



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

RANDAL R. MUNN
Assistant Attorney General

KEITH G. MUNRO
Chief of Staff

January 31, 2008

OPINION NO. 2008-01

COUNTIES; DISTRICT ATTORNEYS;
PRIVATE PRACTICE OF LAW:
NRS 7.105, NRS 252.120, and
NRS 252.070 do not expressly prohibit a
deputy district attorney, in a county with a
population of less than 100,000, from
representing a private client in a criminal
case in a federal court where neither the
State of Nevada nor any county or other
political subdivision thereof is a party.

Hy T. Forgeron, District Attorney
Lander County, Nevada
Post Office Box 187
Battle Mountain, Nevada 89820

Dear Mr. Forgeron:

You have requested an opinion related to a deputy district attorney that has been asked to engage in the private practice of law.

QUESTION

May a deputy district attorney, in a county with a population of fewer than 100,000, represent a private client in a criminal case in a federal court¹ where neither the State of Nevada nor any county or other political subdivision thereof is a party?

BACKGROUND

A deputy district attorney in your office has been asked to represent a criminal defendant in a federal case as part of his private practice. Because Lander County has

¹ For purposes of this analysis, we are assuming the federal court in question is the district of Nevada.

a population of fewer than 100,000, your office allows deputies to engage in the private practice of law as long as it does not conflict with their official duties or require too much time.

ANALYSIS

NRS 252.070(4) allows deputy district attorneys who are employed by counties with a population of fewer than 100,000 to engage in the private practice of law. NRS 7.105 sets forth the rule that district attorneys and their deputies “shall not, during their terms of office or during the time they are so employed, in any court of this State, accept an appointment to defend, agree to defend or undertake the defense of any person charged with the violation of any ordinance or any law of this State.” Likewise NRS 252.120(1) prohibits district attorneys and their partners from appearing,

within his county as attorney in any criminal action, or directly or indirectly aid, counsel or assist in the defense in any criminal action, begun or prosecuted during his term; nor in any civil action begun or prosecuted during his term, in behalf of any person suing or sued by the State or any county thereof.

Clearly, deputy district attorneys are allowed to engage in the private practice of law if employed by counties with a population fewer than 100,000. NRS 252.070(4). However, deputy district attorneys cannot defend any person charged with violating any ordinance or law of the State of Nevada. NRS 7.105. Similarly, district attorneys and their partners are prohibited from appearing or assisting in the defense in any criminal action within their county, nor any civil action on behalf of a person suing or sued by the State or county. NRS 252.120. Therefore, the statutes do not expressly prohibit a deputy district attorney located in a county with a population less than 100,000 from representing a criminal defendant in federal court. *Clark County Sports Enter. Inc. v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171, 176 (1980) (“Had the legislature intended inclusion, it would have specifically so provided by language to that effect.”)

In 1973, this Office was faced with a similar question about NRS 252.120 (1973 Opinion). Specifically, this Office was tasked with determining whether NRS 252.120 would,

preclude a district attorney from representing a private client in any state or county civil action, either for the plaintiff or for the defendant, not only in the county wherein the district attorney or his deputy carry out their official duties, but also in any other county in the State of Nevada.

Op. Nev. Att'y Gen. No. 73-126 (April 25, 1973). The 1973 Opinion concluded that "NRS 252.120 represents a clear legislative effort to remove from the individual conscience of the district attorney the option of choosing between divided loyalties where there is a serious risk that the public interest may be compromised in the interests of promoting a professional practice."

Although State law does not expressly prohibit deputy district attorneys from representing a criminal defendant in federal court, you should consider the ethical propriety set forth in the 1973 opinion, as well as the specific facts and elements of the case. The facts of any criminal case can evolve and a defense attorney can find the case to be different than was previously thought when the representation began. This could lead to a situation where the public interest may be compromised in the interests of promoting a professional practice.

As a district attorney, you and your deputies are subject to the Nevada Ethics in Government Law. NRS §§ 281A.010–660. NRS 281A.020(1)(b) declares "[a] public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves."

CONCLUSION

NRS 7.105, NRS 252.120, and NRS 252.070 do not expressly prohibit a deputy district attorney, in a county with a population of less than 100,000, from representing a private client in a criminal case in a federal court where neither the State of Nevada nor any county or other political subdivision thereof is a party. However, when making your decision, we recommend you also consider the ethical propriety of a deputy district attorney representing private interests adverse to those of the public, as well as the specific elements involved in the case. In addition, we recommend seeking guidance from both the Nevada State Bar and the State Ethics Committee.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
KATIE S. ARMSTRONG
Deputy Attorney General
(775) 684-1224



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

March 12, 2008

OPINION NO. 2008-02

INSURANCE; TAXES; UNEMPLOYMENT:

In applying the common law rules to LLCs, it is appropriate for the ESD to consider the type of remuneration received, the services performed by the individual, and the degree of involvement of the individual in the entity's internal governance.

Cynthia A. Jones
Administrator
Employment Security Division
Department of Employment, Training and Rehabilitation
500 East Third Street
Carson City, Nevada 89713

Dear Ms. Jones:

You have asked this Office concerning whether certain persons or business entities are subject to unemployment taxes.

In 1991 the Nevada Legislature enacted Chapter 86 of Nevada Revised Statutes (NRS), authorizing the creation of limited liability companies (LLC). In 2005, the Legislature enacted S.B. 199, which amended Chapter 87 of NRS, to allow the use of limited liability partnerships (LLP) by certain professionals and expanded LLP use in 2007 to cover any type of trade or business.¹ An LLC may be operated by managers or members. An LLP is generally managed by its partners. You have asked the following with respect to payments made to managers and members of LLCs and partners in LLPs:

¹ See Act of May 19, 2005, ch. 128, 2005 Nev. Stat. 421; Act of June 13, 2007, ch. 456, § 25, 1995 Nev. Stat. 2413, 2428.

QUESTION

Are limited liability companies and limited liability partnerships required to pay unemployment insurance taxes on payments made to their managers, members, and partners in consideration of personal services performed for the organization by the members or partners?

ANALYSIS

Nevada's Unemployment Compensation Law (the Act) is set forth in NRS Chapter 612 and is administered by the Employment Security Division (ESD) of the Department of Employment, Training and Rehabilitation (DETR). Its purpose is to "provide temporary assistance and a measure of economic security for individuals who become involuntarily unemployed." *Airport Casino, Inc. v. Jones*, 103 Nev. 387, 390, 741 P.2d 814, 816 (1987). It establishes a fund from which unemployment benefits are paid. NRS 612.585. The fund is financed by contributions from employers. NRS 612.535–.553. It requires employers to report to the ESD and pay unemployment taxes on wages paid to employees. See NRS 621.535.

The Act defines "employer" to include "[a]ny employing unit which for any calendar quarter has paid or is liable to pay wages of \$225 or more, and which employs during that period one or more persons in an employment subject to [the Act]." NRS 612.055(1). NRS 612.060 defines "employing unit" to include "any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation . . . which has or . . . had in its employ one or more individuals performing services for it within this State." The Act generally defines "employment" as "service . . . performed for wages or under any contract of hire, written or oral, express or implied."² NRS 612.065. Wages are defined to include "[a]ll remuneration paid for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash." NRS 612.190(1).

Although the definition of "employing unit" does not specifically refer to LLCs or LLPs, its inclusion of "any . . . type of organization" is sufficiently broad to include these business entities.³ The question becomes whether the services performed by

² The Act, in NRS 612.070–.145, inclusive, contains several exceptions to the general definition of "employment." For example, NRS 612.095 excludes domestic services in a private home unless the wages equal or exceed \$1,000 in any calendar quarter. NRS 612.105 excludes service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 18 years in the employ of his father or mother. There is no statutory exception to the term "employment" that specifically addresses services performed by managers and members of LLCs or partners in LLPs, as there is in other states. See, e.g., Oregon Revised Statutes 657.044 (Employment does not include services provided to LLCs and LLP by members and partners).

³ We understand that the ESD currently registers and recognizes LLCs and LLPs as employing units and employers when those businesses pay wages to their employees.

managers and members in the case of LLCs, and by partners in the case of LLPs, constitute employment within the Act. To analyze this question we must consider the nature of LLCs and LLPs with particular attention to the nature of the services provided and the individual's role in the organization. We must also consider the nature of the payments made to these individuals and determine whether they are properly considered wages or a return on the individual's investment in the business.

Limited liability companies are often referred to as "hybrid" business entities, because they adopt and combine features of both partnership and corporate forms.

From the partnership form, the LLC borrows characteristics of informality of organization and operation, internal governance by contract, direct participation by members in the company, and no taxation at the entity level. From the corporate form, the LLC borrows the characteristic of protection of members from investor-level liability. Flexible in nature, the LLC allows direct involvement and control by its members yet also permits a corporate representative form of governance if the entity elects to be governed by managers.

.....
In 1988, the IRS issued Revenue Ruling 88-76, allowing the Wyoming LLC to secure partnership classification for income tax purposes, despite the presence of limited liability. After this landmark decision, states began passing legislation allowing for the formation of LLCs. By the end of 1996, every U.S. jurisdiction had enacted its own LLC statute (citations omitted).

Gottsacker v. Monnier, 281 Wis.2d 361, 370–371, 697 N.W.2d 436, 440–441 (Wis. 2005), citing *Joseph W. Boucher, et al.*, LLCs and LLPs: A Wisconsin Handbook § 1.4 (rev.ed.1999).

Nevada's law governing limited liability companies is set forth in NRS Chapter 86 (LLC Act). The LLC Act distinguishes between members and managers of LLCs. A manager is defined in terms of function performed, and is "a person . . . designated . . . or selected . . . to manage the company."⁴ NRS 86.071. NRS 86.081 defines a member in terms of ownership and/or control: a member is "the owner of a member's interest in a limited-liability company or a noneconomic member." NRS 86.321. A member's interest is the member's "share of the economic interests in a limited-liability company, including profits, losses and distributions of assets." NRS 86.091. A non-

⁴ Since a non-member manager of an LLC is specifically hired by the LLC to perform management services on its behalf, and there is no issue of whether the services constitute a contribution of capital, it is clear that the wages paid to such managers are reportable under the Act and subject to unemployment taxes.

economic member is one who has no economic share, no obligation to contribute capital, no right to participate in or receive distributions of profits of the company or an obligation to contribute to the losses of the company, but who may have voting and other rights. NRS 86.095. A member may contribute capital to an LLC by providing “cash, property *or services rendered*, or a promissory note or other binding obligation to contribute cash or property *or to perform services*.” NRS 86.321 (emphasis added). Although as initially enacted in 1991, LLCs had to have at least two members, as of 1995 they may be formed with only one member. See Act of June 25, 1991, ch. 442, § 289, 1991 Nev. Stat. 1293; Act of July 5, 1995, ch. 586, § 91, 1995 Nev. Stat. 2107.

Limited liability partnerships may be formed pursuant to provisions at NRS 87.440–.540. See *also* NRS 88.606–.609. As with members in LLCs, partners in LLPs may make contributions to the partnership in the form of services. See *Cornell v. Sagouspe*, 53 Nev. 145, 295 P. 443 (1931) (In the absence of an agreement, partner is not entitled to pay for services performed for the partnership). NRS 87.180 governs the rules determining rights and duties of partners in general. NRS 87.180(5) grants all partners equal rights in the management and conduct of the partnership business. NRS 87.180(6) states that, subject to an agreement to the contrary, no partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs. NRS 87.4322(3)(c) provides that a person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment for services as an independent contractor or of wages or other compensation to an employee. NRS 87.4333(6) provides that each partner has equal rights in the management and conduct of the partnership business. NRS 87.4333(8) states that a partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

In *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), the U.S. Supreme Court held that the statutory definition of “employee” in the Employee Retirement Income Security Act of 1974 (ERISA) incorporates traditional agency law criteria for identifying master-servant relationships. The Internal Revenue Service (IRS) identifies 20 “factors” discussed in the common law rules for determining whether a master-servant relationship exists for purposes of the Federal Unemployment Tax Act (FUTA). 26 U.S.C. §§ 3301–3311; Rev. Rul. 87-41, 1987-1 C.B. 296, 1987 WL 419174. As noted by one law review commentator, however, the problem with the common law rules is that they focus on the employee versus independent contractor relationship and, in most cases, were decided before LLCs and LLPs even existed. Daniel S. Kleinberger, “*Magnificent Circularity*” and the *Churkendoose*: *LLC Members and Federal Employment Law*, 22 Okla. City U. L. Rev. 477 (1997):

The perplexing question is whether an LLC member who provides services to the LLC can be an *employee*.

The perplexity has four sources: (i) the novelty of the LLC and the resulting absence of LLC-specific case law; (ii) the “magnificent circularity” of the relevant statutory definitions and the resulting complexity in the available case law; (iii) the hybrid nature of an LLC (part partnership and part corporation), and the resulting difficulty in extrapolating from cases dealing with analogous issues in the context of partnerships and corporations; and (iv) the dichotomous nature of any LLC member who actively works for an LLC – one part capitalist owner, one part laboring service provider. The fourth source is especially problematic because the available case law has had difficulty handling that dichotomy in the context of well-established entities – i.e., partnerships and corporations.

Id. at 481. Although the commentator examines federal case law as applied to services provided by LLC members, he notes that

[I]f the role of the LLC member within their business determines whether federal employment statutes cover those members, then that coverage question has no categorical answer. The role of members differs too widely for any per se rule to apply to all members in all LLCs. To use a phrase commonplace in the federal employment case law, the analysis will have to take into account the “totality of the circumstances.”

Id. at 491. In addition to there being no “per se” rule on the question you present, it is clear that the labels attached to the relationship by the parties are usually not helpful in the analysis. See *Loomis Cabinet Co. v. Occupational Safety and Health Review Comm’n*, 20 F.3d 938, 942 (9th Cir. 1994) (stating that “[i]n determining whether an employment relationship exists, the label of ‘partner’ is meaningless”).

Originally enacted as Title IX of the Social Security Act of 1935, FUTA, 26 U.S.C. § 3301 *et seq.*, envisioned a cooperative federal-state program of benefits to unemployed workers. Congress’ purpose was to encourage states to enact uniform unemployment insurance statutes, so that the unemployed would no longer suffer because states, in order to protect their respective economic positions, avoided imposing unemployment taxes on employers operating within their borders. *Special Care of New Jersey, Inc. v. Board of Review*, 742 A.2d 1023 (N.J. 2000). By enacting FUTA, Congress encouraged the states to set up their own unemployment compensation systems by granting employers complying with the requirements of 26 U.S.C.A. § 3304 a ninety percent credit against their federal unemployment taxes for taxes paid to state unemployment plans. 26 U.S.C.A. § 3302. Once states comply with the mandatory federal standards, they have “great latitude regarding the parameters of

their unemployment-compensation laws.” *Special Care of New Jersey, Inc.*, 742 A.2d at 1028, citing *Carpet Remnant Warehouse, Inc. v. New Jersey Dep’t of Labor*, 593 A.2d 1177 (N.J. 1991). As long as they meet the requirements for certification under § 3304 states may vary their programs. *Special Care of New Jersey, Inc.*, 742 A.2d at 1028–1029, citing *Macias v. New Mexico Dep’t of Labor*, 21 F.3d 366, 368 (10th Cir.1994):

Therefore, the fact that FUTA excludes certain persons or entities from its payroll tax “does not preclude a state from including those [persons or entities] in its definition.” [Citation omitted.] A state legislature is thus empowered to determine what is exempt “without regard to existing definitions, and is not required to conform in every respect to the federal scheme.” See also *Equitable Life Ins. Co. v. Iowa Employment Sec. Comm’n*, 231 Iowa 889, 2 N.W.2d 262, 265 (1942) (“That the [state] legislature may determine what shall constitute employment subject to taxation without regard to existing definitions or categories and that it is not required to conform in every respect to the national ideology upon the subject as expressed in the Acts of Congress, is well settled.”).

Indeed, the United States Supreme Court has expressly held that the existence of an exemption under FUTA does not mandate the same exemption under state law. *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 310, 63 S.Ct. 1067, 1069, 87 L.Ed. 1416, 1420 (1943).

742 A.2d 1023 at 1028–1029. Although Nevada’s unemployment law must meet FUTA minimum requirements in order to be “certified” and entitle Nevada employers to the federal unemployment tax credit, Nevada is free to grant unemployment benefits more liberally than FUTA requires.

The Nevada Supreme Court has not squarely addressed the issue of when a payment to a member of an LLC, or to a partner in an LLP, should be deemed wages instead of a return on investment. However, other legal authority addresses the application of Nevada’s unemployment law in similar situations.

In *Whitney v. State of Nevada, Dep’t of Employment Security*, 105 Nev. 810, 783 P.2d 459 (1989), the Court considered whether a claimant’s promotional activities on behalf of a corporation constituted “employment” or “self-employment,” thereby making him ineligible for unemployment benefits while he conducted those activities. The claimant, Richard A. Whitney, had formed a corporation with a business associate. Whitney performed promotional activities for the corporation, attempting to procure investors and business equipment. Although his business associate received regular compensation from the corporation, Whitney received none. Attempts to obtain financing for the business failed and the corporation never actually entered into the

business of helicopter cargo service for which it was formed. During the time of his promotional activities, Whitney applied for and received unemployment benefits from the State of Nevada. The Court concluded:

The promotional activities engaged in by Whitney did not constitute “employment” or “self-employment”; therefore, he was not ineligible for unemployment compensation. . . . It is clear from the record that Whitney was not “employed” by the corporation, nor was he employed by himself. Unlike his associate . . . Whitney was not working “for wages under a contract of hire....,” which is the statutory definition of “employment.”

Id. at 460, citing NRS 612.065. Although the Court in *Whitney* was not addressing the issue of “employment” for purposes of employment tax liability, it is clear it would not consider general promotional services performed by an owner/principal to be employment. Rather, such services would more likely be considered contribution of capital to the corporation in the hope of future profit.

In Op. Nev. Att’y Gen. No. 1937-252 (November 29, 1937), we concluded that director’s fees paid to a corporate director acting as such did not constitute “wages” but payments for other types of services performed for the corporation would be reportable under the unemployment compensation law. Although this conclusion may be questionable given more modern views on corporate officer compensation⁵, it does illustrate how the Court might rule if the LLC or LLP is viewed as a corporation.

In *Cornell v. Sagouspe*, 53 Nev. 145, 150-151, 295 P.443, 444–445 (1931), the Court noted that the general rule:

[U]ndoubtedly is that one partner is not entitled to charge the other compensation for his services without special agreement. *Folsom v. Marlette*, 23 Nev. 459, 49 P. 39; 1 C. J. 786, § 230. In other words, the law presumes that the absence of an agreement for compensation necessarily implies that each partner relies upon the profit arising from the business and his partnership interest therein for his compensation.

The court also noted, however, that the rule is not inflexible or universal:

Where it can be fairly and justly implied from the conduct of the partners and the course of dealing between the partners, or from circumstances of equivalent force, that one partner is

⁵ The Internal Revenue Service considers payments to corporate officers to be wages reportable as wages under FUTA. See 26 U.S.C. § 3121(d)(1).

to be compensated for his services, his claim will be sustained.

Id. at 151. It thus appears that in Nevada payments made to partners will be deemed to be a distribution of partnership profits, in the absence of an agreement with the partnership to receive compensation in the form of wages.

The Nevada Supreme Court has noted a general presumption that a worker is an employee within the purview of the unemployment insurance system, and unemployment statutes should be liberally construed to advance the protective purpose of providing temporary assistance and economic security to individuals who become involuntarily unemployed. *State of Nevada Dep't of Employment, Training and Rehab., Employment Sec. Div. v. Reliable Health Care Services of S. Nevada, Inc.*, 115 Nev. 253, 983 P.2d 414 (1999); *State, Dept. of Employment Sec. v. Harich Tahoe Developments*, 108 Nev. 175, 825 P.2d 1234 (1992). In these cases, the issue presented was whether the worker was exempt under NRS 612.085, which provides in full:

Services performed by a person for wages shall be deemed to be employment subject to this chapter unless it is shown to the satisfaction of the Administrator that:

1. The person has been and will continue to be free from control or direction over the performance of the services, both under his contract of service and in fact;
2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and
3. The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

This statute encapsulates the common law master-servant, employer-independent contractor dichotomy. As observed in *State of Nevada Dep't of Employment, Training and Rehab., Employment Sec. Div. v. Reliable Health Care Services of S. Nevada, Inc.*, since the requirements of this statute are in the conjunctive, all three elements need to occur for services to be deemed "non-employment" under the statute. *State of Nevada Dep't of Employment, Training and Rehab., Employment Sec. Div.*, 115 Nev. at 258. Since in most cases any services provided to an LLC or LLP by a member, manager, or partner will relate to the usual course of the entity's business or take place at the customary places of the entity's business, it is unlikely that such personal services will ever be deemed "non-employment" under NRS 612.085.

Nevada's unemployment law must be applied in a manner consistent with the FUTA's minimum requirements. NRS 612.070⁶ requires ESD to find an employee relationship to be a covered service if the individual would be treated as an employee and services covered under federal unemployment law. We must therefore determine how LLCs and LLPs are classified under FUTA.

LLCs and LLPs are not given their own tax classification in the Internal Revenue Code. Instead, the Internal Revenue Service (IRS) uses the tax entity classifications it has always had for business taxpayers: corporation, partnership or sole proprietorship. For example, a multi-member LLC may file a Form 8832 and elect to file as a partnership or a corporation. See 26 C.F.R. § 301.7701-3(a). If it files as a partnership, payments to its members are not deemed wages by the IRS. If it files as a corporation, such payments are considered wages for unemployment tax purposes. Single member LLCs are classified as "disregarded entities," i.e., the IRS treats the LLC as a sole proprietor, unless the LLC elects to be classified as a corporation. If treated as a disregarded entity, compensation paid to the sole member is not considered wages for unemployment tax purposes.

You inform us that most states simply follow this federal tax election in determining whether to deem payments to members and partners as wages subject to unemployment tax. Indeed, we believe the federal classification may be considered conclusive if an entity elects a "corporate" classification. In the case of a corporate classification, since FUTA requires payment of unemployment taxes on payments to members and partners, NRS 612.070 requires that such service be covered under Nevada's unemployment law. In the case of a single member LLC that does not elect corporate treatment, ESD may properly consider compensation paid to the member to be a return on his or her investment and not wages subject to the unemployment law.

The difficulty lies, however, in reaching a "non-employment" conclusion with an entity that files as a partnership. Although under federal law payments to partners are not considered wages or covered employment, one can easily imagine situations where an employee relationship should be found despite an entity's federal classification. For example, a multi-member LLC may elect to file its federal income tax return as a partnership and as a result, payments to its members will not be considered wages or subject to federal unemployment taxes. Although this treatment makes sense for non-managing members who perform no personal services and receive only a portion of the LLC's profits, it would require one to ignore the statutory definitions of "employer,"

⁶ NRS 612.070 states in part:

In addition to any other provisions of this section, service is required to be covered under this chapter, if with respect to such service *a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund*, or if such service is required to be covered as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act. [Emphasis added.]

“employing unit” and “wages” if applied to exempt payments made to managing members in consideration of their management or other personal, traditional “employment” services performed on behalf of the LLC. We believe in this situation the ESD must consider the circumstances of each case, the nature of the payments, the services performed by the individual and his or her role in the organization and apply its statutes and common law rules governing the master-servant relationship to determine whether the payments are subject to unemployment tax liability.⁷

CONCLUSION

Whether payments to members of LLCs and partners in LLPs are subject to unemployment taxes should be determined consistently with NRS 612.070, which requires the ESD to cover services in any situation which would subject the employer to unemployment taxes under FUTA. Thus the ESD should consider payments to members of LLCs or partners in LLPs for personal services performed for those organizations to be wages subject to unemployment tax if the organization elects to be treated as a corporation under federal law. Since single member LLCs that do not elect corporate treatment are treated as “disregarded entities” under federal law with no liability for unemployment taxes, the ESD should exempt these from unemployment taxes for payments made to the member for personal services.

In the case of LLCs and LLPs that are classified as partnerships under federal law, the ESD should apply its statutes and common law rules governing the master-servant relationship to determine whether payments made to members and partners should be considered “wages” under NRS 612.190(1) subject to unemployment taxes. In the case of partnerships, in the absence of an express or implied agreement with the partnership to receive compensation in the form of wages, payments to partners should

⁷ The previously cited law review commentator suggests rules that de-emphasize the “right to control” aspects of the common law master-servant rules and emphasize factors that focus on the type of remuneration received, the services performed by the individual (which must involve some “traditional, employee-like tasks”), and the degree of involvement of the individual in the entity’s internal governance. Kleinberger, “*Magnificent Circularity and the Churkendoose: LLC Members and Federal Employment Law*,” 22 Okla. City U. L. Rev. 477 (1997). Although these factors are certainly logical and appropriate to consider in the context of these types of organizations, giving them extra weight in the consideration of all other relevant circumstances does not necessarily reflect Nevada law.

Cynthia A. Jones
March 3, 2008
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be deemed a distribution of partnership profits. In applying the common law rules to LLCs, it is appropriate for the ESD to consider the type of remuneration received, the services performed by the individual, and the degree of involvement of the individual in the entity's internal governance.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DOUGLAS E. WALTHER
Chief Deputy Attorney General
Government & Natural Resources
(775) 684-1234

DEW/LSD



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

April 18, 2008

OPINION NO. 2008-03

PUBLIC RECORDS; TRAFFIC CITATIONS: Traffic citations issued to juveniles are not public record based on the confidentiality of juvenile court records established in NRS Chapter 62H.

Jearld L. Hafen, Director
Nevada Department of Public Safety
555 Wright Way
Carson City, Nevada 89711-0900

Dear Director Hafen:

This letter is in response to your request for an opinion from the Nevada Attorney General's Office concerning whether traffic citations should be open to inspection as public records pursuant to Nevada Revised Statutes (NRS) Section 239.010.

QUESTION ONE

Are citations issued by the Nevada Department of Public Safety's (DPS) Highway Patrol Division public records pursuant to NRS 239.010?

ANALYSIS

The Nevada Public Records Act (PRA), embodied in NRS 239.010, provides that all public books and 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. NRS 239B.010. The PRA presumes that all records are to be open to the public unless deemed confidential by law. The purpose of the PRA is to ensure the accountability of the government to the public by facilitating public

access to vital information about governmental activities. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 59, 63 P.3d 1147, 1149 (2003), *citing*, *DR Partners v. Board of County Comm'rs of Clark County*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

The Nevada traffic laws are contained in Chapter 484 of the NRS. Traffic citations are generally discussed in NRS 484.791-817. Chapter 484 of the NRS does not declare traffic citations to be confidential. Therefore, pursuant to NRS 239.010, traffic citations are not exempt from the PRA by law and should be open for inspection.

However, the Nevada Supreme Court has recognized two exceptions to the PRA that are not codified in statute -- the *Donrey* balancing test and the deliberative process exception, both of which should be considered in an analysis of the PRA.

A. The *Donrey* Balancing Test

The Nevada Supreme Court has acknowledged a common law limitation on the requirement in NRS 239.010 that all public records be open, *see Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990). In *Donrey*, the Court used a "balancing test" to weigh the public interest in disclosing a police investigative report against the interest served by non-disclosure. *Id.* at 635-636. In order to determine if traffic citations are confidential through a *Donrey* analysis, the DPS must show that the public interest in disclosure of traffic citations is outweighed by the public interest served by non-disclosure.

In *Donrey*, the Nevada Supreme Court used public policy considerations found in case law and a former Attorney General's Opinion to determine that a police investigative report should be open to the public. *Id.* at 636. The public policy considerations articulated in *Donrey* include the following: whether there is a pending criminal proceeding; whether there are confidential sources to protect; whether there are investigative techniques to protect; whether there is a possibility of denying someone a fair trial; and whether there is any potential jeopardy to law enforcement personnel. *Id.*

In the case of traffic citations, these public policy considerations weigh in favor of disclosure. While there may be a pending criminal proceeding for a traffic violation, nothing in a traffic citation would reveal a confidential source, disclose an investigatory technique, or prevent someone from getting a fair trial. The information contained on a traffic citation is routine. A traffic citation includes the name and address of the person who is issued the citation; the state registration number of the vehicle; the number of the

driver's license; the NRS citation and the offense charged with a brief description; the time and place where the person is required to appear in court; and the signature of the peace officer. NRS 484.799. Allowing public inspection of information contained in a traffic citation will not have any adverse effect on the violation or the adjudication of the offense. Therefore, based upon these considerations, traffic citations should be open to the public.

However, one public policy argument in support of non-disclosure may exist. A traffic citation contains information about an individual who has not yet been formally charged with a traffic offense. An argument could be made that it is premature to allow inspection of a record containing information about an individual who has not yet been charged with a crime. But this is not a strong argument for two reasons:

1. Traffic citations, once issued by an officer, must be filed with the Court and may not be disposed of in any other manner. NRS 484.813;
2. Once a traffic citation is filed with the court, the traffic citation becomes a lawful complaint, rendering it a public record. NRS 484.817.

Therefore, since it is inevitable that a traffic citation, once issued, will become a public record through the court system, there is no policy argument that supports maintaining confidentiality of the record for the brief period of time between the issuance of the citation and the filing of the citation with the Court.

B. The Deliberative Process Exception

The second exception to the PRA is termed the deliberative process exception. The deliberative process exception protects disclosure of pre-decisional, opinions and recommendations, about agency policies. *DR Partners v. Board of County Comm'rs of Clark County*, 116 Nev. 616, 6 P.3d 465 (2000). The purpose of this exception is to encourage candid discussions within an agency without fear of exposure of preliminary policy ideas. *Id.* at 623. Therefore, in order to qualify for this exception, the records must include opinions, recommendations or advice about agency policies. *Id.*

Traffic citations are not pre-decisional opinions or recommendations that affect agency policies. Rather, traffic citations are charging documents that result from the violation of the existing traffic laws. Therefore, the deliberative process exception does not apply to the confidentiality of traffic citations.

Since the *Donrey* balancing test and the deliberative process exception do not support confidentiality of traffic citations, the only remaining basis for keeping records confidential is an express provision of law. Since traffic citations are not deemed confidential by NRS Chapter 484, or any other statute or regulation, traffic citations must be open for inspection.

CONCLUSION TO QUESTION ONE

Traffic citations have not been declared by law to be confidential, nor do public policy concerns support confidentiality. Therefore, appropriately redacted traffic citations are public records pursuant to NRS 239.010. See conclusion to question three.

QUESTION TWO

If citations are public record, would they become public record prior to or following disposition?

ANALYSIS

NRS 484.813 states that once a traffic citation is issued to a driver, the citation *must* be filed with the court. It further states that disposing of a traffic citation in any other way would be unlawful. NRS 484.813.

A traffic citation is made in the form of a complaint and becomes a lawful complaint when filed with the court. NRS 484.799; NRS 484.817. Once a complaint is filed with the court, it is subject to public inspection. Therefore, once a traffic citation is issued to a driver, it is certain to be filed with the court and become a public record. No purpose in law or policy would be served by keeping citation confidential until it is filed.

CONCLUSION TO QUESTION TWO

Since it is inevitable that a traffic citation will become a public record once issued to a driver, there is no strong public policy argument to support the position that a traffic citation should be held confidential for the brief period between issuance of the traffic citation and the filing of the traffic citation with the court. Therefore, a traffic citation becomes a public record when it is issued to a driver.

QUESTION THREE

Should any personal information be redacted from a citation prior to release?

ANALYSIS

Personal information is deemed confidential by law and a government agency is required to ensure that personal information be maintained as confidential. NRS 239B.030(2). NRS 603A.040 defines "personal information" as the following:

A natural person's first name or first initial or last name in combination with any one or more of the following data elements, when the name and data elements are not encrypted:

1. Social security number.
2. Driver's license number or identification card number.
3. Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.

. . . .

A traffic citation contains the name and address of the person who is issued the citation; the state registration number of the vehicle; the number of the driver's license; the NRS citation and the offense charged with a brief description; the time and place where the person is required to appear in court; and the signature of the peace officer. NRS 484.799. Since traffic citations contain the driver's license number, as well as the driver's name, the driver's license number should be redacted pursuant to NRS 239B.030(2) and NRS 603A.040.¹

CONCLUSION TO QUESTION THREE

The driver's license number and any other personal information as defined by NRS 603A.040 should be redacted from the traffic citation prior to inspection and/or release.

¹ If a citation contains any other personal information as defined by NRS 603A.040 including a social security number, it should be redacted from the citation prior to release.

QUESTION FOUR

Are citations issued to juveniles considered public records, and if so, should any of the juvenile(s) information be redacted prior to release?

ANALYSIS

The juvenile court has jurisdiction over traffic offenses committed by a minor child. NRS 62B.380. The juvenile court keeps records of all cases brought before it. NRS 62H.030. The record of any case brought before the juvenile court may only be opened for inspection pursuant to a court order to individuals who have a legitimate interest in the record. *Id.* Therefore, juvenile traffic records carry the presumption of confidentiality.

NRS Chapter 484 is silent on the record retention of juvenile traffic citations. Therefore, the DPS should defer to Chapter 62H, concerning the confidentiality of juvenile records. Since juvenile records are presumed confidential unless otherwise deemed public by statute, juvenile traffic citations should be maintained as confidential records. NRS 62H.030.

CONCLUSION TO QUESTION FOUR

Traffic citations issued to juveniles are not public record based on the confidentiality of juvenile court records established in NRS Chapter 62H.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

SAMANTHA T. LADICH
Deputy Attorney General
775-684-4606



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

May 6, 2008

OPINION NO. 2008-04

BUDGET; GOVERNOR; REVENUE: If the Governor determines that an NRS 353.220(4) work program is necessary because of a qualifying emergency situation, he may approve the revision and make a later report to the Interim Finance Committee (IFC). NRS 353.220(5)(a). If the Governor determines that an NRS 353.220(4) work program revision is necessary and requires expeditious action, he must submit a request to the IFC stating same, and IFC must act within 15 days or the request is deemed approved. NRS 353.220(5)(b).

Governor Jim Gibbons
Office of the Governor
101 North Carson Street
Carson City, Nevada 89701

Dear Governor Gibbons:

You have asked for an opinion on the procedures to be followed by the Governor when setting aside budget reserves which implicate the work program thresholds stated in NRS 353.220(4).

QUESTION

In light of the requirements of NRS 353.220, what procedures must the Governor follow to revise agency work programs to set aside budget reserves to address revenue shortfalls?

ANALYSIS

In an All Agency Memorandum dated January 14, 2008, State Budget Director Andrew Clinger directed the submission of work programs necessary to implement a 4.5 percent budget reduction in fiscal years 2008 and 2009. The Administration provided a report on the status of these budget cuts to the Interim Finance Committee (IFC) at its meeting on January 24, 2008. A work program is a group of documents used to make changes to the legislatively approved budget. See Work Program Manual, Fourth Edition, Page 5.¹ The process of creating, reviewing, and approving work programs is intended to ensure, among other things, that expenditures are within applicable appropriations, are used for legislatively approved purposes, that sufficient funds exist to allow the expenditure and that changes in planned revenues and expenditures can be proposed, evaluated and authorized in a manner consistent with the State Budget Act. Work Program Manual, Fourth Edition, Page 7. Primarily, this is the duty of the Budget Director prior to submitting work programs for processing by the Controller.

NRS 353.220 sets forth the process for work programs. NRS 353.220 describes requirements for the creation, submission, and approval of work programs. Subsection 4 provides in part that, whenever a work program requests a revision that will “. . . increase or decrease by 10 percent or \$50,000, whichever is less, the expenditure level approved by the Legislature for any of the allotments within the work program, the request must be approved as provided in subsection 5 before any appropriated or authorized money may be encumbered for the revision.” Subsection 5 sets forth three ways in which such a work program may be approved:

If a request for the revision of a work program requires additional approval as provided in subsection 4 and:

(a) Is necessary because of an *emergency* as defined in NRS 353.263 or for the protection of life or property, the Governor shall take reasonable and proper action to approve it and shall report the action, and his reasons for determining that immediate action was necessary, to the Interim Finance Committee at its first meeting after the action is taken. Action by the Governor pursuant to this paragraph constitutes approval of the revision, and other provisions of this chapter requiring approval before encumbering money for the revision do not apply.

¹ State Budget Division website:
http://budget.state.nv.us/WrkPrgmManual/work_program_manual_4th_edition_R1.pdf

(b) The Governor determines that the revision is necessary and *requires expeditious action*, he may certify that the request requires expeditious action by the Interim Finance Committee. Whenever the Governor so certifies, the Interim Finance Committee has 15 days after the request is submitted to its Secretary within which to consider the revision. Any request for revision which is not considered within the 15-day period shall be deemed approved.

(c) Does not qualify pursuant to paragraph (a) or (b), it must be submitted to the Interim Finance Committee. The Interim Finance Committee has 45 days after the request is submitted to its Secretary within which to consider the revision. Any request for revision which is not considered within the 45-day period shall be deemed approved. [Emphasis added.]

Therefore, unless the Governor declares that a qualifying emergency situation exists under NRS 353.220(5)(a), a revision for a work program under section .220 must first be submitted to the IFC for approval.

While it appears the budget cut work programs require IFC approval pursuant to NRS 353.220, decreases which are placed into reserves have not historically been construed by the Legislative Counsel Bureau (LCB) as requiring IFC approval. It is also apparent from an examination of the Budget Act, as well as the historical practice and procedure involving the processing of work programs, that the Legislature treats work programs that increase authorized spending differently than work programs that reduce spending. For example, the aggregate of the “allotments” submitted in work programs pursuant to NRS 353.215 must not exceed the “total appropriation or other funds from any source whatever” and all expenditures to be made from legislative appropriations are to be made “on the basis of such allotments and not otherwise.” On the other hand the Legislature granted substantial discretion in NRS 353.225 to set aside reserves out of legislative appropriations “in such amount as the [Budget] Chief may determine.”²

² Historically, the provisions of NRS 353.215, 353.220 and 353.225 were originally enacted together as sections 12, 13 and 14 of Senate Bill 229 in the 1949 Nevada Legislature. 1949 Nev. Stat. 602, 606. From 1949 until 1969, the statutes required the Governor to decide in advance of the fiscal year whether or not to set aside reserves “in making the original allotments.” 1969 Nev. Stat. 1117. (Section 12 of this act strikes the language “in making original allotments” from NRS 353.225(1) under testimony by the Legislative Counsel Daykin that “[i]t permits work programs to be started any time during the fiscal year ...”) *Hearing on S.B. 143 Before the Assembly Committee on Government Affairs*, 1969 Leg., 55th Sess. 12 (March 21, 1969). The requirement of obtaining prior approval of work programs from the IFC was added to NRS 353.220 in 1979. 1979 Nev. Stat. 606, 609. Therefore, prior to 1979 the authority to approve work programs rested solely with the Governor and, between 1969 and 1979, the Governor possessed the sole discretion to order and approve work programs at any time during the biennium to affect NRS 353.225 reserves.

It has been the common practice between the Budget Division and LCB that IFC approval is not required to revise budgets to place funds in reserve. This construction of the law has been included in the State's Work Program Manual, which contains in Appendix E a document entitled "Determining If IFC Approval is Required" containing a "decision tree" that indicates that if the revision "[i]ncreases revenue and places funds in reserve only" that "IFC approval [is] NOT required." Work Program Manual, p. 43. Additionally, the Department of Administration's Work Program Packet Checklist includes a check box that states "Does not require IFC approval because . . . [p]laces funds in reserve only." *Id.* p. 47. Although these Executive Branch documents are not binding on the Legislative Branch, it appears that the Legislature has been aware of this statutory construction and past practice and has accepted it.

Finally, we note that IFC did not formally object to Mr. Clinger's report on the subject work programs at its January meeting.³ Past construction of NRS 353.220 has produced a long standing practice and procedure that neither the Legislature nor the IFC have required their prior approval for work programs implementing reserves. Nonetheless, since the instant question is now raised and the past practice brought to our attention, we must opine that the requirements of NRS 353.220 are clear. Where a statute is clear on its face, we may not look for a meaning beyond the statute itself. *Worldcorp v. State, Dep't of Taxation*, 113 Nev. 1032, 944 P.2d 824 (1997). Accordingly, we conclude as follows:

CONCLUSION

If the Governor determines that an NRS 353.220(4) work program is necessary because of a qualifying emergency situation, he may approve the revision and make a later report to the IFC. NRS 353.220(5)(a). If the Governor determines that an NRS 353.220(4) work program revision is necessary and requires expeditious action, he must submit a request to the IFC stating same, and IFC must act within 15 days or the request is deemed approved. NRS 353.220(5)(b). Finally, if the Governor determines

³ Any supposition that the inaction of the IFC on this item may have demonstrated its willful acquiescence to the item's approval was subsequently dispelled by a March 31, 2008, letter from IFC Chairman Morse Arberry to the Governor wherein he demanded that such work program revisions be formally approved by the IFC before being placed in reserve, referencing NRS 353.220.

Governor Jim Gibbons
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that an NRS 353.220(4) work program revision is not necessary to meet a qualifying emergency situation and does not otherwise require expeditious action, he must present the request to the IFC, which has 45 days to act or the request is deemed approved.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
JAMES T. SPENCER
Chief of Staff

JTS:MAS



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

July 29, 2008

OPINION NO. 2008-05

DISCRIMINATION; PEACE OFFICERS;
PEACE OFFICER BILL OF RIGHTS;
SEXUAL HARASSMENT: Chapter 289 of the Nevada Revised Statutes applies when the Department of Personnel's Sexual Harassment and Discrimination Investigative Unit conducts an investigation into a complaint of sexual harassment, discrimination, and/or a related claim of retaliation or hostile work environment involving a peace officer.

Todd Rich, Director
Department of Personnel
209 East Musser Street, #101
Carson City, NV 89701-4204

Dear Mr. Rich:

You have requested an opinion regarding the application of NRS Chapter 289 to the Department of Personnel's sexual harassment and/or discrimination investigations.

BACKGROUND

The general provisions governing rights of peace officers are set forth in NRS Chapter 289 and are commonly referred to as the Peace Officer Bill of Rights.¹ The Peace Officer Bill of Rights gives peace officers different rights from those held by other public employees, such as more stringent notification rights when faced with investigations for official misconduct, such as sexual harassment or discrimination.

¹ NRS 289.020-.120

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During the 2003 Session of the Nevada Legislature, Governor Guinn requested funding for a Sexual Harassment and Discrimination Investigation Unit (Unit), to be housed within the Department of Personnel. The Unit's mission is several fold: to perform prompt and unbiased investigations into allegations of sexual harassment and discrimination for purposes of promptly correcting problems, to aid in the defense of the State in administrative or court proceedings, and to facilitate employee training in the area of sexual harassment. The Unit was incorporated into the Governor's Policy Against Sexual Harassment and Discrimination (Governor's Policy). The Governor's Policy requires department directors to report allegations of sexual harassment or discrimination to the Unit. Once the agency reports any such allegations to the Unit, the Unit in essence becomes an investigative arm of the agency.

The Department of Personnel is seeking to harmonize the statutory provisions found in the Peace Officer Bill of Rights with the Department's duties and responsibilities related to investigations conducted by the Unit per the Governor's Policy. Therefore, the Department has asked the following questions.

QUESTION ONE

When the Unit conducts an investigation into a complaint of sexual harassment, discrimination, and/or a related claim of retaliation or hostile work environment involving a peace officer, does any section of NRS Chapter 289 apply, and if so, which sections?

ANALYSIS

NRS 289.057(1) provides "[a]n investigation of a peace officer may be conducted in response to a complaint or allegation that the peace officer has engaged in activities which could result in punitive action." Punitive action is defined as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer of a peace officer for purposes of punishment." NRS 289.010(4). The results of an investigation into allegations of sexual harassment, discrimination, and/or retaliation conducted by the Unit could lead to any one of the negative employment actions set forth in the definition of punitive action. See NAC 284.650 and 284.771. Therefore, NRS 289.057 does apply to investigations conducted by the Unit. Furthermore, the statutory provisions found in the Peace Officer Bill of Rights in their entirety apply to any entity conducting an investigation of a peace officer that could result in punitive action.

You should be aware of several provisions in particular. Listed below are the statutes followed by a brief explanation, several of which will be discussed later in greater detail. However, please note not every statutory provision itemized below requires action to be taken by the Unit while conducting an investigation.

1. NRS 289.040 provides that the law enforcement agency may place certain documents related to an investigation conducted pursuant to NRS 289.057 into a peace officer's administrative file.

2. NRS 289.055 requires each State agency that employs peace officers to establish written procedures for investigating complaints and allegations of misconduct.

3. NRS 289.057(3)(a) allows a peace officer who is the subject of an investigation, and upon whom punitive action is imposed, to review any administrative or investigative file maintained by the law enforcement agency relating to the investigation.

4. NRS 289.060 requires a law enforcement agency to provide written notification to a peace officer if he is subject to investigation pursuant to NRS 289.057, and provides requirements for the interrogation.

5. NRS 289.070 provides that during an investigation conducted pursuant to NRS 289.057, the peace officer under investigation may, but is not required to, submit to a polygraphic examination concerning such activities.

6. NRS 289.080 allows a peace officer who is being interrogated pursuant to NRS 289.057, upon request, to have two representatives of his choosing present.

7. NRS 289.100 limits the applicability of NRS Chapter 289. Specifically, NRS 289.100(2) provides that NRS Chapter 289 "does not affect any procedures which have been adopted by the law enforcement agency if those procedures provide the same or greater rights than provided for in this chapter."

CONCLUSION TO QUESTION ONE

When the Unit conducts an investigation into a complaint of sexual harassment, discrimination, and/or a related claim of retaliation or hostile work environment involving a peace officer, provisions of NRS 289.020 to 289.120 apply.

QUESTION TWO

Assuming that NRS Chapter 289 does apply to these investigations, does NRS 289.060 require notice to all peace officers who will be questioned, or just to the peace officer that is under investigation?

ANALYSIS

NRS 289.060 sets forth the notification requirements and requirements for interrogation relating to an investigation conducted pursuant to NRS 289.057. Specifically, NRS 289.060 provides "a law enforcement agency shall, not later than 48

hours before any interrogation or hearing is held relating to an investigation conducted pursuant to NRS 289.057, provide written notice to the peace officer.” Words in a statute “should be given their plain meaning unless this violates the spirit of the act.” *McKay v. Bd. Of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). By the plain meaning of NRS 289.060 in its context, only the peace officer under investigation is required to receive the notification. However, if during the course of an investigation, a peace officer who is testifying as a witness and is not the subject of the investigation, gives inculpatory evidence that could lead to his or her own discipline, the interview should conclude and the required notice should be given to the peace officer per NRS 289.060.

CONCLUSION TO QUESTION TWO

Only the peace officer who is the subject of an investigation is statutorily required to receive the notification set forth in NRS 289.060.

QUESTION THREE

Under NRS 289.060(2)(b), how much detail is required in the summary of alleged misconduct?

ANALYSIS

NRS 289.060(2) provides elements that the notification of interrogation must contain. Specifically, NRS 289.060(2)(b) provides the notification must include “[a] summary of alleged misconduct of the peace officer.” The purpose of the notification provision is to provide procedural due process protections to peace officers when faced with interrogation for misconduct, and to put the peace officer on notice of the alleged misconduct. Therefore, the notification should, to the extent possible, cite to specific allegations and include dates of the alleged misconduct sufficient to enable the peace officer to prepare for his or her questioning.

CONCLUSION TO QUESTION THREE

Under NRS 289.060(2)(b), the summary of alleged misconduct should, to the extent possible, concisely include the specific allegations of misconduct and include dates of the alleged misconduct.

QUESTION FOUR

May general questions regarding the work environment or work relationships be asked without specifically identifying the question in the notification required by NRS 289.060?

ANALYSIS

NRS 289.060 does not contain any prohibitions against asking questions that were not specifically identified in the notification to the peace officer. However, NRS 289.060(3)(c) limits the scope of the questioning during an interrogation to the alleged misconduct of the peace officer. Therefore, general questions regarding the relationship of the complainant and the accused, or the general work environment, may be asked if the questions pertain to the alleged misconduct of the peace officer.

CONCLUSION TO QUESTION FOUR

General questions regarding the work environment or work relationships may be asked without specifically identifying the questions in the notification required by NRS 289.060 if the questions pertain to the alleged misconduct of the peace officer.

QUESTION FIVE

Do witnesses have the same rights under NRS Chapter 289 as the accused, e.g., the right to the presence of representative(s) during the investigation interview?

ANALYSIS

The Peace Officer Bill of Rights only provides procedural due process protections to peace officers and does not address the rights of witnesses. However, if an NRS 289.057 investigation is commenced regarding inculpatory evidence given by a witness who is also a peace officer, then that witness would be afforded the same rights under NRS Chapter 289 as the accused.

CONCLUSION TO QUESTION FIVE

Witnesses do not have the same rights under NRS 289 as the accused, unless the law enforcement agency commences a NRS 289.057 investigation into the witness.

QUESTION SIX

NAC 284.718(5) designates any notes, records, recordings or findings of an investigation as confidential and NAC 284.726(6) identifies to whom these records may be released. Does NRS 289.080(6) require the release of these records even though NAC Chapter 284 is more specific to these types of investigations?

ANALYSIS

NAC 284.718(5) designates as confidential any notes, records, recordings or findings of an investigation conducted by the Department of Personnel regarding sexual harassment or discrimination. However, NRS 289.080(6) allows the peace officer who

was subject of the investigation, if appealing a recommendation to impose punitive action, to review and copy the entire file concerning an investigation, including any recordings, notes, transcripts of interviews, and documents contained in the file.

It appears that NAC 284.718(5) and NRS 289.080(6) are in conflict. However, an administrative regulation cannot contradict a statutory mandate. See *Clark County Social Service Dept. v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990). Further, “[i]t is an accepted rule of statutory construction that a provision which specifically applies to a situation will take precedence over one that applies only generally.” *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003). NRS 289.080(6) specifically applies to investigative documents concerning peace officers who are the subject of an investigation; whereas, NAC 284.718(5) is a general requirement relating to documents concerning other public employees. Therefore, the specific statute allowing a peace officer to review and copy the entire file concerning an investigation, rather than the general regulation that designates such documents as confidential, governs the peace officer’s entitlement to the documents.

CONCLUSION TO QUESTION SIX

NRS 289.080(6) requires the release of the entire file concerning an investigation to the peace officer who was the subject of the investigation provided he is appealing the recommendation to impose punitive action.

QUESTION SEVEN

Does NRS 289.060(3)(b) apply to sexual harassment and discrimination investigations?

ANALYSIS

NRS 289.060(3)(b) also provides specific requirements that must be met when interrogating a peace officer pursuant to NRS 289.057. Specifically, subsection 3(b) provides that the peace officer must be orally informed on the record before the interrogation begins that “(1) [h]e is required to provide a statement and answer questions related to his alleged misconduct; and (2) [i]f he fails to provide such a statement or to answer such questions, the agency may charge him with insubordination.”

Todd Rich, Director
July 29, 2008
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This opinion has previously established that NRS 289.057 applies to investigations conducted by the Unit; therefore, NRS 289.060(3) applies as well.

CONCLUSION TO QUESTION SEVEN

NRS 289.060(3)(b) applies to sexual harassment and discrimination investigations. We appreciate your need for assistance in interpreting the cited statutory provisions as they relate to investigations conducted by the Sexual Harassment and Discrimination Investigation Unit. The Department of Personnel may find it productive to discuss a possible legislative amendment to codify and clarify the Unit's authority.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
KATIE S. ARMSTRONG
Deputy Attorney General
Government and Natural Resources
(775) 684-1224

KSA:LSD



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JAMES T. SPENCER
Chief of Staff

August 11, 2008

OPINION NO. 2008-06

LICENSES; SECONDHAND DEALERS:

The City's proposed licensing structure, which would allow secondhand dealer special event participants to be licensed under less stringent requirements than those required in NRS 268.0974, is not permissible under Nevada law unless these participants are exempt from the statutory definition of secondhand dealer.

John J. Kadlic, City Attorney
Reno City Attorney's Office
Post Office Box 1900
Reno, Nevada 89506-1900

Dear Mr. Kadlic:

In your May 22, 2008 letter, you have requested that the Office of the Attorney General (Office) opine as to whether a municipality has discretion to permit a participant at special events at which secondhand merchandise is sold to have less stringent regulation if the special event promoter holds a privileged secondhand dealer license. A secondary question is whether this same discretion would also permit the municipality to allow persons selling antiques and other secondhand merchandise in a mall where the owner conducts all sales transactions to be licensed in a similar manner.

QUESTION ONE

May the City of Reno (City) adopt a licensing structure for limited duration special events where secondhand merchandise is sold, wherein the special event promoter obtains a privileged secondhand dealer license by meeting the requirements contained

John J. Kadlic, City Attorney
August 11, 2008
Page 2

in NRS 268.0974, and the participants obtain a general business license by meeting less stringent requirements than those contained in NRS 268.0974?

ANALYSIS

The language in NRS 268.0974 is plain, unambiguous, and mandatory. “[E]ach person who wishes to engage in the business of a secondhand dealer” must obtain an appropriate license from the City. NRS 268.0974(1). The statutory definition of “person” is “a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization,” unless otherwise expressly provided in a particular statute or as required by the context. NRS 0.039. Therefore, the words “each person” specifically include each person or business engaged in the business of a secondhand dealer. The qualifications to obtain the required license are also clearly delineated in NRS 268.0974(2)–(3).

When the words of a statute have “a definite and ordinary meaning,” it is not appropriate to “look beyond the plain language of the statute unless it is clear that this meaning was not intended.” *Harris Associates v. Clark County Sch. Dist.*, 119 Nev. 638, 641–42, 81 P.3d 532, 534 (2003). This is a case in which the words of the statute have definite, ordinary meaning.

Accordingly, each person who is engaging in the business of a secondhand dealer must comply with the provisions of NRS 268.0974. Therefore, the answer to your question turns on whether the participants in special events where secondhand merchandise is sold are “secondhand dealers” under the statute.

As defined by statute, a “secondhand dealer” is a person engaged either full-time or part-time “in the business of buying and selling metal junk, melted metals or secondhand personal property . . . including, without limitation antiques, coins and

collectibles.” NRS 647.018(1). The only dealers of secondhand merchandise excluded by statute are dealers who buy and sell used books and dealers who buy and sell secondhand firearms, as long as certain other legal requirements are met.¹ NRS 647.018(2). Again, the statutory language in this provision is plain and unambiguous, and it is not appropriate to look beyond the words of the statute. *Harris Associates*, 119 Nev. at 641–42, 81 P.3d at 534.

Thus, the City’s proposed licensing structure, which would require the special event promoter to obtain a privileged secondhand dealer license by meeting the requirements contained in NRS 268.0974 and would allow participating event merchants to obtain only a general business license by meeting less stringent requirements than those contained in NRS 268.0974, is not permissible for licensing secondhand dealers. It would, however, be appropriate for dealers of used books and secondhand firearms, provided the secondhand firearms dealers meet the requirements in NRS 647.018(2) to exempt these dealers from the scope of the definition of a “secondhand dealer.”

CONCLUSION TO QUESTION ONE

The City’s proposed licensing structure, which would allow secondhand dealer special event participants to be licensed under less stringent requirements than those required in NRS 268.0974, is not permissible under Nevada law unless these participants are exempt from the statutory definition of secondhand dealer.

QUESTION TWO

May the City of Reno adopt a licensing structure similar to that posed in Question One for a mall where antiques and other secondhand merchandise are sold, wherein the owner obtains a privileged secondhand dealer license by meeting the requirements contained in NRS 268.0974, the owner conducts all sales transactions, and the vendors obtain a general business license by meeting less stringent requirements than those contained in NRS 268.0974?

¹ Generally, when express exceptions are provided in a statute, no other exceptions are intended. *In re Estate of Prestie*, 122 Nev. ___, 138 P.3d 520, 524 (Adv. Op. 70, July 20, 2006) (“We have previously recognized the fundamental rule of statutory construction that “[t]he mention of one thing implies the exclusion of another.”) (footnote omitted; quoting *State v. Wyatt*, 84 Nev. 731, 734, 448 P.2d 827, 829 (1968)). Thus NRS 647.018 should not be read to exempt any other persons, such as participants holding a general business license and participating in a special event held by a special event promoter holding a privileged secondhand dealer license obtained pursuant to NRS 268.0974.

John J. Kadlic, City Attorney
August 11, 2008
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CONCLUSION TO QUESTION TWO

In light of the analysis in Question One above, no analysis is necessary in response to this question. Unless the vendors in the mall are exempt from the statutory definition of secondhand dealer, all vendors selling secondhand merchandise would have to be licensed by the City of Reno as required by NRS 268.0974.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

SARAH A. BRADLEY
Deputy Attorney General
Business and Licensing
(775) 684-1213

SAB:PAS



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

August 18, 2008

OPINION NO. 2008-07

BENEFICIARIES; INVESTMENTS;
PUBLIC EMPLOYEES RETIREMENT:
Article 9, § 2 of the Nevada Constitution prohibits the PERS Retirement Board from making investment decisions that further a “social interest” and that are not in the exclusive interest of the members and beneficiaries of the fund. The Board must only invest the trust fund money for the purpose of funding and administering the Public Employees’ Retirement System of Nevada.

Dana K. Bilyeu, Executive Officer
Public Employees’ Retirement System of Nevada
693 West Nye Lane
Carson City, Nevada 89703

Dear Ms. Bilyeu:

The Retirement Board of the Public Employees’ Retirement System of Nevada seeks guidance from the Office of the Attorney General (Office) on the following question of law.

QUESTION

Does Article 9, § 2 of the Nevada Constitution prohibit the Board from making investment decisions that are not in the exclusive interest of the members and beneficiaries of the fund, but further a social purpose?

ANALYSIS

The Public Employees' Retirement System of Nevada (PERS) is a constitutionally created trust fund administered by a board of trustees for the exclusive benefit of the members and beneficiaries of the fund. Specifically, Article 9, § 2(2) of the Nevada Constitution states:

2. Any money paid for the purpose of providing compensation for industrial accidents and occupational diseases, and for administrative expenses incidental thereto, and for the purpose of funding and administering a public employees' retirement system, . . . *must never be used for any other purposes*, and they are hereby declared to be trust funds for the uses and purposes herein specified. (Emphasis added.)

Additionally, Article 9, § 2(3)–(4) states:

3. Any money paid for the purpose of funding and administering a public employees' retirement system must not be loaned to the state or invested to purchase any obligations of the state.

4. The public employees' retirement system must be governed by a public employees' retirement board. The board shall employ an executive officer who serves at the pleasure of the board. In addition to any other employees authorized by the board, the board shall employ an independent actuary. The board shall adopt actuarial assumptions based upon the recommendations made by the independent actuary it employs.

NEV. CONST. art. 9, § 2(3)–(4).

On January 28, 1987, the Office of the Attorney General issued a letter opinion¹ to the Executive Officer and the PERS Retirement Board which analyzed the standard of investment that must be applied to the investments of the trust as codified in Chapter 286 of the Nevada Revised Statutes. Specifically, the 1987 opinion analyzed

¹ A true and correct copy of the January 28, 1987 opinion is attached hereto and incorporated by reference.

NRS 286.220(2) and NRS 286.682. Although the opinion did not expressly address or analyze Article 9, § 2 it is nonetheless relevant to your question.

The 1987 opinion concluded that the PERS Retirement Board did not have authority to consider social or ethical issues in setting investment policy if by doing so it sacrificed either the return or safety of investments. This conclusion was based upon statutory language. NRS 286.220(2) states as follows:

The money in the Fund must not be used or appropriated for any purpose incompatible with the policy of the Public Employees' Retirement System, as expressed in NRS 286.015. The Fund must be invested and administered to assure the highest return consistent with safety in accordance with accepted investment practices.

Additionally, NRS 286.682 states:

The Board may invest the money in its fund in every kind of investment which men of prudence, discretion and intelligence acquire or retain for their own account.

Buttressing the direction given in the statutory language, the Nevada Constitution itself constrains investment choices.

Article 9, § 2 of the Nevada Constitution was an amendment approved and added in 1974 by the voters. The amendment declared that the PERS Retirement Fund money "must never be used for any other purposes, and they are hereby declared to be trust funds for the uses and purposes herein specified." NEV. CONST. art. 9, § 2. Therefore, the Nevada Constitution sets forth in plain and unmistakable terms that the money in the PERS Retirement Fund is to be forever held in trust for the benefit of all public employees who are eligible to participate.

Moreover, in 1996, the voters of Nevada approved an amendment to Article 9, § 2 preventing the loan of assets of the trust to the State. Additional provisions providing for the independence of the administration of the trust fund were also included. See NEV. CONST. art. 9, § 2(3) & (4). The 1996 amendment (Article 9, §§ 3 and 4) also express the intent of the Nevada voters to prevent use of the trust fund money for purposes other than the benefit of the public employees and retired members.

These statutory and constitutional provisions signal a requirement for investment assiduously devoted to a single purpose. This requirement necessarily excludes all other purposes, including social policy purposes. *Accord*, 2000 Alaska Op. Atty. Gen. 89 (June 5, 2000).²

The Nevada Constitution is the supreme law of the State. *Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990). Therefore, any law that contravenes the Nevada Constitution renders the law “null and void.” See *Batesel v. Schultz*, 91 Nev. 553, 554, 540 P.2d 100 (1975). Further, “an express constitutional provision requiring a certain thing be done in a certain way is exclusive to like extent as if it had included a negative provision to the effect that it may not be done in any other way.” *Goldman*, 106 Nev. at 37, 787 P.2d at 377.

Bearing in mind these principles, we conclude that the purpose of the pension trust is to fund benefits and pay for the administration of the pension fund, nothing else. Article 9, § 2 also expressly declares that the money held in trust to fund the PERS Fund “shall never be used for any other purposes. . . .” See NEV. CONST. art. 9, § 2. Using the pension trust fund for a social objective, no matter how honorable, would directly conflict with the stated constitutional requirements and purpose.

Article 9, § 2 of the Nevada Constitution is clear and unambiguous and its meaning is plain. The trust fund monies in the PERS Fund “must never be used for any other purposes.” There are no exceptions contained within this language. Any attempt to legislate or impose a social purpose in the PERS Fund investments is

² In *State of Nevada ex. rel. Greenbaum v. Rhodes*, 4 Nev. 312 (1868), the Supreme Court held that funds pledged by the constitution for education could not be diverted by the State Legislature for internal improvement or any other branch of state government not immediately connected to the education system. *Id.* at 317. The Supreme Court in *State ex. rel. Keith v. Westerfield*, 23 Nev. 468, 49 P.119 (1897), held that both principal and interest are protected from legislative diversion, and declared an act unconstitutional which would have paid the salary of the superintendent of the State Orphans Home from the constitutionally protected State School Fund. *Id.* at 473, 49 P. at 121.

Further, the Supreme Court in *Ex Parte McMahon*, 26 Nev. 243, 66 P.294 (1901) found an act unconstitutional that authorized one-half of a fine to be paid to an informant under the “act protecting wild game,” since 100% of all such fines were pledged solely for educational purposes. The *McMahon* court stated “[t]he language used [in the Constitution] is plain, clear, and unambiguous, and does not require construction, and it seems to us that said section 19 of the act supra clearly contravenes this constitutional provision.” *Id.* at 245, 66 P. at 294.

As demonstrated by the above-cited cases, Nevada Supreme Court case law adopts a strict interpretation of the Nevada Constitution when the trust fund at issue is constitutionally created. The cases firmly disallow diversion of trust funds for unauthorized uses not expressly allowed by the Constitution or the laws.

prohibited by the plain language of Article 9, § 2.³ PERS Fund investment must not become influenced by political or social issues, as its only purpose is to fund the members' retirement through prudent investing.⁴

CONCLUSION

Article 9, § 2 of the Nevada Constitution prohibits the PERS Retirement Board from making investment decisions that further a "social interest" and that are not in the exclusive interest of the members and beneficiaries of the fund. The Board must only invest the trust fund money for the purpose of funding and administering the Public Employees' Retirement System of Nevada.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

CHRISTINE S. MUNRO
Senior Deputy Attorney General
Government & Natural Resources
(775) 684-1143

CSM/LSD
Encl.

³ Our 1987 opinion did not consider the requirements of Art. 9, § 2 and concluded by stating that a social responsibility investment standard could be authorized by legislative action. We hereby overrule our earlier opinion on that point, pointing out that such a standard could only be authorized by amending the constitutional provision to allow consideration of such a standard by the PERS Retirement Board in making investments, and not by a legislative enactment.

⁴ *Guinn v. Legislature of State of Nevada*, 71 P.3d 1269 (Nev. 2003), overruled on other grounds by *Nevadans for Nevada v. Beers*, 122 Nev. ___, 142 P.3d 339 (Adv. Op. 80, September 8, 2006).



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

August 22, 2008

OPINION NO. 2008-08

COMPENSATION; WATER; WATER DISTRICTS: LCWD should be considered a "public utility" for the purposes of NRS 244.279. Lincoln County, acting through its Board of County Commissioners, may sell or lease the water rights applications to Lincoln County Water District in the manner prescribed by NRS 244.279, but may not transfer the applications without compensation. The water rights applications in question may be sold or leased for a nominal value as long as the reversionary interest remains in the county.

Gregory J. Barlow, District Attorney
Lincoln County
Post Office Box 60
Pioche, Nevada 89043

Dear Mr. Barlow,

You have asked this Office to opine on the subject of an uncompensated transfer of water rights applications currently owned by Lincoln County to the Lincoln County Water District (LCWD).

QUESTION ONE

Can the water rights applications currently held by Lincoln County be transferred to the Lincoln County Water District without compensation?

ANALYSIS

Water rights are a form of real property under Nevada law and are protected by a comprehensive statutory scheme and a significant body of judicial interpretation.¹ In Nevada, a person does not own actual water, but only the right to use available water in accordance with his or her priority.

In this instance, Lincoln County is proposing to transfer water right applications, which are unperfected rights. However, applications provide significant rights to the holder, such as a priority date which upon perfection relates back to the date of the application. NRS 534.080(3). In addition, the Legislature deals with water right permits and applications to appropriate water in a similar fashion for purposes of transfer:

[E]very conveyance of an application or permit to appropriate any of the public waters, a certificate of appropriation, an adjudicated or unadjudicated water right or an application or permit to change the place of diversion, manner of use or place of use of water must be:

1. Made by deed;
2. Acknowledged in the manner provided in NRS 240.161 to 240.168, inclusive; and
3. Recorded in the office of the county recorder of each county in which the water is applied to beneficial use and in each county in which the water is diverted from its natural source.

NRS 533.382. Therefore, for purposes of transfer, we must analyze the applications in the same manner as actual water rights permits.

The Legislature has placed certain conditions on the transfer of water rights from a county to a public utility:

1. A board of county commissioners may sell or lease:
 - (a) A right-of-way to a public utility as defined in NRS 704.020; and
 - (b) Water rights to a public utility engaged in the business of furnishing water for municipal, industrial and domestic purposes to customers within the boundaries of the county,

¹ *Carson City v. Lompa*, 88 Nev. 541, 542, 501 P.2d 662, 662 (1972). "When a right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation as authorized by the state water law, it is a right which is regarded and protected as real property." (Citations omitted.)

without first offering those rights-of-way or water rights to the public.

2. If a public utility wishes to dispose of any right-of-way or water right acquired pursuant to subsection 1, it must be reconveyed to the county.

NRS 244.279. Any transfer of the applications would have to comply with these provisions if the transfer is to a public utility.

This office has noted before that:

[B]oards of county commissioners are administrative agencies of the state and are required to perform such duties as are prescribed by law under NEV. CONST. art. 4, § 26. *Ex rel Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923); *City of Las Vegas v. Mack*, 87 Nev. 105, 481 P.2d 396 (1971). Their powers are derived exclusively from legislative acts. Op. Nev. Att'y Gen. No. 97-19 (June 2, 1997), Op. Nev. Att'y Gen. No. 88 (November 12, 1963). "It is well settled that county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect." *State ex rel. King v. Lothrop*, 55 Nev. 405, 408, 36 P.2d 355 (1934).

Op. Nev. Att'y Gen. No. 2002-15 (March 21, 2002). Thus the direction of the Legislature that the county "may sell or lease" the water rights in question would preclude an uncompensated transfer.² In addition, any sale or lease would have to include a reversionary interest in the county if LCWD were to decide to convey or relinquish the applications or any resulting water rights.³

² See *Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620 (1920). ("Expressio unius est exclusio alterius" is a rule of statutory interpretation that when the Legislature lists the situation in which a statute would apply, it is meant to exclude other situations.)

³ The Legislature specifically considered and rejected a requirement that a public utility pay assessed market value for the water rights. *Hearing on S.B. 92 Before the Senate Committee on Government Affairs*, 1983 Leg., 62nd Sess. 17 (March 7, 1983). Chairman Keith Ashworth made it clear that the water rights could be sold for a nominal amount such as one dollar. *Id.* The concern of the legislature was that the reversionary interest of the county may be worthless if the county would have to repay full market value. *Id.* It thus appears that the main concern of the legislature was in the reversionary interest to ensure that publicly-owned water rights did not make their way into private hands without going through the proper process

You have noted that NRS 277.053 allows political subdivisions of the State to transfer real property without charge to other political subdivisions of the State for a public purpose. However, under longstanding rules of statutory construction, a specific statute will control in the case of a conflicting statute of general application.⁴ Thus the specific command of NRS 244.279 regarding the sale or lease of water rights will control in the face of NRS 277.053 which relates to real property in general.

The question which looms in the background is whether the LCWD is a public utility for purposes of the transfer of water rights from the county. LCWD is expressly not subject to the jurisdiction of the Public Utilities Commission. Act of June 11, 2003, ch. 474, § 15, 2003 Nev. Stat. 2989. However, it is not clear that the Legislature intended the requirements of NRS 244.279 to be limited to those entities under the control of the Public Utilities Commission.

The definition of a public utility is:

Any plant or equipment, or any part of a plant or equipment, within this State for the production, delivery or furnishing for or to other persons, including private or municipal corporations, . . . water for business, manufacturing, agricultural or household use, or sewerage service, whether or not within the limits of municipalities.

NRS 704.020 (2)(a).

The background materials indicate that LCWD does not currently have any wells or water rights and that it does not provide any water service. NRS 244.279(1)(b) allows a sale or lease to a "public utility engaged in the business of furnishing water." However, it is clear that the Legislature intended LCWD to proceed toward providing water either by itself or in conjunction with another entity. Act of June 11, 2003, ch. 474, § 11, 2003 Nev. Stat. 2979. Acquiring these water rights applications in furtherance of the legislative intent would therefore be in compliance with these statutes. It is the opinion of this office that LCWD should be considered a public utility for the limited purposes of NRS 244.279.

CONCLUSION

While acknowledging that this is a very close case, it appears that LCWD should be considered a "public utility" for the purposes of NRS 244.279. Lincoln County, acting

⁴ "Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls." *Laird v. State Pub. Employees' Retirement Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982).

Mr. Barlow, District Attorney
August 22, 2008
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through its Board of County Commissioners, may sell or lease the water rights applications to Lincoln County Water District in the manner prescribed by NRS 244.279, but may not transfer the applications without compensation. The water rights applications in question may be sold or leased for a nominal value as long as the reversionary interest remains in the county.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

BRYAN L. STOCKTON
Deputy Attorney General
Government and Natural Resources
(775) 684-1228

BLS/SLG



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JAMES SPENCER
Chief of Staff

September 5, 2008

OPINION NO. 2008-09

BIDS; CONTRACTS; LOCAL
GOVERNMENT: Unless an express
exception applies, a local government may
not join or use a contract of another
governmental entity, without the contract
having been competitively bid at some
point in time.

Mr. David Roger, District Attorney
Clark County
Post Office Box 552215
Las Vegas, Nevada 89155-2215
Dear Mr. Roger:

You have requested an opinion concerning local government competitive bidding requirements under NRS 332.039 and exceptions to the rule of competitive bidding in NRS 332.112–.148. Your question is whether it is legal for a local governmental entity to join or use a contract of another governmental entity without regard to whether it was competitively bid or not. Based on your request, we summarize your question and analyze it as follows:

QUESTION

May a local government of the State of Nevada join or use a contract of another governmental entity without the contract having been competitively bid?

ANALYSIS

The policy of the State of Nevada requires that local government contracts of a certain magnitude must be advertised for competitive bid, unless otherwise provided by specific statute. NRS 332.039.¹

The purpose of bidding is to secure competition, save public funds, and to guard against favoritism, improvidence and corruption. [Competitive bidding] statutes are deemed to be for the benefit of the taxpayers and not the bidders, and are to be construed for the public good.

Gulf Oil Corp. v. Clark County, 94 Nev. 116, 118–19, 575 P.2d 1332, 1333 (1978); quoted in *Associated Builders and Contractors, Inc. v. Southern Nevada Water Authority*, 115 Nev. 151, 158, 979 P.2d 224, 229 (1999). Op. Nev. Att’y Gen. No. 86-15 (Aug. 1, 1986). “[E]xceptions to the competitive bidding requirements should be strictly construed so as not to dilute the strong public policy or permit a public body to avoid pertinent legislative enactments.” *Id.*

Exceptions to competitive bidding for local governments are contained in NRS 332.112–.148. NRS 332.115(1) exempts from the requirement for competitive bidding “[c]ontracts which by their nature are not adapted to award by competitive bidding” and lists several examples. Relevant here is subsection (m) which exempts contracts for “[s]upplies, materials or equipment that are available pursuant to an agreement with a vendor that has entered into an agreement with the [federal] General Services Administration or another governmental agency located within or outside this State.”

Later in the chapter, NRS 332.195 empowers local governments, with the authorization of the contracting vendor, to join or use contracts of (1) other local governments located within or outside the State, or (2) the State of Nevada or other states. Your question is whether NRS 332.195 provides an exception to competitive bidding when local governments join in the contracts of other government entities.

While NRS 332.195 provides authority to join or use the contracts of other government entities, it does not contain any express exception to competitive bidding requirements, and, unlike NRS 332.115, it is not codified within NRS 332.112–.148, statutes that do provide exceptions from competitive bidding requirements. This suggests that NRS 332.195 does not contain an implicit exception from competitive

¹ NRS 332.039(1) currently requires contracts over \$50,000 to be advertised for competitive bid; contracts of estimated value more than \$25,000 but not exceeding \$50,000 must be submitted for bid or proposal to at least two persons who are capable of performing the contract.

bidding.² *Cf., Clark County Sports Enters., Inc. v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171, 176 (1980) (had the Legislature intended to include something within an exception to a general rule of taxation it would have specifically so provided; presumptions are against legislative intent to provide an exception to general policy.) The authority to join in another government contract is consistent and does not conflict with the general requirement that the contract either must be competitively bid or that an exception to competitive bidding must apply.³

Because there is no conflict between the general requirement for competitive bidding in NRS 332.039 and the authorization to enter into other government contracts in NRS 332.195, there is no occasion to invoke the principle of statutory construction that the more specific statute takes precedence over the more general. *See Lader v. Warden*, 121 Nev. 682, 687–89, 120 P.3d 1164, 1167–68 (2005) (stating the principle, but finding that the sentence enhancement provisions of NRS 484.3792 and

² By Act of May 27, 1975, ch. 732, 1975 Nev. Stat. 1536, the Nevada Legislature revised and re-enacted the Local Government Purchasing Act. The Act contained separate sections that would be codified as NRS 332.115 and 332.195. 1975 Nev. Stat. at 1538, 1539. Section 15 of the Act, which would become NRS 332.115, contained specific exceptions to the competitive bidding requirement. It did not include an exception for contracts for supplies, materials and equipment with a vendor who had a contract with the General Services Administration or other governmental agency (the “GSA exception”). The GSA exception was not enacted until twenty-two years later. Act of May 12, 1997, ch. 70, 1997 Nev. Stat. 132. In 1999 the GSA exception received its current designation as NRS 332.115(1)(m). Act of May 20, 1999, ch. 176, 1999 Nev. Stat. 889.

NRS 332.195 was enacted as Section 23 of the Act of May 27, 1975. 1975 Nev. Stat. at 1539. Originally, this section authorized local governments to join with other government bodies in the “letting” of contracts, and required that one local government be designated as “the situs of the contract for the purpose of advertising for or requesting bids.” *Id.*, Section 23(1) & (3). Section 23(4) stated that “Local governments may utilize the contracts of another governing body or public entity with the authorization of the contracting authority.” Subsequent significant amendments replaced the 1975 language and allowed local governments to “join or use the contracts of other local governments within this state,” Act of April 12, 1985, ch. 95, 1985 Nev. Stat. 357; allowed local governments to join or use the contracts of the State of Nevada, Act of May 29, 1999, ch. 378, 1999 Nev. Stat. 1682, 1686; allowed local governments to join or use contracts of local governments both within and outside this state, Act of June 9, 2003, ch. 388, 2003 Nev. Stat. 2261, 2263; and allowed local governments to join or use the contracts of other states. *Id.*

From its enactment in 1975 to the present, the Legislature has treated NRS 332.195 separately from the exceptions to competitive bidding contained within NRS 332.115. Available legislative history does not establish an implied exception to competitive bidding requirements within NRS 332.195.

³ A contract on which another Nevada local government is the lead agency will likely be subject to the same requirements and exemptions from competitive bidding as would apply to the joining local government under the provisions of NRS Chapter 332. A contract of the State of Nevada would have similar requirements for competitive bidding. *E.g.*, NRS 333.300, NRS 333.310 and NAC 333.150. If a Nevada local government anticipates that it would join a contract negotiated by a governmental entity of another state, the procurement of that contract could be conducted to comport with the competitive bidding requirements of NRS Chapter 332.

David Roger
September 5, 2008
Page 4

NRS 207.010 were not in conflict.) Rather, we apply the principle that statutes should be construed together to avoid conflict and promote harmony. *E.g., Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 127 P.3d 1088, 1105 (Adv. Op. 13, February 9, 2006). NRS 332.115(1)(m) and NRS 332.195 may be construed together, the former being an express exception to competitive bidding for certain types of contracts available through the GSA or other government agencies, and the latter being an authorization for local governments to join with other state or local government contracts.

CONCLUSION

Unless an express exception applies, a local government may not join or use a contract of another governmental entity, without the contract having been competitively bid at some point in time. NRS 332.195 grants broad authority to local governments to join or use contracts of other local governments, the State of Nevada, or other states, with the authorization of the vendor on those contracts. It does not state that it is an exception to the requirement for competitive bidding. Exceptions to the general requirement for competitive bidding must be found elsewhere, including, without limitation, NRS 332.115(1)(m), which potentially applies to contracts for supplies, materials and equipment with a vendor who has a contract with the United States General Services Administration or other governmental agency.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____

JEFFREY D. MENICUCCI
Deputy Attorney General
Government and Natural Resources
(775) 684-1214

JDM:SG



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

September 8, 2008

OPINION NO. 2008-10

HIGHWAYS; LAW ENFORCEMENT;
PARKS: Unless NDP regulates or administers the roads and lands, then park rangers have no authority to make arrests pursuant to Nevada Revised Statutes.

Mr. David Morrow, Administrator
State of Nevada Conservation
and Natural Resources
Division of State Parks
901 South Stewart Street, #5001
Carson City, Nevada 89701

Dear Mr. Morrow:

In your June 16, 2008 letter, you requested that this Office opine on the jurisdiction of Nevada State park rangers, as commissioned peace officers, over roads and lands which cross over or lie adjacent to lands administered or controlled by the Nevada Division of State Parks (NDP). You further requested clarification of whether NDP's financial investment in maintenance, signs, or other improvements on roadways and lands not specifically assigned to NDP creates authority for NDP park rangers to exercise their police powers to enforce the laws of Nevada on those same roads and lands.

QUESTION ONE

Do NDP Park Ranger Peace Officers have the authority to provide law enforcement services on State highways that cross or run adjacent to lands controlled or administered by NDP?

ANALYSIS

We look to the Nevada Revised Statutes (NRS) to determine whether NDP has statutory authority to provide law enforcement services in an area that is within the boundaries of a state park.

NRS 407.065 provides in part:

1. The Administrator, subject to the approval of the Director:

.....

(b) Shall protect state parks and property controlled or administered by the Division from misuse or damage and preserve the peace *within those areas*. The Administrator may appoint or designate certain employees of the Division to have the general authority of peace officers. [Emphasis added.]

Further, with regard to NDP park rangers as peace officers, NRS 289.260 provides in part that:

1. Rangers and employees of the Division of State Parks of the State Department of Conservation and Natural Resources have, at the discretion of the Administrator of the Division, *the same power to make arrests as any other peace officer for violations of law committed inside the boundaries of state parks or real property controlled or administered by the Division*. [Emphasis added.]

2. An employee of the Division of State Parks of the State Department of Conservation and Natural Resources appointed or designated pursuant to paragraph (b) of subsection 1 of *NRS 407.065* has the powers of a peace officer.

It is the fundamental rule of statutory construction that “when the language of a statute is expressly clear and unambiguous, the apparent intent must be given effect, as there is no room for construction.” *Metz v. Metz*, 120 Nev. 786, 791–92, 101 P.3d 779, 783 (2004) (citing *State, Dep’t Human Res. v. Estate of Ullmer*, 120 Nev. 108, 113, 87 P.3d 1045, 1049 (2004)). Specifically, the legislative intent is clear from the words of the statute, and therefore, no additional interpretation is required. *McKay v. Bd. of Supervisors Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986), quoting *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984), stating that

“Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature’s intent.”

Park Ranger Peace Officer authority is determinable from the plain meaning of the statutes. Generally, the NDP, through its administrator, shall protect the state parks and real property (controlled or administered) from misuse and damage, and preserve the peace pursuant to NRS 407.065. Specifically, with regard to its park rangers, NRS 289.260 clearly and unambiguously declares that the provision of law enforcement services by NDP is limited to the area inside the geographic boundaries of state parks and other real property controlled or administered by NDP. Thus NDP Park Ranger Peace Officers have jurisdiction for law enforcement on local and State highways so long as these roads lie within the boundaries as authorized by NRS 289.260.

However, if the roads are neither within the boundaries nor controlled or administered by NDP, then park rangers would not have peace officer authority to make arrests. Roads located adjacent to NDP’s parks or other real property are not within the geographical boundaries and are therefore outside of the jurisdiction set forth in NRS 289.260 (“inside the boundaries”) and NRS 407.065 (“within those areas”).

CONCLUSION TO QUESTION ONE

Generally, NDP Park Ranger Peace Officer authority to make arrests on local and State highways exists so long as these highways cross over or are located within the boundaries of parks or real property controlled or administered by NDP. However, NDP does not have jurisdiction over roads located outside of its parks or real property, including roads lying adjacent to its parks or real property.

QUESTION TWO

Do NDP Park Ranger Peace Officers have authority to take action for violations of law that take place on lands not controlled or administered by NDP?

ANALYSIS

Pursuant to NRS 407.065, NDP has no authority to enforce the law when a violation occurs outside NDP park boundaries as this statute clearly states that NDP may only enforce the law when violations occur within parks or lands controlled or administered by NDP.

Additional statutes create authority for all peace officers, or, for park rangers in particular. See e.g., 1) felony arrests (NRS 171.124); 2) enforcement of petrified wood protection (NRS 206.320); 3) enforcement of antiquities protection (NRS 381.221); 4) safety inspection for water vessels (NRS 488.900); and, 5) the enforcement of plant

protection (NRS 527.050). However, none of these statutes expand the geographical jurisdiction of the NDP Park Ranger Peace Officers. Because the statutes that establish NDP law enforcement jurisdiction limit it geographically, see NRS 407.065 (“within those areas”) and NRS 289.260 (“inside the boundaries”), and there is no expression expansion elsewhere of the geographical scope of authority, the law enforcement jurisdiction for NDP remains within the park boundaries or the boundaries of lands controlled or administered by NDP¹.

CONCLUSION TO QUESTION TWO

NDP Park Ranger Peace Officers do not have law enforcement authority outside the boundaries of state parks or other real property controlled by the Division. Statutes that establish peace officers’ authority for the protection of plants, antiquities, petrified woods, water vessel safety, and protect the public from felonies and gross misdemeanors are consistent with and do not alter the geographical scope of jurisdiction.

QUESTION THREE

Does NDP’s payment of funds for the maintenance of roads, signs, or other improvements on roads or land not assigned to NDP establish control or administration of such lands upon which the roads are located resulting in NDP having law enforcement jurisdiction of such lands?

ANALYSIS

Although not specifically defined in the Nevada Revised Statutes, the words “controlled or administered” are defined by Black’s Law Dictionary. Control is defined as “to regulate or govern by law.” BLACK’S LAW DICTIONARY 330 (7th ed. 1999). Administration is defined as “the management or performance of the executive duties of a government in public law, the practical management and direction of the executive department and its agencies.” BLACK’S LAW DICTIONARY 44 (7th ed. 1999).

Here, none of the activities mentioned (maintenance of roads, signs, or other improvements on lands) rise to the level of NDP regulating or governing the roads or lands in question. Generally, the practical management and direction of roads are performed by the local, state, or regional transportation with these responsibilities. NDP is not charged with these responsibilities for roads that are outside of state park boundaries. Consequently, absent any express statutory authority to control or

¹ Based on similar language of geographical limitation, we have opined that the jurisdiction of the capitol police extends only to State buildings and grounds as statutorily defined. Op. Nev. Att’y Gen. No. 2001-18 (July 5, 2001).

David Morrow
September 8, 2008
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administer those roads or lands, NDP Park Ranger Peace Officers would not have jurisdiction to make arrests on them.

CONCLUSION TO QUESTION THREE

Unless NDP regulates or administers the roads and lands, then park rangers have no authority to make arrests pursuant to Nevada Revised Statutes.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

ROBERT G. KILROY
Deputy Attorney General
Bureau of Government Affairs
(775) 684-1231

RGK:VJB



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

November 18, 2008

OPINION NO. 2008-11

GOVERNOR; MILITARY; SEARCH:
Before ordering the Nevada National Guard to active duty, the Governor should identify the statutory provision he is relying on to exercise this authority and this determination will govern whether the Nevada National Guard is acting as a military force or a labor force.

Cynthia N. Kirkland, Major General
State of Nevada Office of the Military
Office of the Adjutant General
2460 Fairview Drive
Carson City, Nevada 89701-6807

Dear Major General Kirkland:

You have requested an opinion regarding the Office of the Military/Nevada National Guard (NVG).

QUESTION

When ordered to active duty by the Governor to conduct a search and rescue mission, is the NVG a military force or labor force?

ANALYSIS

It is a fundamental rule of statutory construction that, "[w]hen the language of a statute is expressly clear and not ambiguous; the apparent intent must be given effect, as there is no room for construction." *Metz v. Metz*, 120 Nev. 786, 791–92, 101 P.3d 779, 783 (2004) (citing *State, Dep't Human Res. v. Estate of Ullmer*, 120 Nev. 108, 113, 87 P.3d 1045, 1049 (2004)).

The Governor, pursuant to NRS 412.122(1), may order the NVG into State service as a military force when one of the following events occurs: "invasion, disaster, insurrection, riot, breach of the peace, or imminent danger thereof, or other substantial threat to life or property. . . ." Pursuant to NRS 412.138, the Governor may also order the NVG to active duty as a labor force for one of the following purposes: "to fight a fire, combat a flood or any other emergency"

The NVG may need to conduct search and rescue missions under the factual criteria set forth in both NRS 412.122(1) and 412.138. For example, it would be reasonable for the NVG to conduct a search and rescue mission because someone has been placed in harm's way during a fire, flood, or other emergency. It would also be reasonable if the NVG needed to rescue someone from an imminent danger during the course of an invasion, disaster, riot, or breach of the peace. Therefore, since the Governor has the authority to determine when the NVG is being ordered into State active duty service, he has the discretion to determine if the NVG is acting as a military force or a labor force.

CONCLUSION

The emergency situation presented will dictate if the NVG is needed to operate as a military force or as a labor force. The Legislature has provided the Governor with the authority to make this determination. As a result, before ordering the NVG to active duty, the Governor should identify the statutory provision he is relying on to exercise this authority and this determination will govern whether the NVG is acting as a military force or a labor force.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

ROBERT G. KILROY
Deputy Attorney General
Government and Natural Resources



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

December 5, 2008

OPINION NO. 2008-12

BUDGET; INVESTMENTS; TREASURER:

The line-of-credit plan proposed by Treasurer Marshall to issue notes up to a principal amount of \$160 million to the Local Government Pooled Investment Fund does not violate Article 9 of the Nevada Constitution.

Christopher Nielsen, General Counsel
State of Nevada
Office of the Governor
Capitol Complex
Carson City, Nevada

Dear Mr. Nielsen:

You have requested an opinion from this office regarding the constitutionality of the plan proposed by Treasurer Kate Marshall to borrow money from the Local Government Pooled Investment Fund, particularly with regard to Article IX of the Nevada Constitution. This opinion is based on the attached bill draft, which was provided to this office on December 4, 2008.

BACKGROUND

There is an approximate \$330 million shortfall estimated for the fiscal year ending June 30, 2009. Treasurer Kate Marshall has proposed a plan to help balance the budget by borrowing up to \$160 million from the Local Government Pooled Investment Fund (Fund).

The Fund was created by NRS 355.167, and is administrated by the State Treasurer. The Fund permits local governments to pool their money for investment purposes. NRS 355.167(2). The money is deposited with the Treasurer, who invests the money in any investments approved by law. NRS 355.167(3). Approved investments include, but are not limited to: U.S. bonds, Treasury notes and bills, and negotiable CDs. See NRS 355.170(1). Additionally, the Fund may invest in “[s]ecurities which have been expressly authorized as investments for local governments by any provision of Nevada Revised Statutes or by any special law.” NRS 355.170(1)(f).

Treasurer Marshall’s plan provides for a “line of credit” from the Fund to pay for the State’s operating expenses. The plan would permit the State to borrow money from the Fund by issuing one or more notes to the Fund with an aggregate principal amount not to exceed \$160 million. The principal amount of any note or notes would bear interest monthly at a rate of approximately 2.25%. This is approximately 0.25% greater than the Fund’s current average monthly earning. No money could be borrowed after August 31, 2009.

The plan also provides that the principal amount borrowed will be repaid in installments, with not less than 25% of the total principal amount borrowed repaid by August 31, 2010, at least 50% of the total principal repaid by August 31, 2011, at least 75% of the principal repaid by August 31, 2012, and all of the principal repaid by August 31, 2013.

The notes would be issued pursuant to a contract between the State and the Fund, under which the Fund would agree to invest in the notes. The Governor would execute such contracts on behalf of the State, and the Treasurer would execute them on behalf of the Fund. The notes would be sold to the Fund at an amount equal to the principal amount borrowed.

The note or notes issued would be general obligations of the State. The full faith and credit of the State would be pledged to the payment of the principal and interest on the note or notes. They would be issued on the order of the Treasurer, according to the State Securities Law (NRS 349.150 to 349.364). The proceeds from the sale of any notes will be deposited in the general fund and used for general operations of the state.

ANALYSIS

Paragraph 1 of Article IX, Section 2 of the Nevada Constitution provides:

The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a

tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Nev. Const. Art. 9, § 2(1).

Section 3 of Article 9 provides in pertinent part:

The State may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of two per cent of the assessed valuation of the State, as shown by the reports of the county assessors to the State Controller, except for the purpose of defraying extraordinary expenses, as hereinafter mentioned. Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within twenty years from the passage of such law, and shall specially appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished until the principal and interest of said debts shall have been wholly paid. Every contract of indebtedness entered into or assumed by or on behalf of the State, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion, suppress insurrection, defend the State in time of war, or, if hostilities be threatened, provide for the public defense.

Nev. Const. Art. 9, § 3.

The purpose of the debt limitation provisions in Article 9, Section 3 is to prevent heavy borrowing by the State. *Employers Ins. Co. of Nevada v. State Bd. of Examiners*, 117 Nev. 249, 254, 21 P.3d 628, 631 (2001). Prior to 1840, other states borrowed considerable funds to finance railroads and internal improvements, only to default after the depression of 1837. *Id.* Nevada, like other states which joined the union after 1840, included this debt limitation provision in the constitution to prevent this situation. *Id.* Article 9, Section 3 therefore limits the public indebtedness to no more than 2% of the assessed valuation of the State. It also requires that the purpose or purposes of the debt must be distinctly specified, that the obligations be repaid in no more than 20 years, and that the act contracting for public debt must provide for the levying of a tax to repay the obligations. Nev. Const. Art. 9, § 3.

Early in the State's history, the Nevada Supreme Court considered these requirements of Article 9, Section 3, as well as several issues relevant to borrowing from special funds. In *Klein v. Kinkead*, 16 Nev. 194 (1881), the Legislature passed a bill to issue bonds in the principal amount of \$80,000 to the state school fund, for the purpose of building an insane asylum. *Id.* at 200. The bonds would be signed by the governor and the state controller, and countersigned by the state treasurer. *Id.*

The act in *Klein* was challenged numerous grounds, including that taking money from the state school fund to build the asylum unlawfully diverted money away from the fund, to be used for a different purpose. *Id.* at 206. The state school fund was to be for the schools, and could be invested only in U.S. bonds or bonds of the State. *Id.* The court rejected this argument, finding that the asylum bonds were indistinguishable from other bonds of the State that were issued prior, and in which the state school fund was clearly permitted to invest. *Id.* at 207. The court characterized the asylum bonds as investments for the school fund, not as diverting or taking money from the fund. *Id.*

It was also argued that the act was unconstitutional because Section 3 of Article 9 permitted the Legislature to incur public debt only when the State's expenses exceeded its revenues, as provided in Section 2 of Article 9, a situation that apparently did not exist at the time. *Id.* The court rejected this contention, holding that Section 2 imposed no limitations on borrowing under Section 3. *Id.* at 204. It stated:

The authority to create a bonded debt is subject to no restrictions or conditions whatever save that such debt shall not exceed the [limit], and the law authorizing it shall provide for its payment within twenty years by taxation. The constitution nowhere declares the necessity which shall exist as prerequisite to the issuance of bonds or the making of a loan under this section, nor the use to which money obtained by such loan shall be applied.

Id. at 204-05.

Treasurer Marshall's plan is similar to that approved by the Nevada Supreme Court in *Klein*. First, as the court made clear in that case, the issuance of notes to the Fund does not unlawfully divert money from the Fund. Like the state school fund in *Klein*, the Fund will receive a return on the notes 0.25% greater than the returns it receives on its other investments. It will therefore ultimately benefit from investing in the notes, which are backed by the full faith and credit of the State. Second, the "balanced budget" requirement of Article 9, Section 2 does not prohibit the State from contracting for public debt that will not be repaid within two years for the purposes of funding its current expenses. In fact, as the court in *Klein* explained: "...the object in authorizing a bonded indebtedness was to enable the state to maintain its business upon a cash

basis, notwithstanding financial exigencies, without resorting to onerous taxation.” 16 Nev. at 205.

Turning back to Article 9, Section 3, Treasurer Marshall’s plan meets all of this section’s requirements as well. The plan contemplates that the notes will be general obligations of the State, issued pursuant to the Nevada State Securities Law, and that they will be repaid no later than 2013. The notes are therefore “public debt” within the meaning and limitations of Article 9, Section 3. See *Morris v. Board of Regents of University of Nevada*, 97 Nev. 112, 114-15, 625 P.2d 562, 563-64 (1981) (a public debt is created when the tax revenues of the state are liable for the repayment of the obligation and subsequent legislatures are bound to continue the tax at least at its present level until the obligation is paid). We are advised that notes issued up to the maximum principal of \$160 million will not exceed the State’s current bonding capacity. Therefore the plan will not result in a violation of Article 9, Section 3’s limitation on public indebtedness.

Like the act in *Klein*, Treasurer Marshall’s plan plainly states the purpose of the debt: to fund general operations of the state, on an as-needed basis, up to a principal amount of \$160 million. The plan also provides for the repayment of the notes within twenty years. In fact, it provides for repayment of the notes by 2013, considerably sooner than required by Article 9, Section 3.

Finally, by incorporating the State Securities Law, Treasurer Marshall’s plan effectively provides for a taxing source to repay the notes. The State Securities Law provides that general obligations of the State must be paid through a special tax on property. NRS 349.238. By reference to the State Securities Law, the plan satisfies Article 9, Section 3’s requirement that the act provide for taxes to repay the obligations, even though the plan does not explicitly impose a tax.

This office addressed a similar situation in Op. Nev. Att’y Gen. No. S-3 (August 24, 1962). In that opinion, the Attorney General determined that a legislative act providing for a bond issue and stating that the bonds would be repaid from the consolidated bond interest and redemption fund met the requirement of Article 9, Section 3 that the act levy a tax for repayment of the obligations. The consolidated bond interest and redemption fund was created by NRS 349.120, and provided that the legislature must appropriate to the fund sufficient monies to service the bonds. The Attorney General reasoned that this statute provided for the necessary appropriations to repay the bonds, and that it was immaterial that a provision for the levying of a tax was in a different act. The same situation exists here. Reference to the State Securities Law provides for the necessary tax and appropriations for the repayment of the notes.

Christopher Nielsen, General Counsel
December 5, 2008
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CONCLUSION

To conclude, our office is of the opinion that the line-of-credit plan proposed by Treasurer Marshall to issue notes up to a principal amount of \$160 million to the Local Government Pooled Investment Fund does not violate Article 9 of the Nevada Constitution.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
JAMES T. SPENCER
Chief of Staff
(775) 684-1200

JTS:MAS