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OPINION NO. 2012-08

ECONOMIC DEVELOPMENT; PUBLIC
BODIES; SECRETARY OF STATE:

The power to appoint a designee to serve on the Board of Economic Development as a voting member also includes the power to do that which will make the delegation effective and complete.

Steven D. Hill, Executive Director
Nevada Governor's Office of
Economic Development
808 West Nye Lane
Carson City, Nevada 89703

Dear Mr. Hill:

You have requested our opinion regarding designee membership on the Board of Economic Development (BOED). NRS 231.033(1)(a)(3) allows the Secretary of State to designate a person to serve in his stead as a member of the BOED. NRS 231.033 provides for the composition of the BOED as follows:

NRS 231.033 Board of Economic Development: Creation; membership; terms; officers; quorum; meetings; expenses.

1. There is hereby created the Board of Economic Development, consisting of:

(a) The following voting members:

- (1) The Governor or his or her designee;
- (2) The Lieutenant Governor or his or her designee;
- (3) The Secretary of State or his or her designee; and

(4) Six members who must be selected from the private sector and appointed as follows:

(I) Three members appointed by the Governor;

(II) One member appointed by the Speaker of the Assembly;

(III) One member appointed by the Majority Leader of the Senate; and

(IV) One member appointed by the Minority Leader of the Assembly or the Minority Leader of the Senate. The Minority Leader of the Senate shall appoint the member for the initial term, the Minority Leader of the Assembly shall appoint the member for the next succeeding term, and thereafter, the authority to appoint the member for each subsequent term alternates between the Minority Leader of the Assembly and the Minority Leader of the Senate.

(b) The following nonvoting members:

(1) The Chancellor of the Nevada System of Higher Education or his or her designee; and

(2) One member appointed by the Department of Employment, Training and Rehabilitation from the membership of the Governor's Workforce Investment Board.

QUESTION

Whether it is permissible for the Secretary of State to appoint his deputy as his designee to the BOED on an "as necessary" basis.

BACKGROUND

These facts underlie this request for our opinion.

Ross Miller, Secretary of State, was unable to attend the July 13, 2012 meeting of the BOED. He sent Ryan High, Deputy Secretary of State, to the meeting as his designee. NRS 233.031(1)(a)(3) defines the Nevada Secretary of State "or his designee" as a voting member of the BOED. The Secretary of State may, in his discretion, name a designee to the BOED.

Mr. High introduced himself during roll call as Mr. Miller's designee. He was seated, but he was told that he could not vote. Minutes of the meeting indicate Mr. Miller was recorded as "absent excused."

NRS 225.060 provides that the Secretary's Chief Deputy (and other specified deputies) may perform all the duties required of the Secretary of State.

ANALYSIS

The power to appoint a designee¹ conferred by NRS 231.033(1) is given to three constitutional officers. NRS 231.033(1) defines these three designees as voting members of the BOED. Your opinion request asks whether such designees are either permanent appointments or alternatively can be ad hoc, as-needed appointments.

The Legislature has treated the terms of appointment of the other members of the BOED differently from the three constitutional officer members for whom no tenure is specified.² This is an important distinction which we believe means that constitutional officer designees serve at the will of the appointer.

The Secretary of State is a public officer as defined in NRS 281.005.³ NEV. CONST. ART. 15, §§ 10 and 11⁴ provide authority for appointment and removal of public

¹ Appointment is one of several meanings for designee. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002)

² NRS 231.033(4) states:

Except as otherwise provided in this subsection, the members of the Board appointed pursuant to subparagraph (4) of paragraph (a) of subsection 1 and subparagraph (2) of paragraph (b) of subsection 1 are appointed for terms of 4 years. The initial members of the Board shall by lot select three of the initial members of the Board appointed pursuant to subparagraph (4) of paragraph (a) of subsection 1 to serve an initial term of 2 years.

³ NRS 281.005(1) defines "public officer" as:

1) [A] person elected or appointed to a position which:
(a) Is established by the Constitution or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and
(b) Involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.

⁴ Section 10 establishes that officers are chosen or appointed according to law: Election or appointment of officers. All officers, whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law. NEV. CONST. art. 15, § 11. Section 11 defines the tenure of public officers: The tenure of any office not herein provided for may be declared by law, or, when not so declared, such office shall be held during the pleasure of the authority making the appointment, but the Legislature shall not create any office the tenure of which shall be longer than four (4) years, except as herein otherwise provided in this Constitution. In the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter

officers in certain contexts. The following examination of NEV. CONST. ART. 15, § 11, necessary to answer your question, is guided by principles of construction utilized by the Nevada Supreme Court.⁵

The phrase in NRS 231.033(1)(a)(3), “or his designee,” means the appointment of a public officer. Had the Secretary of State permanently designated Mr. High to the BOED, there would be no question that Mr. High would have been a voting member without any restriction. However, disagreement arose because the Secretary of State intended to appoint his deputy on an as needed basis.

The statute is silent regarding restriction on the power of appointment of a designee to the BOED. However, we believe the delegated power to appoint an officer/designee is subject to NEV. CONST. art. 15, § 11, which provision allows removal or replacement of the officer at the pleasure of the appointer, but only with certain legal restrictions. This constitutional provision is consistent with the widely accepted general rule applicable to public officer appointment to and removal from administrative agencies, boards, and commissions.⁶

The general rule regarding the appointment and removal of public officer is that the power of appointment carries with it the power of removal at the pleasure of the appointer where definite terms are not specified by the Legislature and in the absence of other statutory restrictions. NEV. CONST. art. 15, § 11; *Eads v. City of Boulder City*, 94 Nev. 735, 738, 587 P.2d 39, 41 (1978) citing NEV. CONST. art. 15 § 11; and *Leeper v. Jamison*, 32 Nev. 327, 108 P.1 (1910); Op. Nev. Att’y Gen. No. 89-19 (December 31, 1989)(appointed representatives on the Nevada State Board of Geographic Names serve at the pleasure of the appointer); see also *Gowey v. Siggelkow*, 382 P.2d 764 (Idaho 1963) for an extensive recitation of authorities supporting the general rule.

with reference to the tenure of office or the dismissal from office of any such officer or employee shall control. NEV. CONST. art. 15, § 11.

⁵ The Nevada Supreme Court’s primary objective when construing the Nevada Constitution is to discern the intent of those who enacted the provisions at issue, and to fashion an interpretation consistent with that objective. *Guinn v. Legislature*, 119 Nev. 460, 471, 76 P.3d 22 (2003). When construing constitutional provisions, the Court uses the same rules of construction used to interpret statutes. *Rogers v. Heller*, 117 Nev. 169, n. 17, 18 P.3d. 1034, 1038 n.17 (2001). The Court will give words in the Constitution their plain meaning unless doing so would violate the spirit of the provision. *State ex rel. State Board of Equalization v. Bakst*, 122 Nev. 1403, 1413, 148 P.3d 717, 724 (2006).

⁶ We do not believe that the statute’s use of “designee” has any meaning other than appointment. The Legislature uses other words such as proxy, alternate and substitute, but their statutory use is not synonymous with designee. Use of proxy is typically found in contexts in the NRS including chapters governing insurance, corporations, securities, and trusts.

The *Eads* Court explicitly stated the rule: "Absent a specified term of office, the incumbent may be removed at will by the appointing authority." *Eads*, 94 Nev. at 738. The *Eads* Court was also mindful that the general rule applies only where there are no legal restrictions against "at will" removal, for instance, statutory restriction forbidding removal unless for cause. Our review of NRS 231 does not reveal any such legal restriction preventing removal of the designee at the pleasure of the Secretary of State.

At its August meeting, the BOED did not allow Secretary of State Miller's designee to vote. Furthermore, it appears the BOED did not seat Mr. High as a designee but considered Secretary Miller to be the member since he was marked "absent excused" in the minutes of the meeting. Credentials may have been an issue since Mr. High merely appeared and orally announced he was Secretary Miller's designee. The request for opinion explains that Secretary Miller intends to participate in future meetings and did not intend to permanently appoint Mr. High to the seat.

We believe that NRS 231.033's delegation of the power to appoint a designee implies the power necessary to complete his or her delegated authority. "Power conferred by statute necessarily carries with it the power to make it [the delegated power] effective and complete." *Moore v. Bd. of Trustees of Carson-Tahoe Hosp.*, 88 Nev. 207, 210, 495 P.2d 605, 607 (1972). To be complete, an appointment can and should include specification of the duration of the appointment.

We suggest that the BOED adopt a policy to describe necessary credential requirements for the constitutional officer's designee before he or she may be seated, and a process that provides appropriate notice at a specified time before the BOED's next meeting that a designee will appear in the stead of the appointer.

In a situation similar to the issue presented herein, the West Virginia Supreme Court of Appeals suggested establishing a procedural rule clarifying the meaning of "designated representative." A lower court had invalidated the vote of a person attending a public meeting of a Regional Jail and Correctional Authority, an appointed body, finding her vote to have been a proxy. Proxy votes were prohibited by procedural rule, although statute clearly gave the secretary of the Department of Administration authority to appoint "his or her designated representative" to attend public body meetings. The West Virginia Supreme Court of Appeals found she had been sent as the designated representative with full voting power, not as a proxy, although she had not been "properly documented." The court summed up the situation and appealed to the Legislature for relief:

[We] are reluctant to invalidate the [designated representative's] vote [rejecting a lower court's determination that the voter was a "proxy"] in issue solely

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due to lack of guidance on what is required to qualify as a designated representative. We do, however, suggest that a procedural rule clarifying what is required to comply with the meaning of a "designated representative" under West Virginia Code [] specifically be adopted to address the requirements, such as the preparation of a document which indicates whether the authorization extended is continuing or limited to a particular meeting.

State of West Virginia v. County Commission of Cabell County, 222 W.Va. 1, 12, 657 S.E.2d 176,187 (2007). The court's suggestion of a clarifying procedural role is equally appropriate in the present circumstances.

CONCLUSION

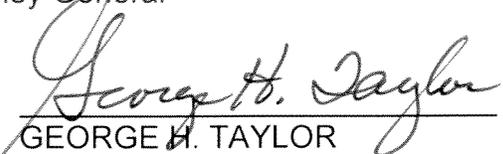
The plain meaning of NRS 231.033 guides our view that the Secretary of State's designee to the BOED is a voting member of the Board, but the statute is silent regarding the designee's term. This indicates that the term of his appointment is indefinite and that the designee serves at the pleasure of the Secretary of State. Consequently the Secretary has authority to appoint a designee on an as-needed basis.

The power to appoint a designee to serve on the BOED as a voting member also includes the power to do that which will make the delegation effective and complete. To be complete, an appointment should include specification of the duration of the appointment. It is recommended a policy be adopted by the BOED specifying, at a minimum, the required terms and conditions regarding the appointment of permanent or temporary designees and whether the Board must be notified by a time certain prior to meetings that a designee will be appointed.

Sincerely,

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Attorney General

By:


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GHT/CG

cc: Ross Miller, Nevada Secretary of State