



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

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CATHERINE CORTEZ MASTO
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JIM SPENCER
Chief of Staff

January 9, 2009

OPINION NO. 2009-01

ENVIRONMENTAL PROTECTION;
POLLUTION: Churchill County may regulate the emission of odors from facilities located within the County. The County may proceed to do this by either developing a program pursuant to NRS 445B.500(4) or by its Nuisance Ordinance adopted pursuant to NRS 244.360.

Arthur E. Mallory, District Attorney
Rusty D. Jardine, Deputy District Attorney
Churchill County District Attorney's Office
365 South Maine Street
Fallon, Nevada 89406

Dear Mr. Mallory and Mr. Jardine:

By letter dated December 28, 2007, you have requested the opinion of this Office as to the preemption by the State of Nevada regarding whether a county can continue to enforce its nuisance code for odor when there exist State laws that occupy the field of air pollution.

QUESTION

Has the State Legislature occupied the field of odor regulation, and thereby preempted control by local governments such as Churchill County?

ANALYSIS

Churchill County has received complaints about odors purportedly emanating from the Bango Oil recycling facility. In addition, a Complaint for Nuisance was filed with the Clerk of the County Commission regarding the odors but subsequently has been withdrawn. The Nevada Division of Environmental Protection (NDEP) has also received complaints. NDEP investigated the odors and determined that “the odors identified in association with Bango Oil facility do not meet the definition of the persistent, intense odors that constitute a nuisance as established by Nevada Administrative Code 445B.22087.” See NDEP letter to Churchill County Manager dated December 11, 2007.

The main question for determination is whether State law regulating air pollution preempts the provisions of the Churchill County code relating to nuisance. You suggest in your letter that if an entity of State government occupies the entire field of air pollution regulation, the nuisance powers of a political subdivision are preempted. However, preemption analysis begins with the intent of the Legislature. The Legislature, by the plain language of Nevada Revised Statute (NRS) 445B.500, did not intend for the State to occupy the entire field of air pollution with the intent of preventing counties from having the ability to regulate air pollution as well.

NRS 445B.500 provides in pertinent part:

1. Except as otherwise provided in this section and in NRS 445B.310:

(a) The district board of health, county board of health or board of county commissioners in each county whose population is 100,000 or more shall establish a program for the control of air pollution and administer the program within its jurisdiction unless superseded.

. . . .

4. Any county whose population is less than 100,000 or any city may meet the requirements of this section for administration and enforcement through cooperative or interlocal agreement with one or more other counties, or through agreement with the State, or may establish its own program for the control of air pollution. If the county establishes such a program, it is subject to the approval of the Commission.

Arthur E. Mallory, District Attorney
Rusty D. Jardine, Deputy District Attorney
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Your analysis concludes that since Churchill County does not have a population of 100,000 it has not “established such a program.” Lacking a program “[t]he County thus defers to the Division of Environmental Protection (NDEP) for the control of air pollution because it does not presently enjoy authority to establish a ‘local air pollution control agency.’” However, this does not preclude county regulation.

The statute at section 4 allows a county whose population is under 100,000 to “establish its own program for the control of air pollution.” A “program” as defined by section 1(b) “[m]ust include, without limitation, standards for the control of emissions, emergency procedures and variance procedures established by ordinance or local regulation which are equivalent to or stricter than those established by statute or state regulation.” NRS 445B.500(1)(b)(1). The language of the statute is express in that the Legislature intended to allow political subdivisions to develop programs for the control of air pollution. However, Churchill County has not chosen to develop its own program. It may nonetheless regulate odors that constitute a nuisance. Suppression of nuisances is one of the most important duties of government. *Kelley v. Clark County*, 61 Nev. 293, 127 P.2d 221, 223 (1942). As well, a county can enact laws not inconsistent with State laws. *Id.* at 299, 127 P.2d at 223–24.

As noted in your letter, Churchill County possesses the legislative grant of authority to abate nuisances. NRS 244.360. The Churchill County Code, Chapter 8.12, adopted the language of NRS 40.140(1)(a), which defines nuisance as: “anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” This provision of the code is not inconsistent with NRS Chapter 445B or the regulations adopted thereunder.

As stated above, NDEP has defined nuisance in its regulations at NAC 445B.22087. However, this definition does not purport to be exclusive. Instead, it is just one objective measure of nuisance, one of innumerable ways in which nuisance might be proven. “[T]he determination of whether the particular operation constitutes a nuisance remains a question of fact.” *Jezowski v. City of Reno*, 71 Nev. 233, 239, 286 P.2d 257, 260 (1955).

Police powers such as nuisance regulation are important aspects of State and local government authority. “It has been said that the suppression of nuisances injurious to the public health or morality is among the most important duties of government.” T.C.W., Annotation, *Validity, Construction, and Application of Statute or Ordinance Declaring Plant or Establishment Which Emits Offensive Odors to be a Public Nuisance*, 141 A.L.R. 285, 287 (1942).

Police power confers upon the states the ability to enact laws in order to protect the safety, health, morals, and general welfare of society. Municipalities have the right to exercise their police powers and enact ordinances related to the protection of the public health, even if their ordinances interfere with private property rights. (citations omitted.)

Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. Adv. Op. No. 51 (November 8, 2007). In recognition of this important power, and to harmonize the various statutory and regulatory provisions discussed above, we conclude that compliance with NDEP standard does not serve as a source of immunity from nuisance liability, and that the county retains authority to regulate nuisances, including odors. *Cf. Varjabedian v. Madera*, 142 Cal. Rptr. 429, 433, 572 P.2d 43, 47 (1977).¹ To conclude otherwise and read NDEP's standard as exclusive would be to legalize nuisance, which nothing in law indicates is the intent of Nevada's legislature. See William H. Rodgers, Jr., *Rodgers' Environmental Law*, § 2:12 (2007) ("even in states subscribing to some version of legalized nuisance, it is said that the legislature must 'expressly' endorse as acceptable the costs that otherwise would be condemned as a nuisance.") *Cf. Nye County v. Plankinton*, 94 Nev. 739, 587 P.2d 421 (1978) (statutory licensing scheme for houses of prostitution was repugnant to and, by plain and necessary implication, repealed common-law rule that such house constituted a nuisance *per se*).²

¹ A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury. (*Quoting Hassell v. San Francisco*, 11 Cal.2d 168, 171, 78 P.2d 1021, 1022 (1938)).

² Naturally, the County cannot authorize what NDEP prohibits; County regulation must not conflict, but can complement, State regulation.

Arthur E. Mallory, District Attorney
Rusty D. Jardine, Deputy District Attorney
January 9, 2009
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CONCLUSION

Churchill County may regulate the emission of odors from facilities located within the County. The County may proceed to do this by either developing a program pursuant to NRS 445B.500(4) or by its Nuisance Ordinance adopted pursuant to NRS 244.360.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
WILLIAM FREY
Senior Deputy Attorney General
Bureau of Government Affairs

WF/RH



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January 28, 2009

OPINION NO. 2009-02

GENERAL IMPROVEMENT DISTRICT;
MUNICIPAL CORPORATION: A board of
county commissioners has authority to
involuntarily include an incorporated city in
a GID if the board votes unanimously to do
so.

Mr. Jeff McGowan, City Attorney
City of Fernley
595 Silver Lace Boulevard
Fernley, Nevada 89408

Dear Mr. McGowan,

You have requested an opinion on the ability of boards of county commissioners to create an improvement district that includes an incorporated city.

QUESTION

Does a county have authority to involuntarily include an incorporated city in a general improvement district created pursuant to Chapter 318 of the Nevada Revised Statutes?

ANALYSIS

General improvement districts (GIDs) are authorized and defined in NRS Chapter 318. Such districts are a form of municipal or quasi-municipal corporation. 1 *McQuillin on Municipal Corporations*, § 2.28, page 185 (3d ed. 1999) (“[d]istricts authorized... by the legislature as governmental agencies designed to function in a limited sphere in the accomplishment of public purposes . . . , while deemed municipal corporations in a broad sense, are generally, but not uniformly, held, if a corporation of any kind, a quasi-municipal corporation”). “Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the

state as may be intrusted to them.” *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), *quoted in City of Reno v. Washoe County*, 94 Nev. 327, 329, 580 P.2d 460, 461 (1978).

The manner of GID formation is properly the subject of state regulation. “[S]tates have broad authority over the establishment and development of municipalities within their borders.” *Green v. City of Tucson*, 340 F.3d 891, 901 (9th Cir. 2003). Thus, legislatures commonly limit formation of municipal corporations within a certain distance of an already existing municipality.¹ The state’s interest is “not only in regulating the formation of new municipalities, but also in protecting the interests of already existing municipalities.” *Id.* at 902 (internal citations and quotations omitted). The policy of a distance limitation is “to protect cities and towns from problems that may flow from the existence of many separate governmental entities in a limited geographical area.” *Id.* at 903 (internal citations and quotations omitted).

The details of these distance restrictions differ depending upon how the legislature in a state balances competing interests of existing versus proposed entities. In Nevada, NRS 318.055(2) controls the formation of GIDs, and provides a seven mile distance restriction. It specifically requires that “[n]o initiating ordinance may be adopted by the Board of County Commissioners if the proposed district includes any real property within 7 miles from the boundary of an incorporated city or unincorporated town unless” at least one of four alternative criteria are satisfied:

- (a) All members of the board of county commissioners unanimously vote for the organization of a district with boundaries which contravene this 7-mile limitation;
- (b) A petition for annexation to or inclusion within the incorporated city or unincorporated town of that property has first been filed with the governing body of the incorporated city or unincorporated town pursuant to law and the governing body thereof has refused to annex or include that property and has entered the fact of that refusal in its minutes;
- (c) No part of the area within the district is eligible for inclusion in a petition for such an annexation; or

¹ See George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 Stetson L. Rev. 5, 16 (1990) (“limits commonly adopted by a state legislature enable a municipality, otherwise devoid of power, to veto the incorporation of municipalities within a stated distance from the existing municipality”).

(d) The governing body of the incorporated city or the town board of the unincorporated town, by resolution, consents to the formation of the district.

NRS 318.055(2)(a–d).

A GID can only be established if it is closer than seven miles to an existing city or town and the city or town consents, or a unanimous county commission overrides the distance limitation. NRS 318.055(2)(a). This analysis applies only to the initiating ordinance and does not address the numerous other requirements that must be met in order to finally establish the GID, one of which appears to be that the city or town is unable or unwilling to provide the services itself.²

A new GID, once formed pursuant to the legislature’s prescribed method, may overlie part or all of a municipality. “Except as is otherwise provided in this chapter, a district may be entirely within or entirely without, or partly within and partly without, one or more municipalities or counties, and the district may consist of noncontiguous tracts or parcels of property. “ NRS 318.055(3).

Read in combination, these provisions mean that an existing city or town has the authority to essentially “veto” formation of a new GID, but that veto may be overridden by a unanimous vote of the county commission.

CONCLUSION

A board of county commissioners has authority to involuntarily include an incorporated city in a GID if the board votes unanimously to do so.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

BRYAN L. STOCKTON
Deputy Attorney General
Bureau of Government Affairs
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BLS/SLG

² For example, NRS 318.055(4)(c), refers to NRS 308.060 and appears to require a finding that present services are not adequate to serve the area proposed to be included in the GID.

Jeff McGowan, City Attorney
February 2, 2009
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June 22, 2009

OPINION NO. 2009-03

COMPENSATION; EMPLOYEES;
UTILITIES: It is appropriate to give city employees discounted rates on water, sewer, and landfill services as partial compensation for their work, provided that the value of the discounts is commensurate with the value of work received from the employees.

Kevin R. Briggs, Esq.
Ely City Attorney
501 Mill Street
Ely, Nevada 89301

Dear Mr. Briggs:

You have requested an opinion addressing whether a city may give employees a discount on the costs of water, sewer, and landfill services. The question arises because, as you indicate, funds are scarce during the present economic downturn, and such discounts could provide an alternative method of partly compensating City of Ely employees for their work.

QUESTION

Whether a city may give employees discounted rates on water, sewer, and landfill services as partial compensation for their work.

ANALYSIS

Fixing compensation for public employees is a legislative function. *City of Las Vegas v. Ackerman*, 85 Nev. 493, 496, 457 P.2d 525, 528 (1969). Authority to compensate local government officials is properly delegable by the state legislature to

local governments. 63C Am. Jur. 2d Public Officers and Employees § 276. The legislature has delegated authority to set compensation for most officers to Nevada's cities and towns. NRS 245.045 and 266.390. See also NEV. CONST. ART. 17, § 21. And see *Cawley v. Pershing County*, 50 Nev. 237, 246, 255 P. 1073, 1076 (1927) (upholding constitutionality of the delegation).

Local governments are generally authorized to compensate their employees in the manner they choose. "Absent constitutional or statutory limitations, the compensation of local government officers and employees can usually be set by the governing body as it deems proper. The courts are not inclined to interfere with the governing body's determination of what is proper compensation for a local government position." 5 Sandra M. Stevenson, *Antieu on Local Government Law*, 78.01(2) 2nd Ed. 2009).

The City of Ely is incorporated pursuant to NRS Chapter 266. See Op. Nev. Att'y Gen. 95-12 (July 13, 1995). It, like all counties, towns, and cities, must "make provision for the support of its own officers, subject to such regulations as may be prescribed by law." NEV. CONST. Art. 17, § 21. The City of Ely compensates its employees according to its Personnel Policy Manual, adopted pursuant to City Code 1-6-4.

Generally local government employees are compensated by salary, see 63C Am. Jur. 2d Public Officers and Employees § 278, but they may also be paid in other ways, as with perquisites. *Id.* Perquisites may include in-kind payments. "Compensation is not limited to direct cash payments to an employee . . . [and] [t]hus, it is of no moment whether employees are paid for their services through a weekly paycheck, fringe benefits, or a combination thereof." Op. Oh. Att'y Gen. 78-049 at 2-115, *quoted in* Op. Oh. Att'y Gen. 86-046 (June 25, 1986).

The Texas Attorney General has concluded, for example, that a county attorney's use of public employees for his or her private practice was authorized. Op. Tex. Att'y Gen. LO-93-51 (June 18, 1993). The legislature had provided that county commissioners courts could permit a county attorney to "conduct a private practice of law using the district or county office provided by that county for conducting his [or her] official duties." Tex. Gov't Code § 41.011.

Provided that the arrangement constitutes part of the county attorney's compensation for official services rendered to the county and that the county receives a reasonable return for the total compensation it provides the county attorney, the arrangement serves a public purpose and does

not run afoul of [the constitutional prohibition on use of public funds for private purposes].

Op. Tex. Att'y Gen. LO-96-141.

By the last-quoted conclusion, the Texas opinion illustrates that the value of in-kind payments must match the value received in services from the employee. *Cf.* Op. La. Att'y Gen. 02-0475 (Dec. 9, 2002) ("payment in kind for the removal of [] thirteen trees located on Village property can be legally accomplished if, and only if, the value of the wood given the contractor is equal to the value of the services rendered"). *See also* Op. Oh. Att'y Gen. 86-046 ("[i]f the trustees determine that the value of university resources provided a particular physician exceeds the actual amount which the University desires to set as compensation for the physician, they must then require the physician to reimburse the University the amount of the excess"). This requirement for commensurate exchange should serve as a guideline to a proposal to pay in-kind.

Op. Nev. Att'y Gen. 397 (July 23, 1958) provides a caution in considering such a proposal. Lincoln County asked whether it could reclassify a portion of its police officers' wages as subsistence allowance in order to benefit its officers under a new federal tax law. The opinion considered the complicating effect this would have on employee contributions to the State's Retirement Fund, and also on reporting income for federal income tax purposes. The same concerns, and others like them, would attend in-kind payments to compensate public employees.

In sum, there is no express prohibition on use of discounted utility rates to partially compensate city employees.¹ In view of the deference given local governments to set compensation for their employees, we therefore conclude that such compensation is appropriate in the sense that it is legal; we make no conclusion on the wisdom of such policy. Our conclusion also assumes that the City of Ely has necessary authority and control over the water, sewer and landfill utilities within its domain to make this decision, and that such decision would be accomplished through the necessary procedures, such as enactment by ordinance. Lastly, we note that any such action

¹ We note that the Nevada Public Service Commission has previously concluded that utility discounts for utility workers were "unreasonable and unjust." *See Internat'l Brotherhood of Electrical Workers v. Public Service Comm. of Nevada*, 614 F.2d 206, 209 (9th Cir. 1980) (considering but not ruling on the PSC's determination). We note as well that municipal utilities are not controlled by the Public Utilities Commission. Op. Nev. Att'y Gen. 79-23 (Oct. 29, 1979) ("this office has long held that the definitions of public utilities as stated in NRS 704.020 do not include municipally owned utilities. Attorney General's Opinion 732, March 11, 1949; Attorney General's Opinion 187, July 17, 1952; Attorney General's Opinion 99, December 12, 1963").

Kevin R. Briggs
June 19, 2009
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remains subject to change by the legislature since the authority to act derives from the delegation of legislative power.

CONCLUSION

It is appropriate to give city employees discounted rates on water, sewer, and landfill services as partial compensation for their work, provided that the value of the discounts is commensurate with the value of work received from the employees.

Sincerely,

CATHERINE CORTEZ MASTO
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July 10, 2009

OPINION NO. 2009-04

ADA; DISCRIMINATION; EMPLOYEES:
The changes made to the ADA by the Amendments Act do not have any effect on the analyses and conclusions of the 2006 Letter Opinion to Director Greene.

Shelley Blotter
Division Administrator
Employee and Management Services
Nevada Department of Personnel
209 East Musser Street
Carson City, NV 89701

Dear Ms. Blotter:

You have requested an opinion from this Office regarding the changes made to the Americans with Disabilities Act by the ADA Amendments Act of 2008. Specifically, you requested an update regarding the amendments as they relate to a 2006 Letter Opinion written by this Office. (Letter Opinion to Jeanne Greene, former Director of the Department of Personnel, dated September 29, 2006.)

BACKGROUND

On September 29, 2006, this Office issued a letter opinion to Director Greene addressing several questions regarding the interaction of the American with Disabilities Act (ADA) 42 U.S.C. § 12101 et seq. and the State's rules for reemploying its employees who become disabled due to work-related injury or occupational disease. The ADA Amendments Act of 2008 P.L. 110-325 (Amendments Act) became effective January 1, 2009. These amendments made significant changes to the ADA. Due to these changes, you requested the September 29, 2006 Letter Opinion be updated accordingly.

QUESTION

Does the Amendments Act have any effect on the analyses and conclusions of the September 29, 2006 Letter Opinion to Director Greene? If so, please update the Letter Opinion accordingly.

ANALYSIS

Although the Amendments Act made significant changes to the ADA, the amendments do not impact the State's rules for reemploying its employees who become disabled due to work-related injury or occupational disease; therefore, the analyses and conclusions of the 2006 Letter Opinion remain accurate. However, it is important to be cognizant of the changes made to the ADA by the Amendments Act. Therefore, following is a brief summary of the purpose of the Amendments Act and changes made to the ADA by the Amendments Act.

The purpose of the Amendments Act is to restore the original intent of Congress that the ADA be interpreted broadly to include large numbers of individuals within its coverage. Accordingly, the Amendments Act rejects the holdings in several United States Supreme Court decisions¹ and changes the definition of the term "disability."

¹ Sec. 12101 note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553, provided that:

(b) Purposes

The purposes of this Act are—

....

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual

The changes make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

Specifically, the Amendments Act retains the ADA's definition of disability;² however, it changes the way several statutory terms are interpreted. Most significantly, the Amendments Act:

- Directs the Equal Employment Opportunity Commission to revise its current regulations defining "substantially limits" to be consistent with the Act.³
- Expands the definition of "major life activities" by including two non-exhaustive lists. The general major life activities list includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Additionally, major life activities also include the operation of any major bodily function including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.⁴

from doing activities that are of central importance to most people's daily lives";

. . . .

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis

42 U.S.C. §12101(b).

² "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment" 42 U.S.C. § 12102(1).

³ 42 U.S.C. § 12101(b)(6)

⁴ 42 U.S.C. § 12102(2)

- Changes the definition of “regarded as having such an impairment” so that an individual does not need to establish that his impairment substantially limits or is perceived to substantially limit a major life activity to demonstrate the employer “regarded” the employee as being disabled and entitled to protection under the ADA. Instead, an individual need only prove the employer perceived him or her as having some mental or physical impairment, regardless of the substantial nature of the impairment. However, impairments that last or are expected to last for six months or less are too transitory or minor to qualify for protection under this prong.⁵
- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity.⁶
- States that mitigating measures other than ordinary eyeglasses or contact lenses shall not be considered in assessing whether an impairment substantially limits a major life activity. These mitigating measures include medication, medical supplies, equipment or appliances, low-vision devices, prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices or oxygen, or oxygen therapy equipment and supplies, use of assistive technology, reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications.⁷

In summary, the Amendments Act requires that the ADA be interpreted broadly to include more individuals within its coverage. Further, the expansion of the definition of disability will entitle more individuals to reasonable accommodations under the ADA. Consequently, disability discrimination litigation is expected to increase and it is anticipated that individuals will file new law suits to test the parameters of the Amendments Act. However, it is too early to predict how the courts will interpret the new parameters. Further, the Equal Employment Opportunity Commission is expected to provide additional guidance in 2009.

⁵ 42 U.S.C. § 12102(3)

⁶ 42 U.S.C. § 12102(4)(D)

⁷ 42 U.S.C. § 12102(4)(E)

Shelley Blotter
July 10, 2009
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CONCLUSION

The changes made to the ADA by the Amendments Act do not have any effect on the analyses and conclusions of the 2006 Letter Opinion to Director Greene.

Sincerely,

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Attorney General

By:

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JIM SPENCER
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August 12, 2009

OPINION NO. 2009-05

LAW ENFORCEMENT; PUBLIC RECORDS; REPORTS: Accident reports submitted by a driver or owner of a vehicle involved in a traffic accident are confidential and should not be released as public records. Pursuant to NRS 484.243, accident reports, including the information contained therein, submitted by police officers are not privileged or confidential and they may be released as public records. However, if the accident report contains "personal information" as defined by NRS 603A.040, the "personal information" should be redacted prior to release

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

Dear Director Hafen:

You have requested an opinion concerning whether accident report information received by the Department of Public Safety (Department), pursuant to NRS 484.243, is a public record subject to release to the public pursuant to Nevada Revised Statutes (NRS) Section 239.010.

QUESTION ONE

Is an accident report, and the information contained therein, collected pursuant to NRS 484.243 a public record that can be released to the public 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). A governmental entity cannot deny a request to inspect a public record on the basis that the record contains confidential information "if the governmental entity can redact, delete, conceal, or separate the confidential information from the information included in the public book or record that is not otherwise confidential". NRS 239.010(3).

NRS 484.229 requires a driver involved in an accident on a highway or on premises to which the public has access, which results in bodily injury to or death of any person or total damage to any vehicle or item of property to an apparent extent of \$750 or more, to provide to the Department a written report of the accident within 10 days of the accident. The statute outlines the contents of the report required to be submitted to the Department. The report submitted by the driver pursuant to this statute is for the confidential use of the Department or other State agencies having use of the records for accident prevention. NRS 484.229(5). The driver or owner of the vehicle is not required to submit the report if the accident was investigated by a law enforcement agency and the report contains the name and address of the insurance company providing coverage to each person involved in the accident, the number of each policy, and the date on which coverage begins and ends. NRS 484.229(2).

NRS 484.243 reads in relevant part as follows:

1. Every police officer who investigates a vehicle accident of which a report must be made as required in this chapter, or who otherwise prepares a written report as a result of an investigation either at the time of and at the scene of the accident or thereafter by interviewing the participants or

witnesses, shall forward a written report of the accident to the Department within 10 days after his investigation of the accident.

2. The written reports required to be forwarded by police officers and the information contained therein are not privileged or confidential.

3. Every sheriff, chief of police or officer of the Nevada Highway Patrol receiving any report required under NRS 484.223 to 484.238, inclusive shall immediately prepare a copy thereof and file the copy with the Department. [Emphasis added.]

NRS 484.247 requires the Department to prepare and supply police departments, sheriffs and other appropriate agencies or persons forms for written accident reports, as required by NRS Chapter 484, suitable with respect to the persons required to make reports and the purposes to be served. The form must be designed to call for sufficiently detailed information to disclose the cause of the accident, conditions existing at time of accident, the persons involved in the accident, the name and address of the insurance company, the number of the policy providing coverage, and the dates on which coverage begins and ends. From the information received, the Department is to tabulate and analyze all accident reports, and publish annually, or at more frequent intervals, statistical information based thereon as to the number and circumstances of vehicle accidents.

Pursuant to the plain and unambiguous language of the above statutes, a report submitted to the Department by a driver or owner of a vehicle involved in an accident is confidential and should not be released as a public record. However, an accident report, and the information contained therein, submitted by a police officer is not privileged or confidential. Therefore, the accident report is a public record that can be released as a public record.

There is a caveat to the above conclusion regarding accident reports submitted by police officers. Personal information that is required to be included in a document that is recorded, filed or submitted to a governmental agency on or after January 1, 2007, pursuant to a specific state or federal law for the administration of a public program or for an application for a federal or state grant the governmental agency must be maintained in a confidential manner. NRS 239B.030(2). The personal information may not be disclosed except as required to carry out a specific state or federal law, or for the administration of a public program or an application for a federal or state grant. NRS 239B.030(7)(a) provides that "personal information" has the meaning ascribed to it in NRS 603A.040. NRS 603A.040 defines "personal information" as follows:

[A] natural person's first name or first initial and 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.

....

To the extent the accident report form contains a person's name in combination with any of the data elements set out in NRS 603A.040, the "personal information" cannot be released. The accident report which prompts this opinion request contains the driver's name, address, date of birth, phone number, driver's license number and driver's license information. Since the accident report contains the driver's license number, and the driver's name, the driver's license number should be redacted pursuant to NRS 239B.030(2) - (3) and NRS 603A.040.¹

CONCLUSION TO QUESTION ONE

Accident reports submitted by a driver or owner of a vehicle involved in a traffic accident are confidential and should not be released as public records. Pursuant to NRS 484.243, accident reports, including the information contained therein, submitted by police officers are not privileged or confidential and they may be released as public records. However, if the accident report contains "personal information" as defined by NRS 603A.040, the "personal information" should be redacted prior to release.

QUESTION TWO

If a Nevada law enforcement agency supplies crash information to the State that is required by NRS 484.243, can the agency then place conditions on the lawful release of data by the State and Nevada Citations Accident Tracking System (NCATS)?

ANALYSIS

The PRA provides the standards for release of public records held by your agency. The police officer provides the information to the Department as required by NRS 484.243, on a form developed pursuant to NRS 484.247. There is no provision in

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

the statutes for a submitting agency to set conditions on the release of information contained in the accident report submitted to the Department. The Legislature has specifically provided that the accident report, including the information therein, is not confidential or privileged. NRS 484.243(2).

CONCLUSION TO QUESTION TWO

The PRA provides the controlling standards for release of public records held by your agency. The law enforcement agency submitting the mandatory accident report cannot set additional standards or conditions on the release of information contained in the accident report.

QUESTION THREE

Can accident reports submitted pursuant to NRS 484.243 be sold to private companies, such as CARFAX and EXPEDIA?

ANALYSIS

Based on the analysis of Question One, an accident report submitted pursuant to NRS 484.243 is a public record that may be released with the "personal information" redacted prior to release. As a result, the accident report, with personal information redacted, can be released to private companies as public records. The Department's enabling statutes do not provide any guidance on the amount the Department can charge for the release of accident reports to private companies. See NRS Chapter 480. Additionally, a review of the statutes related to accident reports do not provide any guidance on the fees the Department may charge for accident reports released to private companies. See NRS Chapter 484. As a result, the Department must look to the PRA for guidance on the appropriate fee it may charge to private companies for the reproduction of accident reports submitted pursuant to NRS 484.243.

NRS 239.052 provides that a governmental entity may charge a fee for providing a copy of a public record. The fee is not to exceed the actual cost to the governmental entity to provide a copy of the public record unless a specific statute or regulation sets a fee for providing a copy of a public record. "Actual cost" is defined as the "direct cost related to the reproduction of a public record." NRS 239.005(1). Actual costs do not normally include personnel costs. However, NRS 239.055 permits a governmental entity to charge an increased fee for the extraordinary use of its personnel or technology resources. The Department may charge an increased fee, in addition to the "actual cost," if the request requires the extraordinary use of its personnel or technology resources. Upon receiving such a request, the government agency must inform the requestor of the amount of the fee before preparing the requested information. The fee charged must be reasonable and must be based on the cost the governmental entity

actually incurs for the extraordinary use of its personnel or technological resources.² Technological resources is defined as “information, information system or information service acquired, developed, operated, maintained or otherwise used by a governmental entity.” NRS 239.055(2).

CONCLUSION TO QUESTION THREE

Accident reports, and the information contained therein, submitted pursuant to NRS 484.243, may be released to private companies with personal information redacted. The Department may charge a fee for the reproduction of those records which is based on the actual cost incurred by the agency to produce the requested information. Actual costs do not include the personnel costs involved in complying with the request unless the Department must make extraordinary use of it personnel to comply with the request. If the Department must make extraordinary use of its personnel or technological resources to comply with the request, the Department may charge a fee that is reasonable and must be based on the actual cost incurred for the extraordinary use of its personnel or technological resources. In those cases, the Department must inform the requestor of the amount of the fee before preparing the requested information.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

MICHAEL D. JENSEN
Senior Deputy Attorney General
Bureau of Public Affairs
Public Safety Division
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MDJ/JMR

² NRS 239.052(3) requires the public entity to prepare and maintain a list of the fees that it charges at each office in which the governmental entity provides copies of public records. A governmental entity is required to post, in a conspicuous place, a legible sign which states the fee the entity charges to provide a copy of a public record or the location at which a list of each fee the entity charges to provide a copy of a public record may be obtained.



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November 4, 2009

OPINION NO. 2009-06

HIGHWAY PATROL; LIABILITY; MOTOR VEHICLES: When a Nevada Highway Patrol Officer faces criminal charges for an on-duty crash, the Office of the Attorney General may not represent the officer in the criminal proceeding and the State of Nevada is not responsible to pay the fine. The Department of Public Safety may also impose administrative discipline without violating double jeopardy protection.

Chris Perry, Deputy Director
Department of Public Safety
555 Wright Way
Carson City, Nevada 89711

Dear Deputy Director Perry:

This letter is in response to your request for an opinion from the Office of the Attorney General (Office) concerning criminal charges involving Nevada Highway Patrol (NHP) officers involved in on-duty vehicle collisions. Although serious accidents involving NHP troopers are investigated by outside law enforcement agencies, in some cases those agencies will not investigate minor accidents by NHP troopers.

QUESTION ONE

Does an NHP officer, who is issued a citation and/or is arrested by the Department of Public Safety (Department) as at fault in an on-duty vehicle collision, have a right to be represented by the Office during any criminal proceedings?

ANALYSIS

Nevada Revised Statutes prohibit the Attorney General from defending persons charged with violations of ordinances or state laws.

NRS 7.105(1)(a) (b) provides in relevant part that:

(a) The Attorney General and every city attorney, district attorney and the deputies and assistants of each, hired or elected to prosecute persons charged with the violation of any ordinance or any law of this State; and (b) . . . 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.

State law gives the Attorney General primary jurisdiction to investigate and prosecute criminal offenses committed by state officers or employees in the course of their duties. NRS 228.175(2) states that “The Attorney General has primary jurisdiction to investigate and prosecute criminal offenses committed by state officers or employees in the course of their duties or arising out of circumstances related to their positions.”

Because the Attorney General must prosecute state officers for criminal offenses, the Attorney General cannot also defend those officers.

NRS 41 specifies the circumstances under which the Attorney General must provide a defense for state officers and employees, limiting that representation to civil actions when the act or omission was within the course and scope of public duty and performed or omitted in good faith.

NRS 41.0339(2) provides:

The official attorney shall provide for the defense, including the defense of cross-claims and counterclaims, of any present or former officer or employee of the State or a political subdivision, immune contractor or State Legislator *in any civil action* brought against that person based on any alleged act or omission relating to his public duties or employment if:

2. The official attorney has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed or omitted in good faith. [Emphasis added.]

CONCLUSION TO QUESTION ONE

Nevada Revised Statutes prohibit the Attorney General from representing an NHP officer in a criminal proceeding that stems from an at-fault on-duty vehicle collision.

QUESTION TWO

If an NHP officer is involved in an on-duty crash and is issued a citation and/or is arrested, is the NHP Division (Division) responsible for paying the fine(s)?

ANALYSIS

The State of Nevada is required to indemnify officers only in civil actions that result from acts or omissions of the officers when they are working within the course and scope of their employment. NRS 41.0349(3)–(4) read in relevant part as follows:

In any civil action brought against any present or former officer, employee, immune contractor, member of a board or commission of the State or a political subdivision or State Legislator, in which a judgment is entered against the defendant based on any act or omission relating to his public duty or employment, the State or political subdivision shall indemnify him unless:

3. The act or omission of the person was not within the scope of his public duty or employment; or

4. The act or omission of the person was wanton or malicious.

NRS 41.0349(3)–(4) (emphasis added).

The State of Nevada has no statutory authority to pay a criminal fine levied against an officer who has broken the law while on duty. As the Ninth Circuit explained, a federal law enforcement agency indemnifies law enforcement officers in civil cases only. The Court stated that:

In the civil context, the government agency may indemnify an officer against suits, and agencies regularly do so Criminal liability is another matter. The sanction is more severe and the law enforcement agency cannot pay it. The agency can't serve prison time for the officer, nor can it restore voting or other civil rights, or make up for the shame that results from a criminal conviction. Because an employing agency cannot protect the officer from criminal punishment, criminal liability (unlike civil damages) is not fundamentally about enterprise liability and internalizing costs; rather, it is fundamentally about personal blame and accountability.

Idaho v. Horiuchi, 253 F.3d 359, 376 (9th Cir. 2001), *vacated as moot by Idaho v. Horiuchi*, 266 F.3d 979 (9th Cir. 2001); *Cf.*, *State of Washington v. Groom*, 133 Wash.2d 679, 689, 947 P.2d 240, 246 (1997) (stating that the qualified immunity standard for police officers in civil cases does not apply to criminal prosecutions) and *Powers v. Goodwin*, 170 W.Va. 151, 157, 291 S.E.2d 466, 473 (1982) (stating that reported cases appear to disfavor indemnification for attorney's fees in criminal proceedings).

In another federal case, the Ninth Circuit found that while individual government employees could be immune in a civil case, they are not ordinarily immune from prosecution for their criminal acts. *U.S. v. Curtis*, 988 F.2d 946, 948 (9th Cir. 1993); *Cf.*, *Powers v. Goodwin*, 170 W.Va. 151, 157, 291 S.E.2d 466, 473 (1982) (stating that conviction of a common law or statutory crime is conclusive proof that the official was not acting in good faith and was acting outside the scope of his official duties).

Individual government employees can be held liable for criminal acts committed while on duty and the government has no responsibility to indemnify them or pay their criminal penalties.

CONCLUSION TO QUESTION TWO

The Nevada Highway Patrol Division is not responsible to pay the fine of an officer who is issued a citation or is arrested following an on-duty crash.

QUESTION THREE

If the Department takes enforcement action and issues a citation to an NHP officer at fault in a crash, does this action pose any double jeopardy issue when the same Department issues administrative discipline?

ANALYSIS

The prohibition against double jeopardy is found in the Fifth Amendment, to the U.S. Constitution, which is made applicable to the states through the Fourteenth Amendment. The Fifth Amendment states, in relevant part, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb” U.S. CONST. amend. V.

Double jeopardy attaches only to criminal penalties, protecting a person from being tried twice for the same crime. The state is precluded from “punishing twice, or attempting a second time to punish criminally, for the same offense.” *Witte v. United States*, 515 U.S. 389, 396 (1995). “Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense.” *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

A person who faces a criminal prosecution and an administrative hearing involving the same offense is not entitled to double jeopardy protection. See *State v. Lomas*, 114 Nev. 313, 315, 955 P.2d 678, 679–680 (1998), citing *Hudson v. United States*, 522 U.S. 93 (1997).

Because administrative discipline is not criminal punishment, the Department does not violate the double jeopardy protection of the Fifth Amendment of the U.S. Constitution when it cites an officer for violation of the law and then also disciplines the officer for violation of the Department’s policy and/or personnel regulations.

CONCLUSION TO QUESTION THREE

Double jeopardy does not attach when the Department of Public Safety issues a citation for a traffic or criminal violation and then also disciplines the officer for the same event.

QUESTION FOUR

An officer, who is accused of being at fault in a crash, is not compelled to answer questions in the criminal investigation. However, the officer is compelled to respond to all questions in any administrative investigation regarding a vehicle collision. Does this pose any violations of NRS 289, the Peace Officer Bill of Rights?

ANALYSIS

A review of NRS 289 along with NRS 284 and NAC 284 indicates that a department that investigates both the criminal case and the personnel matter could face two potential violations of those statutes involving: 1) compelled testimony, and 2) confidentiality of personnel records. Supervisory officers in the patrol division will investigate the accident for criminal charges and/or ticketing, while the Office of Professional Responsibility (OPR) will conduct the administrative investigation that could lead to discipline.

1. Compelled Testimony

Peace officers may invoke the Fifth Amendment in any criminal prosecution and may refuse to answer questions that may incriminate them, the same as any citizen of the United States.

The Fifth Amendment to the U.S. Constitution provides: “. . . nor shall any person . . . *be compelled in any criminal case to be a witness against himself . . .*” U.S. CONST. amend. V (emphasis added).

However, in an administrative investigation, an officer must answer all questions related to his alleged misconduct or face insubordination charges. NRS 289.060 states that in an administrative investigation for misconduct:

3. The law enforcement agency shall:

. . . .

(b) Immediately before the interrogation or hearing begins, inform the peace officer orally on the record that:

(1) He is required to provide a statement and answer questions related to his alleged misconduct; and

(2) If he fails to provide such a statement or to answer any such questions, the agency may charge him with insubordination.

NRS 289.060(3)(b).

NRS 289.090 specifies that NRS 289.060 does not apply to investigation of alleged criminal activities. Because answers provided in an internal affairs investigation are compelled testimony, the answers cannot be used in a criminal investigation without violating the Fifth Amendment. In a landmark case, the U.S. Supreme Court ruled that “the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.” *Garrity v. State of New Jersey*, 385 U.S. 493, 500 (1967).

Garrity has been refined by other courts. The California Supreme Court found that “thus, incriminating answers given by a public employee under threat of job sanction for refusal to answer may themselves form the basis for job discipline, including termination, so long as the employee has requisite protection against the criminal use of such statements.” *Spielbauer v. County of Santa Clara*, 45 Cal.4th 704, 715, 199 P.3d 1125, 1131 (2009).

The U.S. Supreme Court explained that neither the testimony, nor the fruits of that testimony, may be used in the criminal case.

Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use.

Lefkowitz v. Turley, 414 U.S. 70, 84 (1973).

The law permits both a criminal and an administrative investigation of the same event so long as compelled testimony and the fruits of that testimony are not used in the criminal case.

2. Confidentiality

NRS 289.040 limits what can be placed in an officer's file concerning discipline. NRS 289.040(3)–(5) provides:

3. If a peace officer is the subject of an investigation of a complaint or allegation conducted pursuant to NRS 289.057, the law enforcement agency may place into any administrative file relating to the peace officer only:

(a) A copy of the disposition of the allegation of misconduct if the allegation is sustained; and

(b) A copy of the notice of or statement of adjudication of any punitive or remedial action taken against the peace officer.

4. A peace officer must be given a copy of any comment or document that is placed in an administrative file of the peace officer maintained by the law enforcement agency.

5. Upon request, a peace officer may review any administrative file of that peace officer maintained by the law enforcement agency that does not relate to a current investigation.

Only the disposition, not the investigation may be placed in the file of the police officer. In addition, records of disciplinary actions are confidential under NAC 284.718(1)(j)(2). Those disciplinary records may not be released by OPR to anyone, including the patrol division, which will conduct the criminal and/or ticketing investigation.

1. The following types of information, which are maintained by the Department of Personnel or the personnel office of an agency, are confidential:

(j) Information in the file or record of employment of a current or former employee which relates to his:

(1) Performance;

(2) Conduct, including any disciplinary actions taken against him;

(3) Race, ethnic identity or affiliation, sex, disability or date of birth;

- (4) Home telephone number; or
- (5) Social security number.

NAC 284.718(1)(j).

Access to those records is limited by NAC 284.726(2), which provides in relevant part:

Except as otherwise provided in subsection 3, access to an employee's file of employment containing any of the items listed in paragraphs (g) to (j), inclusive, of subsection 1 of NAC 284.718 is limited to:

- (a) The employee.
- (b) The employee's representative when a signed authorization from the employee is presented or is in his employment file.
- (c) The appointing authority or a designated representative of the agency by which the employee is employed.
- (d) The Director (of the Department of Personnel) or his designated representative.
- (e) An appointing authority, or his designated representative, who is considering the employee for employment in his agency.
- (f) Persons who are authorized pursuant to any state or federal law or an order of a court.
- (g) The State Board of Examiners if the Board is considering a claim against the State of Nevada filed pursuant to chapter 41 of NRS which involves the employee.
- (h) Persons who are involved in processing records for the transaction of business within and between state agencies.
- (i) Persons who are involved in processing records for the transaction of business that is authorized by the employee.

NAC 284.726(2).

While the appointing agency may look at the personnel file, only the disposition of the case is permitted to be placed in the officer's file. The investigation must remain confidential. In addition, a criminal investigation in which a criminal proceeding is pending is also confidential.

A criminal investigation is excluded by statute from a record of criminal history that must be disclosed. NRS 179A.070(2)(a). As the Nevada Supreme Court recognized in *Donrey v. Bradshaw*, public policy considerations, such as a pending or anticipated criminal proceeding justify withholding the investigative information. See *Donrey v. Bradshaw*, 106 Nev. 630, 635–636, 798 P.2d 144, 147–148 (1990). When a criminal proceeding is pending, the Department should not release the criminal investigation file to the OPR.

Thus the criminal and the administrative investigations should be kept separate and confidential. To prevent a violation of NRS 289, supervisory officers investigating the criminal allegations and OPR officers investigating the administrative charges should be prohibited from communicating about their cases. By investigating the criminal allegations first and filing the criminal complaint before starting the administrative investigation, no violation of NRS 289 will occur, provided that no compelled statements by the officer or fruits of those compelled statements are ever used in the criminal matter.

CONCLUSION TO QUESTION FOUR

A Nevada Highway Patrol officer may be compelled to answer questions in an administrative investigation, and no violation of the Peace Officer Bill of Rights or the Fifth Amendment occurs so long as the administrative investigation is not used in prosecution of any criminal case against the officer. By keeping both the criminal and administrative investigations entirely separate and confidential, no violations of statute will occur when separate divisions of an agency conduct both investigations.

QUESTION FIVE

The Department has submitted officer at-fault crash reports to various District Attorneys' Offices for legal opinions on whether enforcement action is appropriate. In many cases, the District Attorney does not respond and enforcement action is not taken in cases where a citation would have been issued had the driver not been an on-duty police officer. Is the practice of submitting an officer-involved case to the District Attorney's Office, for purposes of an unbiased review, legally appropriate for a law enforcement agency? Or, should the Department issue a citation without district attorney review?

ANALYSIS

This question is one of policy rather than legality. The NHP has the authority to investigate an accident and issue a citation to anyone involved. NRS 484.801 specifies that:

Except for felonies and those offenses set forth in paragraphs (a) to (e), inclusive, of subsection 1 of NRS 484.791, a peace officer at the scene of a traffic accident may issue a traffic citation, as provided in NRS 484.799, or a misdemeanor citation, as provided in NRS 171.1773, to any person involved in the accident when, based upon personal investigation, the peace officer has reasonable and probable grounds to believe that the person has committed any offense pursuant to the provisions of this chapter or of chapter 482, 483, 485, 486 or 706 of NRS in connection with the accident.

NRS 484.801.

NRS 484.791(1) grants authority to peace officers to arrest without a warrant for any of these several enumerated offenses.

In addition, NRS 484.795 gives peace officers the discretion whether to write a citation or arrest an offender. NRS 484.795 states in relevant part:

Whenever any person is halted by a peace officer for any violation of this chapter and is not required to be taken before a magistrate, the person may, in the discretion of the peace officer, either be given a traffic citation, or be taken without unnecessary delay before the proper magistrate. . . .

NRS 484.795.

The NHP has therefore authority to issue traffic citations and make arrests without involving the local District Attorney.¹

¹ However, the discretionary power of a peace officer to arrest for a minor traffic infraction was limited by the Nevada Supreme Court in a 2003 case. The Court ruled that under NRS 484.795 an officer's discretion to arrest rather than issue a citation is not unfettered and may be abused if exercised in an unreasonable manner. The Court found that "if the officer abuses his discretion, the resulting arrest

Chris Perry
November 4, 2009
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Nevertheless, in cases involving serious charges against a trooper or in cases involving deaths, the NHP may wish to protect itself from claims of bias by requesting that an outside law enforcement agency investigate the accident and present the case to the District Attorney for charging.

CONCLUSION TO QUESTION FIVE

There is no legal impediment to the Nevada Highway Patrol investigating traffic accidents involving its own employees and issuing its own tickets.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

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CRH:HTC



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December 1, 2009

OPINION NO. 2009-07

CORONERS; INDIANS; JURISDICTION:

Although no authority justifies a tribe's control of, or interference with, a coroner's performance of official duties, this Office strongly recommends entering into a formal agreement with the tribe to establish reasonable procedures for their exercise.

Honorable Arthur Mallory
Churchill County District Attorney
365 South Maine Street
Fallon, Nevada 89406

Dear Mr. Mallory:

You have asked for an opinion from this Office regarding county coroner responsibilities, liabilities, and immunities in Indian country.¹ The issues arise because exercise of state jurisdiction over activities occurring on tribal lands is sometimes an "infringement on inherent tribal authority and is contrary to the principles of self-government and tribal sovereignty." *Flat Ctr. Farms, Inc. v. State Dep't of Revenue*, 49

¹ Indian land is defined by 18 U.S.C. § 1151:

[T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Snooks v. Ninth Jud. Dist. Ct., 112 Nev. 798, 800 n.1, 919 P.2d 1064, 1065 N.1 (1996).

P.3d 578 (Mont. 2002). *Accord, Snooks v. Ninth Jud. Dist. Ct.*, 112 Nev. 798, 802, 919 P.2d 1064, 1066 (1996).

The [Indian nations] . . . [are] distinct communit[ies], occupying [their] own territory . . . in which the laws of [the states] can have no force, and which the citizens of [the states] have no right to enter, but with the assent of the [Indian nations] themselves, or in conformity with treaties, and with the acts of Congress.

Snooks, 112 Nev. At 802, 919 P.2d at 1066 (quoting from *Williams v. Lee*, 358 U.S. 217, 219 (1959)).

Before offering the analysis, some understanding of the office of coroner is necessary. The office historically was one of highest authority. However, it has been diminished in stature over time:

A coroner was known in the Latin of the Middle Ages as 'coronator,' from corona, the Crown, and was so called because he took cognizance only of the pleas of the Crown and was the principal conservator of the peace. He had the power . . . to hear and determine felonies, and therefore his court was analogous to the ordinary courts of law. His powers were later abridged, however, by Magna Charta. Under the early common law, the office of coroner was one of great dignity, the coroner being, next to the sheriff, the most important civil officer in the county. His powers and duties were both judicial and ministerial. His judicial authority extended to inquiries concerning the manner of death of any person slain, or who died in prison, or who otherwise came to a violent or sudden death. He was only entitled to do this *super visum corporis* and for such purpose the coroner's court was considered a court of record. . . . The general nature of the office of coroner is the same today, but his duties and authority are specifically defined by statute and he can only act within the limit of his statutory authority. . . .

23 Or. Op. Atty. Gen. 120 (January 10, 1947), quoting 13 Am. Jur., Coroners, section 2, page 106.

In Nevada, the office of coroner is established and defined by Chapter 259 of the Nevada Revised Statutes. Every county is a separate coroner's district. NRS 259.010. The sheriff of a county is also, by law, the *ex officio* coroner for the county except for those counties whose board of county commissioners chooses instead to appoint a separate coroner. NRS 259.020.

The responsibilities of a coroner in Nevada include certain civil duties. Coroners are responsible for notifying next of kin of the fact of a decedent's death. NRS 259.045.

Duties also include functions and jurisdictions criminal in nature. Coroners investigate deaths when a person has been killed, has committed suicide, or has suddenly died under suspicious circumstances. NRS 259.050(1). If there is a reasonable suspicion that death was caused by a criminal act, coroners must investigate the death in conjunction with the district attorney. NRS 259.050(2).

Following investigation, the district attorney or a district judge of the county may order a coroner's inquest, which is presided over by a justice of the peace. NRS 259.050(3), NRS 259.050(4). If the inquest jury determines that a criminal act caused the death, it certifies the same by an inquisition, which also identifies the accused. NRS 259.110. The transcript of the coroner's inquest is filed with the district court and a warrant issues for the accused. NRS 259.120, NRS 259.130. From this point, the matter is treated as a complaint and prosecuted the same as other matters. *Cf. State v. Holt*, 47 Nev. 233, 219 P. 557 (1923) (murder conviction upheld where state contended that the coroner's jury verdict constituted a complaint, although issue not decided since defendant had validly waived filing of formal written complaint at preliminary hearing).

Having identified the basic functions of the coroner, it is now appropriate to consider your questions.

QUESTION ONE

Do the sheriff's duties as *ex officio* coroner extend into Indian country?

ANALYSIS

Several general principles govern the analysis. First, states have no jurisdiction over certain crimes committed in Indian country. Jurisdiction depends on the status of persons, both victim and accused. An Indian reservation is a part of the State within

which it is located,² and offenses committed there, not involving Indians or Indian property, are punishable by the State. *Nevada v. Jones*, 92 Nev. 116, 546 P.2d 235 (1976). Otherwise, the State lacks jurisdiction. When both the accused and the victim are Indian, criminal jurisdiction lies with a tribe and may also lie with the federal government. Jurisdiction is exclusively federal when the crime involves both an Indian and a non-Indian. See generally *Conference of Western Attorneys General, American Indian Law Deskbook* 160–61 (4th ed. 2008).

States also have limited civil jurisdiction over tribes and tribal members on Indian reservations. A State's interests will justify regulation of a tribe or its members only "in exceptional circumstances." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–32 (1983). "[T]wo independent but related barriers" can defeat state jurisdiction: federal preemption of state authority and infringement of the tribal right to self-government. *Rice v. Rehner*, 463 U.S. 713, 718–19 (1983).

Third, states' authority over non-members on Indian reservations depends upon the balance of state, tribal, and federal interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (state regulation of non-Indian hunting and fishing on reservation not permitted where it will interfere with Indians' right to self-government), *Shivwits Band of Paiute Indians v. State of Utah*, 428 F.3d 966 (10th Cir. 2005) (rejecting Utah's claim of jurisdiction to regulate non-Indian's use of trust land for billboard display along interstate highway based on weighing of state and tribal interests).

Following from these principles, a coroner's jurisdiction on a reservation is limited. Criminal jurisdiction and concomitant duties will not exist if the decedent or an accused is Indian. If all involved are non-Indian, then there may be jurisdiction, possibly subject, however, to a tribe's right to exclude.³ Civil jurisdiction, too, is limited and depends on the circumstances of each individual case. If coroner activity were to threaten tribal self-government, it would be unauthorized. Similarly, if a tribe were to have its own coroner or other officer with similar responsibilities, exercise of the county coroner's jurisdiction would be improper.

Because the analysis in this field is nuanced and fact-specific, the advice proffered by the Colorado Attorney General in 1980 in response to a similar question is also apt

² *Draper v. U.S.*, 164 U.S. 240 (1896). See also Op. Nev. Att'y Gen. 166 (May 2, 1974) (Indian reservations within Nevada are part of the State).

³ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (an Indian tribe's power to exclude nonmembers entirely or to condition their presence on a reservation is well established).

here. See Op. Colo. Att’y Gen. 1980-80 (September 9, 1980). Difficult and uncertain issues about coroner’s jurisdictions on a reservation can be best resolved by agreement between the county coroner and the tribe. *Id.* The vehicle for such an agreement in Nevada is available at NRS 277.110–.180.⁴

CONCLUSION TO QUESTION ONE

Sheriff’s duties as coroner extend onto Indian land to the extent they are not preempted by various principles of federal Indian law. Unless the tribe has a coroner of its own, duties in Indian country would include notification of next of kin of the death of a decedent. Duties might also include investigation of deaths which involve neither an Indian victim nor an Indian suspect.

QUESTION TWO

If the sheriff’s duties do extend to tribal lands, what liability does the county undertake in performing coroner duties on tribal lands and what immunity, if any, will be granted to the sheriff when performing coroner duties on tribal lands?

ANALYSIS

The sheriff’s liabilities in state and federal courts for performing coroner duties on tribal lands would be the same as elsewhere in the county. These cannot be fully explicated here; they are generally as set forth in NRS Chapter 41 and as established under federal constitutional and civil rights law.

⁴ Nevada assumed certain additional jurisdiction over Indian lands under Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, but later retroceded all of it. See, e.g., Act of May 17, 1975, ch. 474, 1975 Nev. Stat. 751 and 40 Fed. Reg. 27501 (1975). In the interim, between assumption and retrocession, this Office issued Op. Nev. Att’y Gen. 71-13 (Feb. 25, 1971), to which you allude. In it, we concluded:

The county is responsible for providing a decent burial where no one else takes charge of the body. This means that the county is to provide burial only as a last resort after all other agencies and individuals have had an opportunity to take charge of the body.

Id. Although it is unclear from the prior opinion whether this conclusion was thought to rest on the jurisdiction afforded by P.L. 280, that federal statute can no longer serve as the basis for any jurisdiction in Nevada since the State has retroceded it. Consequently, we consider your questions applying the normal analysis pertaining to State jurisdiction in Indian country.

Civil adjudicatory jurisdiction of tribal courts over state officials performing official duties in Indian country was found absent in *Nevada v. Hicks*, 533 U.S. 353 (2001).⁵ There is no reason to conclude that a different result would occur in the case of a coroner performing in the course and scope of his or her duties.

However, a tribe's potential civil jurisdiction over state and local officials is not beyond the pale. Justice Scalia writing for the Court in *Nevada v. Hicks*, and answering rhetorically Justice O'Connor's concurring opinion, denied that the Court's decision "would invalidate express or implied cessions of regulatory authority over nonmembers contained in state-tribal cooperative agreements. . . ." *Id.* at 372. If the coroner is concerned with the possibility of implied consent to jurisdiction arising from any cooperative agreement with a tribe, he or she could dispel the possibility by express provision to the contrary in the agreement.

CONCLUSION TO QUESTION TWO

The coroner would assume the same exposure for liability for official actions taken on tribal lands as on non-tribal land within the county.

QUESTION THREE

To what extent can tribal authorities direct or terminate the duties of the ex officio coroner when he is performing coroner duties on tribal lands?

ANALYSIS

No authority supports tribal authority to regulate the conduct of official business by state officials. However, tribes possess the unique authority to exclude persons from their reservations and colonies. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). The interplay of this principle with the rule that states have certain jurisdiction on tribal lands has not been definitively settled. See, e.g., *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003) (confronting but not deciding the issue whether execution of state's criminal process, against tribe's objection, was authorized).

The state of the law is not significantly clarified from 1991 when this office wrote that "courts have not addressed the question of whether this jurisdiction will support a state right to maintain a physical presence on the reservation against the objections of the Indians." Op. Nev. Att'y Gen. 12, 1991 WL 540151 at 3 (April 09, 1991). Thus, even though we concluded in 1991 that state and local law enforcement authorities with

⁵ The Court in *Nevada v. Hicks* only addressed jurisdiction, and did not address immunity issues.

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jurisdiction required no permission from a tribe to enter Indian country and could not legally be expelled in order to control uncertainty and avoid litigation, this office strongly suggests again that an agreement between coroner and tribe would benefit not only the parties to the agreement but the public which depends on the services of the coroner and tribe.

CONCLUSION TO QUESTION THREE

Although no authority justifies a tribe's control of, or interference with, a coroner's performance of official duties, this Office strongly recommends entering into a formal agreement with the tribe to establish reasonable procedures for their exercise.

Sincerely,

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