based upon sexual orientation by places of public accommodation, pursuant to the powers granted to it under NRS Chapter 233.

### QUESTION TWO

In the event NERC finds that a person has been discriminated against based upon his sexual orientation by a place of public accommodation, what action may the Commission take against the place of public accommodation, and/or what remedy is available to the complainant?

### ANALYSIS

To answer the question, we must examine the range of options available to NERC for enforcing state laws prohibiting discrimination in public accommodations, and then examine the impact of A.B. 5 on those options. These are found in Chapters 233 and 651 of the NRS.

As discussed above, NRS Chapter 233 outlines procedures for receipt and investigation of complaints regarding discrimination in public accommodations based on sexual orientation. Under NRS 233.170(4), NERC can issue a cease and desist order if it finds there is proof of discriminatory activities on the part of the accused. Under NRS 233.180, NERC can also apply to the district court, in the pertinent jurisdiction, for a temporary restraining order or permanent injunction.

Two sections of NRS Chapter 651, entitled "Public Accommodations," outline additional remedies for discrimination in public accommodations. Nevada Revised Statutes 651.080 provides for criminal penalties for those found guilty of discrimination in public accommodations. Nevada Revised Statutes 651.090 provides for recovery of actual damages, equitable relief, and attorney's fees by a party discriminated against in the area of public accommodations.

However, the protected classes enumerated under NRS Chapter 651 are more limited than those in NRS Chapter 233 as amended. NRS 651.070 provides that "All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin or disability." Absent, is any reference to sexual orientation as a protected class. Nevada Revised Statutes 651.110, entitled "Filing of complaint with Nevada Equal Rights Commission, evidences the same omission:

Any person who believes he has been denied full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of

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any place of public accommodation because of discrimination or segregation based on race, color, religion, national origin or disability may file a complaint to that effect with the Nevada Equal Rights Commission.

These omissions were not altered by the Legislature by any provision in A.B. 5, and it is therefore clear that sexual orientation is not one of the protected classes addressed in Chapter 651.

Nothing in NRS Chapter 233 or its amendments incorporates or references the criminal or civil penalties available under NRS 651.080 and NRS 651.090. Because the Legislature is deemed to have been aware of NRS Chapter 651 at the time it passed the amendments to NRS Chapter 233, *Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133 (1937), and it did not amend the former, we must conclude that the Legislature did not intend to make Chapter 651 remedies and penalties applicable to sexual orientation discrimination in public accommodation.<sup>1</sup>

This interpretation does not render any portions of either NRS Chapter 233 or NRS Chapter 651 nugatory. Although this result leaves fewer remedies available for one sort of discrimination than for another, it leaves adequate remedies to redress sexual orientation discrimination in public accommodations.

### CONCLUSION TO QUESTION TWO

In the event the Nevada Equal Rights Commission finds that a person has been discriminated against based upon their sexual orientation by a place of public accommodation, the Commission may take any action authorized in NRS Chapter 233 against the place of public accommodation, including ordering that the offending establishment cease and desist from the discrimination, and seeking a temporary restraining order or permanent injunction in district court. Civil and criminal penalties provided in Chapter 651 are not available for this type of discrimination.

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<sup>1</sup> Where particular language is used in one section but not another, the term or its equivalent should not be implied where excluded. *FTC v. Sun Oil Co.*, 371 U.S. 505, 514–15, 83 S.Ct. 358, 364, 9 L.Ed.2d 466 (1963); *Kraus & Bros. v. United States*, 327 U.S. 614, 625–26.

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Sincere regards,

GEORGE J. CHANOS  
Attorney General

By: DAVID W. NEWTON  
Deputy Attorney General

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**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

AGO 2005-12 KINDERGARTEN: GIFTED AND TALENTED: A four-year-old gifted and talented child cannot be admitted to kindergarten in the Clark County School District, according to NRS 392.040(2), and kindergarten is not a “special program” under NRS 388.490(2).

Carson City, December 9, 2005

Mary-Anne Miller, County Counsel, Office of the District Attorney,  
Civil Division, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Ms. Miller:

You have requested that this office provide guidance regarding age requirements for admission to kindergarten and special programs for “gifted and talented” pupils.

BACKGROUND

In your opinion request, you explained that parents of four-year-old “gifted and talented” children have asked that those children be admitted early to kindergarten because their children are emotionally, socially, and mentally ready. Their rationale is that kindergarten is capable of being considered a special program for “gifted and talented” students. Therefore, according to this rationale, since four-year-old “gifted and talented” pupils may be admitted to special programs established for such pupils, they can be admitted to public school kindergarten.

You have indicated that, “The Clark County School District does not have a special program established for 4 year old pupils at this time.” After analysis of the pertinent law, you concluded the following: “It is the opinion of this office that they may not be so admitted to public school, unless the School District has a special program for them.”

QUESTION

May four-year-old children who are “gifted and talented” be admitted early to kindergarten?

ANALYSIS

Your analysis recognizes that NRS 392.040(2) appears to clearly answer a part of this question with the following language: “If a child is not 5 years of age on or before September 30 of a school year, the child must not be admitted to kindergarten.” This language clearly precludes a four-year-old child from being admitted to kindergarten.

This conclusion is consistent with a previous opinion from this office. Op. Nev. Att’y. Gen. No. 971 (December 7, 1950) (because the Legislature had



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declared a certain age as the basis for admission to the first grade in public schools, and this office could not determine the meaning beyond the plain language of the statute). “Where the language of a statute is plain and the meaning unmistakable, there is no room for construction, and the courts may not search for the meaning beyond the statute itself.” *State v. Jepsen*, 46 Nev. 193, 196, 209 P. 501, 502 (1922); *See also In re Walters’ Estate*, 60 Nev. 172, 186, 104 P.2d 968, 974 (1940).

However, your analysis also discusses the possibility that kindergarten might be considered a “special program,” citing NRS 388.490(2), which contains the following language: “Gifted and talented pupils may be admitted at the age of 4 years to special programs established for such pupils, and their enrollment or attendance may be counted for apportionment purposes.” If kindergarten were considered a special program, then admission might be authorized pursuant to NRS 388.490(2), in spite of the prohibition contained in NRS 392.040(2). Accordingly, such a construction would create a conflict between the two statutes: If kindergarten were considered a special program, then under NRS 388.490 a gifted and talented pupil under the age of 5 years would be eligible to attend kindergarten, in direct contradiction of the age requirements set forth in NRS 392.040. In such a case we may turn to oft-cited tenets of statutory construction to resolve the conflict. *State Ind. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 946 P.2d 179 (1997).

The term “special program” is not defined in the Nevada Revised Statutes or the Nevada Administrative Code. We do note, however, that NAC 388.435(5) provides that a gifted and talented pupil must generally “participate in not less than 150 minutes of differentiated educational activities each week during the school year.” We therefore interpret this requirement as being one of the defining properties of a “special program.” You have stated that the Clark County School District (District) does not currently provide that specialized training in its kindergarten classes. This fact indicates that the District has not in the past considered kindergarten to be the equivalent of a special program as contemplated by chapter 388 of NRS and has not yet established the kind of program provided for in chapter 388.

Further, to simply equate the term “kindergarten” with the term “special program,” without any clear legislative indication that they are in fact equivalent terms, would violate fundamental tenets of statutory construction: “No part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such a construction can properly be avoided.” *Independent American Party v. Lau*, 110 Nev. 1151, 1154, 880 P.2d 1391, 1393 (1994). The Legislature’s use of the different terms, “kindergarten” and “special program” is an indication that the Legislature contemplated two different concepts dealing with education, with “kindergarten” having the prohibition against enrollment of children under the age of 5 years, and “special program” having its attendant requirement of 150 hours of specialized training.

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For the above reasons, we conclude that kindergarten within the District cannot be considered a “special program.” Accordingly, the NRS 392.040(2) prohibition against admission to kindergarten by children less than 5 years of age controls on eligibility to attend kindergarten and a gifted and talented pupil who is less than 5 years of age may not attend kindergarten as a special program.

**CONCLUSION**

A four-year-old gifted and talented child cannot be admitted to kindergarten in the Clark County School District, according to NRS 392.040(2), and kindergarten is not a “special program” under NRS 388.490(2).

Sincere regards,

GEORGE J. CHANOS  
Attorney General

By: JAMES E. IRVIN  
Deputy Attorney General

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**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

AGO 2005-13 PHARMACY, BD. OF; DRUGS; STATUTES: Under Senate Bill 5, the prescription drugs that have been “approved by the Federal Food and Drug Administration: are those drugs for which application has been properly made and which have successfully passed the FDA review process and have been awarded approval by the FDA.

Carson City, December 27, 2005

Larry L. Pinson, Pharm.D, Executive Secretary, Nevada State Board of Pharmacy, 555 Double Eagle Court, Reno, Nevada 89521-8991

Dear Mr. Pinson:

You have requested an opinion from the Attorney General’s Office regarding the following question:

QUESTION

Under Senate Bill 5 of the Nevada legislature’s 22<sup>nd</sup> Special Session, what is a prescription drug that “has been approved by the Federal Food and Drug Administration?”

ANALYSIS

Your question is in relation to Senate Bill 5 (S.B. 5) which was passed during the 22<sup>nd</sup> Special Session of the Nevada legislature and became effective as law on July 1, 2005. Act of June 17<sup>th</sup> 2005, Ch. 11, 2005 NV Stat. 22<sup>nd</sup> Spec. Sess., p. 153 (S.B. 5).

Your question is, on its face, straightforward and narrow. Where, as here, the language of the statute is unambiguous, the “plain meaning rule” of statutory construction applies.

The Nevada Supreme Court has held that “[i]f the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning.” *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. ex rel. County of Clark*, 120 Nev. 575, \_\_\_\_, 97 P.3d 1132, 1135 (2004).

Here, the plain meaning of the language “approved by the Federal Food and Drug Administration” is arguably clear on its face. The Federal Food and Drug Administration is a clearly identified and known agency of the United States Government. In addition, the word “approved” has a commonly understood and accepted meaning. Consequently, we need not look beyond the plain meaning of the language of the statute to determine its meaning.

However, you have raised certain issues concerning the “intent” of the legislature in enacting S.B. 5. Specifically, you have stated that the “general

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intent” of S.B. 5 was to allow the State Board of Pharmacy (the “State Board”) to license Canadian pharmacies so that certain drugs could be legally provided to Nevada residents from those pharmacies. In addition, in a letter to this office, dated November 8, 2005, state legislators Senator Joe Heck and Assemblywoman Barbara Buckley also raised numerous issues concerning the “legislative intent” behind S.B.5 (the “Heck/Buckley Letter”).

Therefore, we would be remiss to merely answer your question based upon the “plain meaning” of the language “approved by the Federal Food and Drug Administration,” without examining the relevant legislative history surrounding S.B. 5. Accordingly, we will attempt to answer your question both by examining the “plain meaning” of the language and by examining the relevant legislative intent, with regard to that language, as set forth in the record of the enactment. The result is the same.

### THE PLAIN MEANING OF FDA APPROVAL

The plain meaning of “approved by the Federal Food and Drug Administration” requires that a prescription drug must be “approved” by the Federal Food and Drug Administration (FDA) before that drug can be provided to a Nevada resident by a Canadian pharmacy.<sup>1</sup>

FDA “approval” is the culmination of a process of review, which we now examine. The FDA regulates prescription drugs under the Federal Food, Drug, and Cosmetic Act (FFDCA), which governs the safety and efficacy of prescription medications, including the approval, manufacturing, and distribution of such drugs. 21 U.S.C § 301 et seq. (2005). To ensure compliance with the FFDCA, persons who import prescription drugs into the United States are required to ensure that the drugs comport with FDA approvals in all respects.

Federal law requires that, before a drug may be introduced into interstate commerce in the United States, an application regarding the drug must be filed with and approved by the FDA. The application must include full reports of investigations which have been made to show whether or not the drug is safe for use, and whether the drug is effective in use; a full list of the articles used as components for the drug; a full statement of the composition of the drug; a full description of the methods used in, and the facilities used for, the manufacture, processing, and packaging of the drug; samples of the drug and of the articles

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<sup>1</sup> The *Merriam-Webster Online Dictionary* defines “approve” to mean: “to have or express a favorable opinion of; to accept as satisfactory; to give formal or official sanction to; to take a favorable view” URL: <http://www.m-w.com/cgi-bin/dictionary?va=approve>.

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used as components thereof as the FDA may require; and specimens of the labeling proposed to be used for the drug. 21 U.S.C. § 355 (2005).

The FDA has indicated, by letter to the State Board,<sup>2</sup> that FDA approvals are manufacturer-specific, product-specific, and approvals include many requirements relating to the product, such as manufacturing location, formulation source, and specifications of active ingredients, processing methods, manufacturing controls, container/closure system, and appearance. 21 C.F.R. § 314.50 (2005). The drugs must also meet FDA requirements regarding labeling and dispensing found at 21 C.F.R. § 201.100 (2005) and must not be imported in violation of any provision of 21 U.S.C. § 381 (2005). Once the foregoing requirements have been met, to the satisfaction of the FDA, the FDA may approve the application for that drug.

Therefore, based upon the plain meaning of the language “approved by the Federal Food and Drug Administration,” until such time that the foregoing process has been followed, to the satisfaction of the FDA, a prescription drug would not be considered “approved” by the FDA.<sup>3</sup>

### THE LEGISLATIVE HISTORY OF S.B. 5

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<sup>2</sup> Letter dated September 22, 2005 from Randal W. Lotter Ph.D., Acting Associate Commissioner for Policy and Planning Food and Drug Administration, to Larry Pinson Ph.D., Executive Director Nevada State Board of Pharmacy (the “FDA Letter”).

<sup>3</sup> A Congressional Research Service (CRS) Report for Congress, entitled Prescription Drug Importation and Internet Sales: A Legal Overview, dated January 8, 2004, by Jody Feder, Legislative Attorney American Law Division, provides additional guidance in determining what is required for FDA “approval.” In discussing the issue of FDA approval, the CRS Report refers to a letter from William K. Hubbard, Associate Commissioner for Policy and Planning Food and Drug Administration, to Robert P. Lombardi, Esq., dated February 12, 2003, <http://www.fda.gov/ora/import/kullman.pdf>, which provides as follows: “[t]he reason that Canadian or other foreign versions of U.S.-approved drugs are generally considered *unapproved* in the U.S. is that FDA approvals are manufacturer-specific, product-specific, and include many requirements relating to the product, such as manufacturing location, formulation, source and specifications of active ingredients, processing methods, manufacturing controls, container/closure system, and appearance. . . . Moreover, even if the manufacturer has FDA approval for a drug, the version produced for foreign markets usually does not meet all of the requirements of the U.S. approval, *and thus it is considered to be unapproved*. Virtually all shipments of prescription drugs imported from a Canadian pharmacy will run afoul of the Act, although it is a theoretical possibility that an occasional shipment will not do so. Put differently, in order to ensure compliance with the Act when they are involved in shipping prescription drugs to consumers in the U.S., businesses and individuals must ensure, among other things, that they only sell FDA-approved drugs that are made outside of the U.S. *and that comply with the FDA approval in all respects*. (Emphasis added).

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We now turn to the legislative history leading to the enactment of S.B. 5 to more fully answer the question you posed to this Office.

S.B. 5 began as Assembly Bill 195 (A.B. 195), introduced by bill sponsor Assemblywoman Barbara Buckley during the regular, 73d Session of the Nevada legislature which ended on June 7, 2005. A.B. 195 was not passed out of the legislature during the regular session. Governor Kenny Guinn, relying on authority granted to the Governor by Nevada's Constitution, called a Special Session of the Nevada legislature. In his June 7, 2005 Proclamation, Governor Guinn stated, in relevant part:

WHEREAS, the Legislature has failed to comply with the constitutional mandate to complete its business within 120 days following its commencement; and

WHEREAS, believing that an extraordinary occasion now exists which requires immediate action by the Legislature; . . . .

During the Special Session, the Legislature may also consider any other matters brought to the attention of the Legislature by the Governor.

In this initial Proclamation, Governor Guinn directed the legislature to consider two bills which were not passed during the Regular Legislative Session, Assembly Bill 560 (2d Reprint) and Assembly Bill 198 (1<sup>st</sup> Reprint).

However, in accordance with his prerogative announced in the original Proclamation, that he could request the legislature to "consider other matters," following the issuance of his original Proclamation, Governor Guinn later, on June 7, advised the legislature:

Section 9 of article V of the Nevada Constitution provides that the Governor may request the Legislature, when convened in Special Session, to consider matters other than those set forth in the call.

With this letter, I am exercising my constitutional authority to bring additional legislative business to your attention for consideration. I would request that you consider the matters contained within . . . Assembly Bill No. 195 (3d Reprint) . . . of the 73d Session of the Nevada Legislature.

In response to the Governor's request, the legislature drafted S.B. 5, which reflects word-for-word the language in A.B. 195, except for the different prerequisites to the effective dates attending the two bills. S.B. 5 is in fact a resurrection of A.B. 195 and was clearly intended to be so by both the Governor and the legislature. Accordingly, we will occasionally refer to the legislative history of A.B. 195 to properly understand the genesis of S.B. 5 and its requirements.

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### LEGISLATIVE CONSIDERATION OF A.B. 195 and S.B. 5

Comments of certain legislators made during committee meetings regarding A.B. 195 indicate that the legislature was seriously concerned about the potential health risks associated with the importation of prescription drugs from Canada. The first reprint of the bill, at Section 3, subsection 2 (b), indicated that Canadian pharmacies, licensed by the Board, could not provide prescription drugs to residents of Nevada unless those drugs had been “approved by the Federal Food and Drug Administration or the Canadian governmental agency responsible for approving prescription drugs.”

The second and third reprints of A.B. 195, and the language in S.B. 5 that became effective as law, further demonstrated these concerns and the intent of the legislature regarding the issue of drug safety. In S.B. 5, the legislature chose to remove, from the proposed law, language referencing the approval of drugs by the “Canadian governmental agency.”

Section 3, subsection 2 (b) of S.B. 5 (3d Reprint) reads as follows:

2. In addition to complying with the requirements of subsection 1, every Canadian pharmacy which is licensed by the Board and which has been recommended by the Board pursuant to subsection 4 of NRS 639.2328 for inclusion on the Internet website established and maintained pursuant to subsection 9 of NRS 223.560 that provides mail order service to a resident of Nevada shall not sell distribute or furnish to a resident of this state:

(b) A prescription drug that has not been approved by the Federal Food and Drug Administration; . . . .

The effect of the legislature’s removing the reference to the approval of drugs by the “Canadian governmental agency responsible for approving prescription drugs” was to allow only prescription drugs which were in fact approved by the Federal Food and Drug Administration (FDA) to be provided to Nevada residents by Canadian pharmacies.

Comments made during a work session of the Senate Committee on Commerce and Labor on May 20 2005, regarding A. B. 195, indicate a legislative awareness of this result:

SENATOR HECK:

I would recommend that we amend section 3, subsection 2, paragraph (b) of A.B. 195 by deleting the words, “or the Canadian governmental agency responsible for approving prescription drugs.” If any drug is going to come into the United

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States, it should be approved by the federal Food and Drug Administration (FDA). *An FDA approved drug is not a drug the FDA has approved in general that is now made by someone else. It has to be the specific drug approved by the FDA, which includes where it was made, how it was made and how it was stored...Approval by the FDA means that the manufacturing process, the formulation and the pedigree have been ensured by the FDA.* If we take out the approval of the Canadian health authorities, we eliminate any drugs approved by them that are not approved by the FDA. (Emphasis added).

ASSEMBLYWOMAN BARBARA E. BUCKLEY (Assembly District No. 8): Senator Heck has discussed his amendment with me, and I have no objection.

*Hearing on A.B. 195 Before the Senate Committee on Commerce and Labor, 2005 Leg., 73d Sess. 5-6 (May 20, 2005).*

This recommendation was moved, seconded and the proposed amendment to the bill passed, showing a clear legislative intent that is consistent with the plain meaning of “approved by the Federal Food and Drug Administration.”

Both the plain meaning of S.B. 5 and the clear legislative intent behind the language “approved by the Federal Food and Drug Administration,” contained in S.B.5, establish that “*an FDA approved drug is not a drug that the FDA has approved in general.*” Instead, FDA approval requires that a prescription drug meet with FDA approval for “*how it was made and how it was stored*” and that the “*manufacturing process, the formulation and the pedigree have been ensured by the FDA.*”

Citing the FDA Letter, the Heck/Buckley Letter acknowledges that, due to certain exceptions contained in the Freedom of Information Act (“FOIA”), the State Board would be “unable” to “readily determine” if a particular drug was manufactured in a facility that has been approved by the FDA.<sup>4</sup>

Based on the foregoing, the State Board could not reasonably be expected to confirm that the “manufacturing process,” the “formulation,” the “storage” and/or the “pedigree” have been ensured and/or approved by the FDA. Absent such confirmation, given the plain meaning of the word “approved,”

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<sup>4</sup> The Heck/Buckley Letter provides, at p.5, as follows: “[a]ccording to the FDA, provisions of the Freedom of Information Act (FOIA) may prohibit the FDA from providing “[m]anufacturing site information” under FOIA’s “confidential commercial information” exception or other exceptions set forth in that act. Letter from Randal W. Lutter, Ph.D., Acting Associate Commissioner for Policy and Planning, Food and Drug Administration, to Larry Pinson, D.Ph., Executive Director, Nevada State Board of Pharmacy (Sept. 22, 2005). As a result, the State Board would be unable to obtain a list that would allow them to readily determine if a particular prescription drug was manufactured in a facility that has been approved by the FDA.”



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prescription drugs imported from Canada cannot be determined by the State Board to be FDA “approved.” The State Board simply cannot make such a determination given the limited information available.

In essence, the quality standard adopted by the Nevada legislature is, as a practical matter, unworkable. Consequently, if the Nevada legislature remains intent on allowing the importation of prescription drugs, from Canada, a different quality assurance standard, that is both verifiable and workable, would need to apply.

Due to the constitutional limitations, imposed by the separation of powers doctrine, this office cannot legislate such a standard. Regardless of how motivated we may be to do so, the responsibility for legislating such a standard rests exclusively with the legislature.

### ALTERNATIVE DEFINITIONS OF “APPROVED BY THE FEDERAL FOOD AND DRUG ADMINISTRATION” ADVANCED AFTER THE ENACTMENT OF S.B. 5.

According to the Heck/Buckley Letter, two proposed interpretations of the phrase “approved by the Federal Food and Drug Administration” have been proffered since the enactment of S.B.5. The Heck/Buckley Letter argues for the adoption of the second of these post enactment definitions.

The first interpretation, proffered by the FDA in the FDA Letter, has interpreted “FDA approval” to mean, in the context of prescription drugs:

FDA approved drugs that comply with the FDA approval in all respects, including manufacturing location, formulation, source and specification of active ingredients, processing methods, manufacturing controls, container closure system and appearance (21 C.F.R. §314.50). The importer must also ensure that each drug meets all U.S. labeling requirements and that such drugs are not imported in violation of the American goods returned language in 21 U.S.C §381 (d)(i).

The second interpretation, proffered by Senator Heck and Assemblywoman Buckley, in the Heck/Buckley Letter, is that the phrase “FDA approved” means:

“The FDA must have approved for human use a particular proprietary formulation of a pharmaceutical compound (such as, for example, Lipitor®, Sonata® or Xanax®). Under this interpretation, once it is established that the FDA has, in fact, approved for human use a particular proprietary formulation of a pharmaceutical compound, the only remaining step would be to verify that a prescription drug provided by a Canadian pharmacy is such a pharmaceutical compound and that it is the pharmaceutical compound it is purported to be.”

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In comparing the definition of “approved by the Federal Food and Drug Administration” advanced by Senator Heck and Assemblywoman Buckley, when appearing before the Senate Committee on Commerce and Labor, with the definition of “approved by the Federal Food and Drug Administration” advanced in the Heck/Buckley Letter, the difference is obvious.

Unfortunately, for purposes of statutory construction, only the definition considered by Nevada’s legislators, as reflected in the legislative history, can control. Here, the only definition presented to the legislature, as reflected in the legislative history, is the definition advanced by Senator Heck and Assemblywoman Buckley during the May 20, 2005 Meeting of the Senate Committee on Commerce and Labor.

Consequently, it is the only definition that would now be appropriate to consider and/or control<sup>5</sup>.

### CONSIDERATION OF OTHER PRINCIPLES OF STATUTORY CONSTRUCTION

The Heck/Buckley Letter also argues for the application of alternative and/or additional principles of statutory construction. The first of these, is the principle which states: “[t]hat remedial legislation. . . should be liberally construed to effectuate its purpose. Virden v. Smith, 46 Nev. 208, 211 (1922). See also Diaz v. Golden Nugget, 103 Nev. 152, 155 (1987) (citing Nevada Indus. Comm’n v. Peck, 69 Nev. 1, 111 (1952)). . .”

Essentially, the argument is that S.B. 5 must be interpreted liberally with a view toward providing Nevadans with access to affordable prescription drugs.

The second principle of statutory construction, which the Heck/Buckley Letter argues should apply, is the principle which states that “where at all possible, statutes should be construed so as to give effect to the legislative intent.” Sheriff, Clark County v. Morris, 99 Nev. 109, 117 (1983) (citing White v. Warden, Nevada State Prison, 96 Nev. 634, 636 (1980)).”

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<sup>5</sup> The legislative history, concerning AB 195 and S.B. 5, is void of any reference to a discussion of the definition of “approved by the Federal Food and Drug Administration” now advocated by the Heck/Buckley Letter. The interpretation of “approved by the Federal Food and Drug Administration” advanced by the Heck/Buckley Letter is not only inconsistent with the “plain meaning” of the language “approved by the Federal Food and Drug Administration” it is entirely inconsistent with the definition provided by Senator Heck and Assemblywoman Buckley to the Nevada legislature, during the May 20, 2005 Meeting of the Senate Committee on Commerce and Labor.

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Finally, the Heck/Buckley Letter directs our attention to the principle of statutory construction which provides that, “no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided. See, Banegas v. SIIS, 117 Nev. 222, 228 (2001) (citing Paramount Ins., Inc. v. Rayson & Smitley, 86 Nev. 644, 649 (1970)). See also, Chuidian v. Philippine Nat’l Bank, 912 F.2d 1095, 1102 (9<sup>th</sup> Cir. 1990) (criticizing as illogical a statutory interpretation that would “defeat the purposes” of the act in question).” Each of the above principles of statutory construction have been considered.

With regard to the request for “liberal construction” to effectuate the “purpose” of the legislation, our review of the legislative history confirms that the “purpose” of the legislation is not simply, as the Heck/Buckley Letter argues, to provide Nevadans with access to affordable prescription drugs. Rather, the “purpose” of the legislation is to provide Nevadans with access to safe and affordable prescription drugs. More specifically, “FDA approved” prescription drugs.

Our interpretation is therefore entirely consistent with what the legislative history reveals is the true and complete “purpose” of S.B. 5. Moreover, to ignore the “FDA approval” requirement, so as to facilitate access to affordable prescription drugs, which may not be “FDA approved,” would be to undermine rather than effectuate the “purpose” of the legislation.

With regard to the final principle of statutory construction, which is to “give effect to the legislative intent,” we believe that our interpretation and analysis does exactly that.

If one were to adopt the definition, proffered by the Heck/Buckley Letter, the language “approved by the Federal Food and Drug Administration” would be “rendered nugatory and turned into mere surplusage.” Such a result would not be consistent with the intent of the legislature in enacting S.B. 5. In fact, it would be inconsistent with the intent of the legislature in that it would defeat the true “purpose” of S.B. 5, which is to provide Nevadans with access to safe and affordable prescription drugs. More specifically, “FDA approved” prescription drugs.

### CONCLUSION

The goal of S.B. 5 is both laudable and important to the citizens of this State. In the Heck/Buckley Letter, it was stated that this bill was created in an attempt to ensure that Nevada residents would have access to safe prescription drugs at fair prices. The Heck/Buckley Letter also underscores the most publicized and widely-known truths concerning the cost of health care today:

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Health care costs have skyrocketed over the last several years. The high cost of prescription drugs is one of the major factors affecting the overall cost of health care today.

No one is immune from these rising costs. Government, insurance companies, private corporations, and ultimately individual consumers are all affected. But among the hardest hit are senior citizens who often have to stretch fixed incomes to meet a growing need for prescription drugs.

This Office completely understands and fully embraces those sentiments. Affordable medicine is especially important to those least able to afford it, the senior citizens on fixed incomes mentioned in the letter. However, it is clear from the plain meaning of the language used by the legislature, as well as from the legislative history surrounding S.B. 5, that the Nevada legislature also intended to ensure that the prescription drugs provided to the citizens of Nevada were both safe and effective.

S.B. 5 attempts to strike a balance between the desire for affordable prescription drugs and the need to have adequate protections to ensure the quality and safety of those drugs.

In enacting this legislation, the Nevada legislature made some deliberate and difficult policy choices which expressly limit the types of drugs which can be made available to Nevada's citizens. Unfortunately, those choices now serve as insurmountable legal obstacles to the importation of virtually any drugs from Canada.

A possible solution to this impasse would have been for the legislature to simply accept the language originally contained in A.B. 195, "approved by the Canadian governmental agency responsible for approving prescription drugs."<sup>6</sup>

However, the Nevada Legislature deliberately chose not to include that language in the legislation and our office is not empowered to change that result.

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<sup>6</sup> In a letter to Assemblywoman Barbara E. Buckley, dated May 27, 2005, the State of Nevada Legislative Counsel Bureau stated at page 3 footnote 3. "[w]e note for informational purposes that the Congressional Research Service (CRS), the public policy "research arm" of the United States Congress, has concluded that medications manufactured and distributed in Canada meet or surpass quality control guidelines set by the U.S. Food and Drug Administration." See Memorandum from Blanchard Randall IV and Donna Vogs, Domestic Social Policy Division, CRS, to The Honorable Bernard Sanders, United States House of Representatives (May 28., 2003) ("In the United States, the [Federal Food, Drug and Cosmetic Act] requires that drugs be proven both safe and effective, and be manufactured to strict quality standards, before the FDA can approve them for marketing. Drug products sold in Canada must meet virtually the same statutory requirements. Under the [Canadian] Food and Drugs Act, drugs not only have to be safe and effective, they have to be manufactured to quality standards similar to those for drugs produced in the United States."). Available at <http://congresshealth.com/crsreport.pdf>.

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Regardless of how much this office may wish to facilitate access to inexpensive prescription drugs, it is not the role of this office to interpret a statute in a manner which is inconsistent with its plain meaning or in a manner which is inconsistent with a clear and consistent legislative intent.

Therefore, for purposes of S.B. 5, prescription drugs that have been “approved by the Federal Food and Drug Administration” are those drugs for which application has been properly made and which have successfully passed the FDA review process and have been awarded approval by the FDA.

Unfortunately, few if any prescription drugs, imported from Canada, would meet the standards for importation established by the Nevada legislature in S.B. 5.

If the legislature remains intent on providing Nevada’s citizens with access to safe and affordable prescription drugs, from Canada, it would be incumbent upon the Nevada legislature to revisit this issue so as to adopt a quality assurance standard that is both verifiable and workable.

Sincere regards,

GEORGE J. CHANOS  
Attorney General